Office of the Ohio Public Defender

Timothy Young, State Public Defender

Testimony in Support of HB136
Death Penalty - Serious Mental Illness
Sponsors: Rep. Hillyer

Chairman Eklund, Vice Chair Manning, Ranking Member Thomas, and members of the Senate Judiciary Committee. My name is Tim Young, I am the State Public Defender. Thank you for the opportunity to testify in support of HB136.

People who have a severe mental illness should not be eligible for our most severe punishment. In *Atkins v. Virginia*, the U.S. Supreme Court said, "the severity of the appropriate punishment necessarily depends on the culpability of the offender."[1] The Court "has consistently confined the imposition of the death penalty to a narrow category of the most serious crimes."[2] The death penalty should be reserved only for those who are the worst of the worst. The individuals made ineligible for the death penalty under this bill are not the worst of the worst because the bill requires that they must suffer from impaired judgment due to a serious mental illness. HB136 is necessary, as Ohio law does not exclude someone with one of the identified serious mental illnesses from capital punishment. To paraphrase the Court's rationale for finding that individuals with an intellectual disability should not be executed, "[i]f the culpability of the average murderer is insufficient to justify the most extreme sanction available to the State, the lesser culpability of the [severely mentally ill] offender surely does not merit that form of retribution."[3]

I want to make sure you understand how the mental illnesses that HB136 covers will tie into our present system. Incompetency, NGRI, *Atkins*, and the mitigation phase of capital punishment trials serve important and exclusive functions in our criminal justice system, but do not address the same issues HB136 would reach. I will briefly review each of these four areas to highlight how HB136 addresses a separate need.

Competency

Competency to stand trial is mandatory for every criminal defendant. If a person challenges their competency, they are saying that they do not understand the nature of the charges against them and cannot assist their counsel in their defense. Competency evaluations are completed by psychologists, usually in court clinics, and the Court ultimately decides whether a defendant is competent to stand trial. The Court could restore an incompetent person to competency through classes, coaching, and other learning tools. To determine competency to stand trial, the Court considers the cognitive ability of the accused to recall information and whether the accused can explain the difference between right and wrong. A mentally ill person

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[1] *Atkins v. Virginia*, 536 U.S. 304, 319 (2002).
[2] *Id.*, citing *Gregg v. Georgia,* 428 U.S. 153, (1976).
[3] *Id.*

may have cognitive deficits or may not be able to explain the difference between right and wrong – but mental illness, alone, is not sufficient to find an accused incompetent to stand trial. If a court finds the accused incompetent, the Court orders the individual to treatment to restore him or her to competency. If the person cannot be restored to competency within the statutorily prescribed timeframe, then the charges are dismissed without prejudice, meaning they can be filed again. A person deemed incompetent to stand trial is subject to involuntary commitment to a secure mental health facility.

Not Guilty by Reason of Insanity

Not guilty by reason of insanity is another statutorily created protection for all criminal defendants. NGRI is an affirmative defense. If a person claims NGRI, they have the burden of proving by a preponderance of the evidence that they suffer from a mental disease or defect that prevented them from knowing the wrongfulness of their acts, at the time of the crime. If a person is found to be not guilty by reason of insanity, then they are not guilty of the crime, and can be committed to a secure mental health facility by the trial court for a period of time – up to the total sentence they could have received for the offense with which they were charged.

Atkins

Though competency and NGRI apply to all criminal cases, there are some procedural protections which specifically and only apply to capital cases. In *Atkins, the* United States Supreme Court held that states may not execute anyone with mental retardation, now referred to as intellectual disability.[4] The Court explained that those who are intellectually disabled have common characteristics leading them to increased vulnerability, making them worthy of more protections from the state. The Court explained that, like children, those who suffer from intellectual disability are not the worst of the worst and executing them is disproportionate to the level of offense they are capable of committing. Although a State may not execute an intellectually disabled defendant, the Court may still convict that person and sentence them to life in prison.

Mitigation Phase

Capital cases include a mitigation phase, where counsel for the defendant presents the jury with information about the accused. The jury must decide if the defendant is an appropriate person to execute based on the law and information they learn about the person. While the defense may present evidence of a person's mental illness during the mitigation phase, it is neither effective nor appropriate to rely on juries to protect those who suffer from serious mental illness. If juries could separate their personal concerns about those who suffer from mental illness from their civic duty to decide if the newly-convicted person in front of them deserves the death penalty, Ohio would not need HB136. The Death Penalty Task Force found that average people, those who make up our juries, see mental illness as an aggravating factor,

[4] *Atkins v. Virginia*, 536 U.S. 304 (2002).

instead of a mitigating factor, out of fear and a lack of understanding about mental illness. Accordingly, the Death Penalty Task Force passed this recommendation with a super majority.

