Megan Testa, MD

On behalf of the
Ohio Psychiatric Physicians Association

Before Members of the
Senate Judiciary Committee

Proponent Testimony on Am. Sub. H. B. No. 136
Severe Mental Illness and the Death Penalty

September 24, 2019

Chairman Eklund, Vice-Chair Manning, Ranking Minority Member Thomas, and members of the committee, thank you for the opportunity today to testify in support of Am. Sub. House Bill 136, a bill which, if enacted, would exempt from the death penalty defendants who, at the time of the offense, had a serious mental illness (SMI) that significantly impaired their capacity to exercise rational judgment in relation to conduct, to conform their conduct to the requirements of law, or to appreciate the nature, consequences or wrongfulness of their conduct.

My name is Megan Testa, M.D. and I am a physician practicing forensic psychiatry in Cleveland, Ohio. I currently work in community re-entry, treating individuals with serious mental illness who are under the jurisdiction of the criminal justice system. I provide consultation for the State of Ohio and the City of Cleveland on issues such as Competence to Stand Trial, Criminal Insanity, Violence Risk Assessment and Conditional Release, at the state hospital and the municipal court.

I am here today speaking on behalf of the Ohio Psychiatric Physicians Association (OPPA), a statewide medical specialty organization whose more than 1,000 physician members specialize in the diagnosis, treatment and prevention of mental illness and substance use disorders.

I am also speaking on behalf of the Ohio Alliance on Mental Illness Exemption (OAMIE) a coalition of ten mental health advocacy organizations in support of H.B. 136. Our organizations collectively represent thousands of Ohioans living with mental illness, family members, provider organizations and mental health boards, and include: the National Alliance on Mental Illness of

Ohio; Mental Health and Addiction Advocacy Coalition; Ohio Psychological Association; Ohio Council of Behavioral Health & Family Services Providers; Ohio Association of County Behavioral Health Authorities and the Treatment Advocacy Center, among others.

I am grateful for the opportunity to once again provide testimony on this very important bill. Because you have already heard from me during hearings on S.B. 54, my goal is to keep my testimony today focused on one issue – the differences between *diminished capacity* (the subject of Amended Substitute H.B. 136) and *criminal insanity* (i.e., NGRI), from the perspective of a forensic psychiatric evaluator.

As members of the committee have heard in previous testimony, Am. Sub. H.B. 136 has been written to exempt a very narrow set of individuals with serious mental illness who had diminished capacity at the time of their crimes from being put to death in the state of Ohio. Am. Sub. H.B. 136 states that "a defendant has a serious mental illness if he or she has been diagnosed with Schizophrenia, Schizoaffective Disorder, Bipolar Disorder, or Delusional Disorder and, at the time of the offense, the condition(s), ***while not meeting the standard to be found not guilty by reason of insanity (NGRI),*** nevertheless significantly impaired the person's capacity to appreciate the nature, consequences, or wrongfulness of his/her conduct; exercise rational judgment in relation to his/her conduct; or conform his/her conduct to the requirements of the law." The four diagnoses listed in Am. Sub. H.B. 136 are severe disorders that typically emerge in early adulthood and continue throughout life, either continuously or episodically. They manifest with loss of touch with reality, cognitive impairment, compromised judgment, executive dysfunction (a loss of ability to organize thinking and behavior), lack of insight, and social dysfunction.

The reason why this legislation is being proposed is that current provisions under the law, including Ohio's criminal insanity defense (NGRI), are not sufficient to ensure that individuals whose rationality, judgment, or decision-making capacity was impaired through no fault of their own at the time of their crimes, are not subject to the ultimate punishment that we as Ohioans have decided is to be imposed upon only the most culpable of offenders.

There are several key distinctions between NGRI and diminished capacity.

First, allow me to discuss NGRI. NGRI is an affirmative defense that a defendant offers as their plea in court. In Ohio, a defendant pursuing an NGRI defense must prove that they were suffering from

a severe mental disease or defect that caused them to not know that their behavior was wrong. Therefore, when I am evaluating a defendant on an NGRI, I must perform a diagnostic evaluation and form an opinion regarding whether or not they had a severe mental disease or defect at the time of the crime. Second, I must determine, to a reasonable degree of medical certainty, whether they knew what they were doing was wrong. The Court will hear testimony and if the trier of fact determines that the individual met both requirements of the NGRI standard, they will be found NGRI. It is an intentionally narrow standard in Ohio and very few defendants qualify. We have adopted this narrow standard because a finding of NGRI is an acquittal which leads to treatment, which must be provided in the least restrictive setting that is available. A finding of NGRI does not lead to conviction, nor does it lead to punishment.

Establishing a process for consideration of diminished capacity, or severe mental illness (SMI) exemption, as proposed in Am. Sub. H.B. 136 is completely different. First, diminished capacity is neither an affirmative defense nor a plea. It is a consideration of the defendant's mental state at the time of the offense to make a determination about their culpability for the ultimate punishment. As an evaluator, my role in this type of evaluation would be, first, to perform a diagnostic evaluation and form an opinion regarding whether they had one of the four diagnoses in Am. Sub. H.B. 136 at the time of the crime. Second, I would need to determine, to a reasonable degree of medical certainty, whether the illness caused the individual diminished capacity to appreciate the nature or wrongfulness of their actions, weigh consequences, exercise rational judgment, or conform their conduct to the requirements of the law. The Court would hear testimony and if the trier of fact determined that the individual had both serious mental illness and diminished capacity at the time of their crime, the death penalty would be taken off the table. There would be no acquittal. The trial would proceed, and the individual could be convicted and sentenced to life in prison.

Please allow me to illustrate briefly with a case (describe verbally).

In conclusion, Am. Sub. H.B. 136 is a sound piece of legislation that is necessary to ensure the integrity of the criminal justice system in relation to capital offenses. It would provide a much-needed avenue for streamlining capital cases in which defendants' capacity for rationality, judgment, impulse-control and/or decision-making was impaired, through no fault of their own, by serious mental illness, by taking death off the table while leaving the possibility for conviction and punishment (as opposed to NGRI which leads to acquittal).

As citizens of Ohio we must ensure that anyone we impose the ultimate punishment upon is a person who is ultimately culpable for their actions. For this reason, I strongly encourage the committee to pass Am. Sub. H.B. 136.

Thank you for your time and attention. I welcome the opportunity to respond to any questions you may have at this time.