OHIO JUSTICE & POLICY CENTER
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To: House Criminal Justice Committee
From: Kevin Werner, Policy Director
Date: May 27, 2020
Re: Proponent Testimony for Substitute House Bill 136

Greetings Chairman Eklund, Vice-Chair Manning, Ranking Minority Member Thomas, and all the members of the Senate Judiciary Committee. My name is Kevin Werner and I am the policy director of the Ohio Justice & Policy Center (OJPC). Thank you for the opportunity to provide testimony in support of Substitute House Bill 136.

ABOUT OJPC AND WHY SUB HB 136 IS NECESSARY
OJPC is a Cincinnati-based non-profit law office that works statewide to create fair, intelligent, and redemptive criminal justice systems. We are both litigators and criminal-justice policy experts. We are zealous advocates because we believe fair, intelligent, and redemptive criminal-justice reform is not only possible, it is urgently necessary in our state at this time. Much can be said about why we should not execute individuals with severe mental illness at the time they committed a capital crime. But even when we agree on this, there is a common misperception that defendants with severe mental illness are protected from being executed by our current law. This is not the case. Although mental illness is taken into account at different stages of capital proceedings, **the current procedures will not keep people with severe mental illness from being executed—unless H.B 136 is passed.**

Currently, mental illness can show up in capital proceedings in the four ways described below. Without the added protections in Substitute H.B. 136, these Ohio laws are insufficient to prevent death sentences for people who demonstrate severe mental illness at the time of their offense.

"COMPETENCY TO STAND TRIAL" IS INSUFFICIENT
A defendant with severe mental illness can be found incompetent to stand trial only if the person "is incapable of understanding the nature and objective of the proceedings against the defendant or of assisting in the defendant's defense." Section 2945.38 (G). Competency at the time of trial says nothing about the defendant's mental state at the time the crime was committed. Especially since defendants may be medicated to become competent, the determination has no bearing on the level of a defendant's functioning before being medicated.

The competency standard is also very low. One of the most infamous cases of a defendant with severe mental illness being found competent is that of Scott Panetti. Mr. Panetti suffers from paranoid schizophrenia, but despite his mental illness he was allowed to represent himself at trial. Mr. Panetti wore a cowboy costume, made bizarre statements throughout the trial, and tried to call more than 200 witnesses, including Jesus Christ and John F. Kennedy. Despite the overwhelming evidence of his severe mental illness, Mr. Panetti remains on death row in Texas.[1]

[1] Texas and Ohio competency laws are similar in that a defendant must be able to consult with or assist legal counsel and have an understanding of the proceedings against the defendant.

THE INSANITY DEFENSE IS INSUFFICIENT

In Ohio, in order to be found not guilty by reason of insanity, a defendant must prove "that 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 defense is rarely used, and when it is raised, it rarely succeeds.

Although the insanity defense is related to a defendant's mental state at the time of the crime, it is not available for many defendants whose severe mental illness affected their commission of a crime. Unlike the exemption from execution proposed by Sub. H.B. 136, the insanity defense is not available to a person whose mental illness significantly impaired his or her capacity to exercise rational judgment in relation to the person's conduct; conform the person's conduct to the requirements of law; and/or appreciate the nature, consequences, or wrongfulness of the person's conduct.

The insanity defense is for defendants who society believes are so mentally ill that they cannot be held criminally liable for their crimes. However, for people who are significantly impaired but can still be held responsible for their actions, Sub. H.B. 136 would provide a middle ground. These defendants would still face life in prison, but they would not be given the ultimate punishment, the death penalty.

MENTAL-HEALTH MITIGATION EVIDENCE IS INSUFFICIENT

Ohio allows capital defendants to provide any evidence that would mitigate their sentence. This includes evidence that "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." Section 2929.04(B)(3). Often, the consideration of mental health mitigation is seen as a reason that a mental health exemption is not necessary. However, the presentation of mental health mitigation is not enough to protect individuals with severe mental illness from the death penalty due to the nature of mental illness and the stigma against it.

Severe mental illness can have a profound effect upon a capital defendant's ability to receive a fair trial. Defendants with severe mental illness may not be willing to participate in appeals and volunteer to be executed. In addition, psychotropic medications can interfere with a capital defendant's participation in the trial and can cause changes in personality that lead the jury to perceive the defendant as remorseless.

Most importantly, mental health *mitigation* presented to the jury is often *held against* the capital defendant.[2] The jury can see this evidence as proof of the defendant's future

[2] Berkman, Ellen Fels. "Mental illness as an aggravating circumstance in capital sentencing." Columbia Law Review (1989): 291-309; Kevin M. Doyle, "Lethal Crapshoot: The Fatal Unreliability Of The Penalty Phase." 11 U. Pa. J. L. & Soc. Change 275 (2008)

dangerousness.[3] This perception makes juries more likely to sentence a defendant to death even if future dangerousness is not an explicit aggravating factor.[4]

We must remember that the death penalty is supposed to be reserved from the worst of the worst. When such a determination cannot be reliably made, it puts the entire capital punishment system in question. Given the serious challenges that defendants with severe mental illness face at trial and sentencing, consideration of mental health evidence in mitigation does not provide a reliable avenue for determining that a defendant with severe mental illness is sufficiently culpable to be sentenced to death.

"COMPETENCY TO BE EXECUTED" IS INSUFFICIENT

A death row inmate cannot be executed if "the convict in question does not have the mental capacity to understand the nature of the death penalty and why it was imposed upon the convict." R.C. 2949.28(A). This standard focuses specifically on the individual's understanding of the death penalty and the reasons for its imposition. Therefore, prisoners with severe mental illness who do not have delusions relating to the death penalty will be found competent to be executed. Like competency to stand trial, this standard means that many defendants with severe mental illness will be executed.

CONCLUSION: VOTE FOR SUB. H.B. 136

Competency determinations, the insanity defense, and mitigation serve important roles in the criminal justice system, and each of these concepts demonstrate the extent to which mental illness can affect death penalty cases. Unfortunately, none of these concepts adequately protect defendant with severe mental illness from receiving the death penalty and being executed. As a result, Substitute H.B. 136 is essential to ensuring that individuals with severe mental illness will be punished but will not be given the death penalty.

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[3] Steven Garvey, "Aggravation And Mitigation In Capital Cases: What Do Jurors Think?" 98 Colum. L. Rev. 1538 (1998)

[4] Joshua N. Sondheimer, "A Continuing Source of Aggravation: The Improper Consideration Of Mitigating Factors In Death Penalty Sentencing," 41 Hastings L. J. 409 (1990).