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Opposition Testimony – HB 136
Ohio Senate Judiciary Committee
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Chairman Eklund, Vice-Chair Manning, Ranking Member Thomas, and members of the Ohio Senate Judiciary Committee, thank you for the opportunity to provide opposition testimony for House Bill 136.

Opposing legislation is not something to be done lightly. I would like to publicly acknowledge the efforts by Representative Hillyer and others to address the concerns raised about this legislation and the willingness to accept feedback and make changes.

As Attorney General and a former county prosecutor, I am intimately aware of the challenges inherent in any capital case. When HB 136 was first introduced, I shared many of the same concerns expressed by the Ohio Prosecuting Attorneys Association. Rather than simply reiterating the same concerns, this legislation was placed under review and closely monitored by my office. It has recently become clear that in addition to the lingering concerns expressed by prosecutors, the bill does not appear to meaningfully add to existing protections in Ohio law. For this reason, I cannot support the bill.

Existing Ohio law specifically addresses a defendant's mental state.

This legislation largely duplicates protections already present in Ohio law.

Section 2929.04 of the Revised Code provides the requisite circumstances that must be proven beyond a reasonable doubt to consider the death penalty in an aggravated murder case. Current Ohio law already instructs judges and juries to consider mitigating factors, and requires that these factors ***must*** be weighed against any aggravating factors. ***There is no discretion to ignore a defendant's mental state***.

Ohio Revised Code 2929.04(B)(3):

> "…the court, trial jury, or panel of three judges shall consider, and weigh against the aggravating circumstances proved beyond a reasonable doubt, the nature and circumstances of the offense, the history, character, and background of the offender, and all of the following factors ... [w]hether, at the time of committing the offense, the offender, because of a mental disease or defect, lacked substantial capacity to appreciate the criminality of the offender's conduct or to conform the offender's conduct to the requirements of the law."

It is noteworthy that the standard in current law is broader than the standard for serious mental illnesses sought here. If a judge considering whether to apply the death penalty has more discretion under existing law to consider a mental disease, defect, or lack of capacity as a mitigating factor, a subsequent review under a narrower standard—potentially years or decades after the offense—

seems exceedingly unlikely to effectuate a change in sentence. Judges already have discretion to reduce a sentence to life without parole for a mental diseases, defects, or lack of capacity.

Ohio Jury Instructions require juries to consider a defendant's mental state.

In the Ohio Jury Instructions for capital cases, juries are also required to consider a defendant's mental state.

> "Mitigating factors are factors about an individual or an offense that weigh in favor of a decision that a life sentence rather than a death sentence is appropriate. Mitigating factors are factors that diminish the appropriateness of a death sentence. You must consider all of the mitigating factors presented to you. Mitigating factors include, but are not limited to … whether, at the time of committing the offense, the defendant, because of a mental disease or defect, lacked substantial capacity to appreciate the criminality of his/her conduct or to conform his/her conduct to the requirements of the law."

Even in the presence of multiple aggravating factors, the Ohio Jury Instructions are clear that if the jury finds even one mitigating factor, the appropriate sentence may very well be life without parole. Said another way, if a single juror has any doubt about a defendant's mental state at the time of the offense, and believes that this factor outweighs all other aggravating factors, the instructions point to a sentence of life without parole, not the death penalty.

The retroactive application of this bill is impractical and any perceived benefits are illusory.

According to the Bureau of Justice and Death Penalty Information Center, the average time from sentencing to execution for inmates on death row is around 16 years. With the passage of time, the relevance of a diagnosis years or decades after a crime cannot by itself reasonably warrant resentencing. To do so essentially creates a special status for offenders with specific diagnoses, and disregards the deliberation of judges and juries who originally weighed these matters—often with far more information at their disposal.

If this legislation passes as currently drafted, it is likely that many of Ohio's inmates currently on death row will seek to avail themselves of this new form of postconviction relief. This means that the process will necessarily place a strain on judicial resources and has the possibility of renewing trauma for the friends and families of the victim(s). While I share the concern that no individual be executed for a crime committed while under the affliction of a serious mental illness, I believe current Ohio law already provides sufficient safeguards to prevent this outcome.

If the intention of the legislation is to create an exception that effectively swallows up the death penalty in Ohio, it is certainly within the legislature's purview to revisit that statute. In the meantime, I am unconvinced of the need for this tool in light of the tangible costs of implementation.

I appreciate the opportunity to provide testimony and will entertain any questions you may have at this time.