That is why HB136 is so important, to make sure the law is imposed with regard for the condition of those who, while not incompetent or NGRI, are severely mentally ill. Under HB136 they will still be punished. In fact, the bill ensures the only punishment available to them if convicted is imprisonment for the remainder of their lives. They just cannot be executed.

Included in my testimony is a document that demonstrates the proportional population of defendants that have serious mental illness versus those who claim NGRI or competency.

How HB136 Differs

HB136 would exclude from the death penalty individuals who have mental illness that causes such distortions in their thinking that these individuals do not have a firm grasp on reality, although they may understand the wrongfulness of their actions. Individuals with schizophrenia can experience a loss of reality, delusions, hallucinations, and poor executive function. Symptoms of schizoaffective disorder may include hallucinations, delusions, mania, and clinical depression. Individuals with bipolar disorder may experience intense emotions and mood episodes ranging from elation to hopelessness. Individuals with bipolar II disorder may experience impulsivity, and individuals with bipolar I disorder may experience delusions. Finally, symptoms of delusional disorder may include an unshakable belief in a delusion: something untrue, or something not based in reality. These severe symptoms impede the individual's ability to fully appreciate the reality of the world around them.

There have been many myths and misconceptions surrounding this bill. Opponents have claimed that every death penalty defendant will fake a severe mental illness, defense attorneys will file frivolous claims for each individual on death row, and mental health professionals will make false diagnosis to try and circumvent the criminal justice system. These same myths and misconceptions were also alleged when the United States Supreme Court decided *Atkins* in 2002. In fact, Judge Scalia stated in his dissent that the symptoms of intellectual disability could easily be feigned and defendants would have nothing to lose by raising the defense.[5] Clearly, Justice Scalia's concern and the other myths about the end of the death penalty did not come to pass. In fact, of the individuals on death row in Ohio when *Atkins* was decided, only 9.26% pursed an *Atkins* claim for relief, and only 3.9%, or 8 individuals, were successful. I have attached to my testimony a Myths and Misconceptions fact sheet regarding this bill. This document provides state and national data regarding *Atkins* and other Supreme Court cases that addressed the death penalty. HB136 will not have a significant impact on Ohio's death penalty just as the data shows that *Aktins* and other Supreme Court cases have not significantly limited the death penalty in Ohio or nationwide.

Executing children and the intellectually disabled violates the constitution, offends justice, and disrupts the purpose of capital punishment. States may still prosecute, convict, and

[5] *Atkins*, at 353.

punish children and intellectually disabled people who commit crimes, but the State may not execute them. That is why Ohio needs HB136 - for those who suffer from a serious mental illness, making their crimes less deserving of the harshest punishment our state can impose. Because their serious mental illness inhibits their grasp of reality, these individuals have reduced culpability – they are not the worst of the worst. This bill will not end capital punishment in Ohio – but merely ensure Ohio's death penalty is reserved for those most culpable.

Thank you for the opportunity to testify in support of HB136. I am happy to respond to any questions the Committee may have.

DEATH PENALTY:
Serious Mental Illness Bills

Myths & Misconceptions v. Facts

M&M	Everyone will avoid the death penalty by faking a serious mental illness.
FACT	• When *Atkins v. Virginia* was decided, Justice Scalia dissented arguing that everyone facing the death penalty would avoid it by faking an intellectual disability. He was wrong.[1] • Nationally, from 2002, when *Atkins* was decided, to 2013, only 7.7% of individuals on death row or those charged with a capital offense penalty filed Atkins claims.[2] • Of those individuals, 55% were successful with their *Atkins* claim with decreasing success rates as the obvious post-conviction cases were resolved early on.[3]
M&M	A SMI exception will end the future of the death penalty in Ohio.
FACT	• There have been 56 executions in Ohio since 1999, when Ohio had its first execution under the modern scheme, 52 of which occured after *Atkins*. Clearly, *Atkins* did not end capital punishment in Ohio, nor will the SMI bill. • In the 17 years prior to *Atkins*, the 29 states that have legal death penalty executed 705 individuals. In the 17 years since *Atkins*, those same states executed 711 individuals.[4]
M&M	Everyone currently on death row will successfully litigate an SMI claim.
FACT	• After *Atkins*, there was also concern that every individual on death row would claim they could not be executed because of an intellectual disability. • Of the individuals on death row in Ohio when *Atkins* was decided, only 9.26% pursued an *Atkins* claim for relief.[5] • Only 3.9% of the individuals on death row in Ohio—eight individuals—were successful with their *Atkins* claim.[6] • In 2017, the Fair Punishment Project found that only six men on death row with a scheduled execution date had a mental illness.[7] • Mental health experts have ethical standards they must adhere to that prevent them from making a false diagnosis.[8]

