



## Ohio Prosecuting Attorneys Association

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House Bill 136  
Opponent Testimony  
May 16, 2019

Chairman Lang, Vice-Chair Plummer, Ranking Member Leland and members of the House Criminal Justice Committee, thank you for the opportunity to offer opponent testimony on House Bill 136, legislation which our Association has consistently opposed over the last four years. We have done so because the legislation is not necessary to address any legitimate concerns about the application of the death penalty in Ohio and because, despite changes, the bill remains overbroad and will be subject to abuse by offenders who knew what they were doing, intended the result, and understood the nature and consequences of their actions. I would like to take my time today to address some of the arguments that were made during proponent testimony two weeks ago.

First, it was stated that this proposal was part of “a comprehensive set of recommendations to address problems with Ohio’s capital punishment” made by the Task Force to Review the Administration of Ohio’s Death Penalty. One of the concerns that prosecutors had with that Task Force, and have with using their recommendations as justification for this legislation, is that the Task Force was not charged generally to make recommendations to address problems with Ohio’s capital punishment. They were given the narrow task of assessing whether the death penalty in Ohio is administered in the most fair and judicious manner possible and determining if the administrative and procedural mechanisms for the administration of the death penalty were in proper form or in need of adjustment. The Task Force, however, veered off of this narrow mandate and made a number of substantive recommendations that were anti-death penalty. This was one of them. The Task Force also rejected proposals that would have allowed juries, during the sentencing phase, to consider additional evidence about the offender – evidence of the impact of the crime on victims’ families and evidence of the offender’s violent criminal character.

Second, during the testimony presented by the Public Defender it was stated repeatedly that the bill only excludes individuals with severe and/or debilitating mental illness. No matter how many times some proponents of this legislation use the term “severe,” it is important to understand that this is not who the legislation applies to. Those with severe mental illnesses are already excluded from the death penalty. Revised Code section 2901.01(A)(14) states that “A person is “not guilty by reason of insanity” relative to a charge of an offense” if “at the time of the commission of the offense, the person did not know, as a

result of a severe mental disease or defect, the wrongfulness of the person's acts." This legislation excludes some other group. It excludes those who did appreciate the wrongfulness of their conduct. It excludes those whose evidence of a mental illness is so weak that they are unable to create reasonable doubt in the mind of even one single juror. There is no doubt that the listed illnesses can be severe. But some also vary in degree from mild to severe and may include periods of partial or even full remission. The legislation recognizes no such distinctions and thus casts too wide a net.

It has been argued that this legislation is necessary because juries cannot be trusted to treat serious mental illness as a mitigating factor and that they often treat it as an aggravating factor. Yet it was stated in the same proponent testimony that "by a 2 to 1 margin Americans want to prevent those with a serious mental illness from being subject to a death sentence." Jurors, of course, are selected from the same pool of people who make up the 2 to 1 margin. They are selected by both the prosecution and the defense. It is contradictory for proponents to assert that two thirds of Americans wish to prevent those with a serious mental illness from being subject to a death sentence but that the same group of Americans overwhelmingly treat serious mental illness as an aggravating factor once they are on a jury. If two thirds of the public wish to prevent those with serious mental illness from being subject to a death sentence, then the defense should have no trouble seating jurors who disfavor such a sentence, and even less trouble creating reasonable doubt in the mind of a single juror.

Finally, it has been put forth by the proponents that they have compromised with our Association on multiple occasions and made sufficient concessions on this legislation. Our view of this is substantially different. The bill currently pending before you creates an Atkins-like process where a pre-trial hearing is held to determine whether a person should be excluded from the death penalty based on their mental illness. This is an improvement over the bill that was introduced during the last General Assembly. That bill created a burden shifting procedure that inexplicably would have required the prosecution to prove a negative – that the mental illness did not affect the offender's actions. So while addressing this issue was important, it was not an issue that should have existed in the first place and fixing it hardly amounts to making sufficient concessions given the variety of other concerns that we have consistently raised – concerns about post-conviction relief, an undefined list of mental illnesses, the inclusion of major depressive disorder, language about the illness impacting the offender's "rational judgment," and language about disorders attributable "solely" to the use of alcohol or drugs. Even the Public Defender said in response to a question about this version versus last year's version that the current bill creates the process he would have preferred in the first place. This is not addressing prosecutor concerns.

Overall, Ohio prosecutors continue to believe that this legislation is unnecessary and that it should not be adopted by the General Assembly. If the bill is to be reported out of committee, however, we urge you to address the above concerns that are intended to make the legislation more balanced in terms of fairness for the State and justice for both the victim and the accused.

Thank you again for the opportunity to testify. I would be happy to answer any questions.

## OPAA Amendments to House Bill 136

- 1) Post-conviction relief. Remove the proposed changes to R.C. 2953.21 beginning at line 948.
- 2) Major depressive disorder. Remove major depressive disorder at line 207.
- 3) Rational judgement. Beginning in line 217 remove the phrase “exercise rational judgment in relation to the person’s conduct with respect to either of the following:” It should be required that the illness directly impacted the offender’s ability to conform their conduct to the law or appreciate the nature, wrongfulness, or consequences of their conduct.
- 4) Disorder attributable “solely” to alcohol or drug abuse. In line 225 remove “solely.” There will be no way to determine if a person’s disorder arose solely because of the use of alcohol or drugs or whether the alcohol or drug use arose because the person was predisposed to or had a mental illness. Voluntary drug and/or alcohol abuse should not give a pass to individuals who otherwise understood what they were doing.
- 5) Serious mental illness. The definitions must be narrowed to eliminate the problem of reliance on the DSM and to address problems surrounding mild vs. severe forms of the illness and periods of remission.
- 6) Victim impact evidence. Permit consideration of victim impact evidence during the sentencing phase of a death penalty trial. Permitting such evidence is consistent with Marsy’s Law and consistent with sentencing in other criminal cases where victim statements are authorized.