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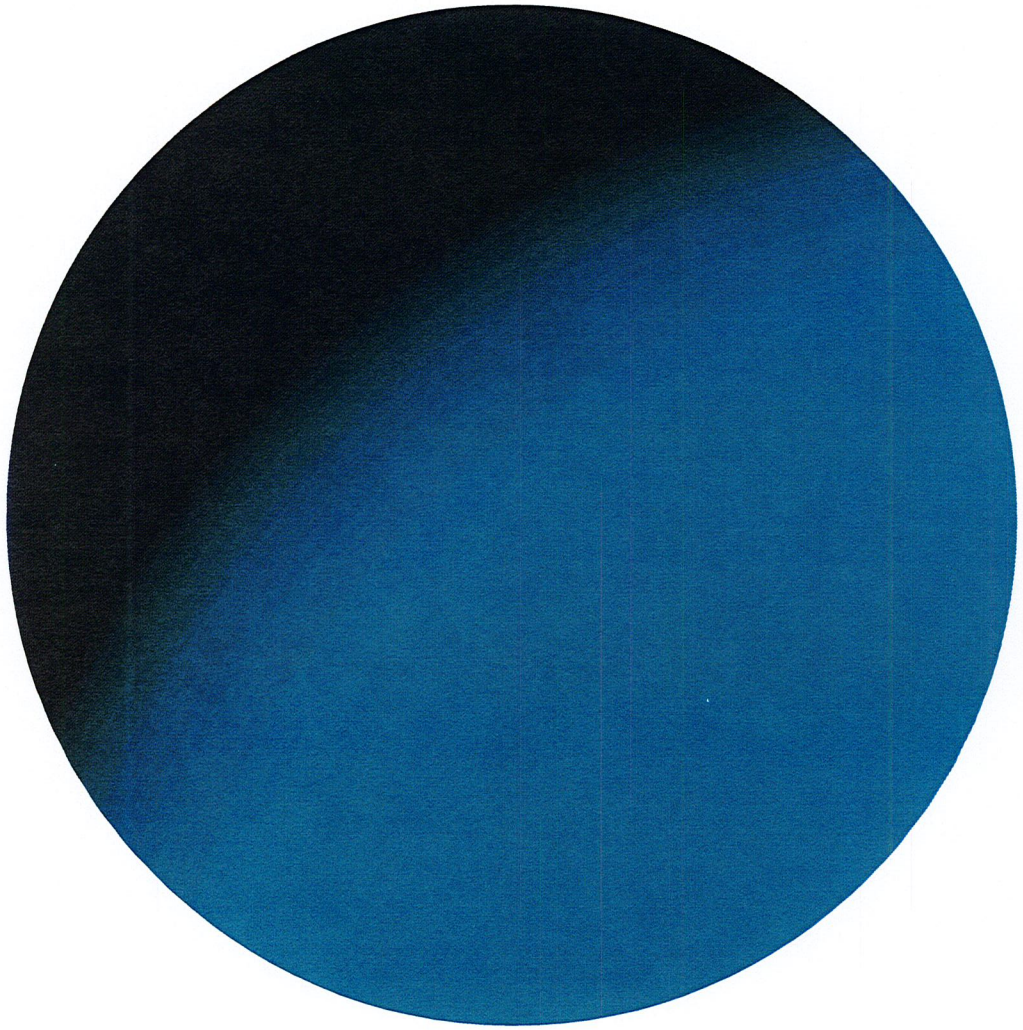
M&M	The SMI bill is uniquely probematic and will cause unending litigation.
FACT	• The U.S. Supreme Court established categorical bars to the death penalty in *Atkins*, *Roper v. Simmons*, and *Ford v. Wainright*, none of which have resulted in unending litigation.[9,10] • In *Ford*, the U.S. Supreme Court ruled that individuals who were insane or incompetent at the time of their execution could not be executed. • After *Ford*, there was speculation that everyone on death row would file litigation to avoid execution. • Nationally, only 6.7% of the individuals on death row who procedurally could, filed a claim.[11] • Defense counsel has an ethical obligation to investigate their client's backround and determined whether they could assert a serious mental illness claim in good faith.[12]

M&M	SMI will make it hard for prosecutors to negotiate pleas.
FACT	Once a SMI is established, it will be easier to negotiate plea bargains because the death penalty will no longer be applicable.[13]

M&M	Future versions of the *Diagnostic and Statistical Manual of Mental Disorders (DSM)* will be written to make Ohio's death penalty inapplicable.
FACT	• The *DSM* is written by internationally recognized clinicians including psychiatrists, psychologists, social workers, psychiatric nurses, pediatricians, and neurologists from 16 countries.[14] • Their deliberative process will not include concern about Ohio's death penalty law.

[1]*Atkins v. Virginia*, 536 U.S. 304 (2002).
[2]J. Blume, *et al.*, "A Tale of Two (and Possibly Three) *Atkins*: Intellectual Disability and Capital Punishment Twelve Years After the Supreme Court's Creation of a Categorical Bar," 23 *William & Mary Bill of Rights Journal* 393 (2014), https://scholarship.law.wm.edu/wmborj/vol23/iss2/4/.
[3]*Id.*
[4]Death Penalty Information Center, Execution Database, Aug. 9, 2019.
[5]Data is accurate as of March 28, 2018—data collected from *Attorney General's Annual Capital Crimes Report 2017*; US Department of Justice, *Bureau of Justice Statistics Bulletin, Capital Punishment 2002*; Supreme Court of Ohio website; Lexis case reports.
[6]*Id.*
[7]Most Ohio Death Row Inmates Mentally Disabled, report says, Alan Johnson, *The Columbus Dispatch*, Aug. 30, 2017, www.dispatch.com/news/20170830/most-ohio-death-row- inmates-mentally-disabled-report-says.
[8]American Psychological Association (2013). Specialty guidelines for forensic psychology, *American Psychologist*, 68, 7.19.
[9]*Roper v. Simmons*, 543 U.S. 551 (2005).
[10]*Ford v. Wainwright*, 477 U.S. 399 (1986).
[11]J. Blume, *et al.*, "A Tale Of Two (and Possibly Three) *Atkins*: Intellectual Disability and Capital Punishment Twelve Years After the Supreme Court's Creation of a Categorical Bar," *23 William & Mary Bill of Rights Journal 393* (2014), https://scholarship.law.wm.edu/wmborj/vol23/iss2/4/.
[12]Ohio Rules of Professional Conduct 1.2(d)(1).
[13]*See* generally, Blume, *et al.*, "A Tale of Two (and Possibly Three) *Atkins*: Intellectual Disability and Capital Punishment Twelve Years After the Supreme Court's Creation of a Categorical Bar," *23 William & Mary Bill of Rights Journal 393* (2014), https://scholarship.law.wm.edu/wmborj/vol23/iss2/4/.
[14]The People Behind DSM-5, American Psychiatric Association, C:/Users/10145036/Downloads/APA_DSM_People-Behind-DSM-5.pdf
[15]Available at https://files.deathpenaltyinfo.org/documents/pdf/FactSheet.f1568209571.pdf.

SMI, NGRI & Incompetence



TOTAL CRIMINAL JUSTICE POPULATION

SMI - The U.S. Department of Justice found, in 2006, that "an estimated 10% of state prisoners" met the criteria for a serious mental illness. James D.J., Gaze, L.E., *Mental Health Problems of Prison and Jail Inmates*, Bureau of Justice Statistics, (2006).

Incompetence – On average 2% of felony charged individuals plea incompetent to stand trial. Of those 78% are found competent. This results in 1 out of 250 people charged with a felony are found incompetent. Futty, John, "Incompetent for Trial Not the Same as Insane," *Columbus Dispatch*, Feb 23, 2013.

NGRI – An average of less than 1 out of 100 people plea Not Guilty by Reason of Insanity. The percentage of all defendants (total felony charged population) that is found to be NGRI is .26 percent, or 1 out of 400. Chiacchia, Kenneth, B., *Insanity Defense: Insanity Defense Statistics, Problems with NGRI, Guilty but Mentally Ill*, https://psychology.jrank.org/pages/336/Insanity-Defense.html

SMI

INCOMPETENCE

NGRI