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215 EAST 9TH STREET SUITE 601
CINCINNATI, OHIO 45202
(T) 513-421-1108 (F) 513-562-3200
CONTACT@OHIOJPC.ORG
WWW.OHIOJPC.ORG

To: Senate Criminal Justice Committee

From: David A. Singleton, OJPC Executive Director & Attorney

Date: October 21, 2015

Re: Senate Bill 162

Greetings Chairman Eklund, Vice-Chair Obhof, Ranking Minority Member Thomas, and members of the Senate Criminal Justice Committee. I am here today to urge your support for Senate Bill 162.

First, let me give a brief introduction to the Ohio Justice & Policy Center. 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.

Second, I would like to explain the focus of my testimony. Much can be said about why we should not execute those who were seriously mentally ill at the time they committed a capital crime. But even when we agree on this, there is a common misperception that seriously mentally ill defendants 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 the seriously mentally ill from being executed.

Competency to Stand Trial

A seriously mentally ill defendant can be found incompetent to stand trial only if he "is incapable of understanding the nature and objective of the proceedings against the defendant or of assisting in the defendant's defense." 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 seriously mentally ill defendant being found competent is that of Scott Panetti. Mr. Panetti suffers from paranoid schizophrenia, but despite his mental illness he was allowed to represented 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 serious mental illness, Mr. Panetti remains on death row in Texas.

Insanity Defense

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 used 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 serious mental illness affected their commission of a crime. Unlike the exemption from execution proposed by SB 162, 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, SB 162 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

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." R.C. 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 the seriously mental ill from the death penalty due to the nature of mental illness and the stigma against it.

Serious mental illness can have a profound effect upon a capital defendant's ability to receive a fair trial. Seriously mentally ill defendants may not allow defense attorneys to present evidence relating to the existence of an illness, not cooperate with defense counsel, 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.

Mental health mitigation presented to the jury can also be held against the capital defendant. The jury can see this evidence as proof of the defendant's future dangerousness. This perception makes juries more likely to sentence a defendant to death even if future dangerousness is not an explicit aggravating factor.

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 seriously mentally ill defendants face at trial and sentencing, consideration of mental health evidence in mitigation does not provide a reliable avenue for determining that a seriously mentally ill defendant is sufficiently culpable to be sentenced to death.

Competency To Be Executed

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, seriously mentally ill prisoners 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 seriously mentally ill defendants will be executed.

Conclusion

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 seriously mentally ill defendants from receiving the death penalty and being executed. As a result, Senate Bill 162 is essential to ensuring that seriously mentally ill defendants will be punished but will not be given the death penalty.

Respectfully Submitted,
David A. Singleton

Serious Mental Illness and the Death Penalty

Why current legal protections are inadequate and why SB 162 is a solution

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INTRODUCTION

Many assume that seriously mentally ill capital defendants will not actually be executed because they will be determined incompetent to stand trial, will present a successful insanity defense, will be sentenced to a lesser penalty by presenting mental health mitigation evidence, or will be determined incompetent to be executed. 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 seriously mentally ill defendants from receiving the death penalty and being executed.[1]

Proposed Senate Bill 162 would create a procedure to exempt from the death penalty those who are seriously mentally ill at the time of their offense.

The bill defines a seriously mentally ill person as someone who:

> has been diagnosed with Schizophrenia; Schizoaffective disorder; Bipolar disorder; Major depressive disorder; and/or Delusional disorder;
>
> *and*
>
> at the time of the crime, the person's 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.

COMPETENCY TO STAND TRIAL

Purpose and Standards

The competency determination is deeply rooted in the Anglo-American legal tradition. At common law, a person who was "mad" at the time of trial could not be forced to stand trial.[2] This remained true even if the individual was sane at the time of the crime. This protection "has been viewed as a byproduct of the ban against trials in absentia, as the mentally incompetent defendant, although physically present in the courtroom, is in reality afforded no opportunity to defend himself."[3] As a result, the competency determination focuses on the defendant's ability to understand and participate in his defense.

Ohio law provides that a defendant is incompetent to stand trial if a court determines that "because of the defendant's present mental condition, the defendant is incapable of understanding the nature and objective of the proceedings against the defendant or of assisting in the defendant's defense, . . ."[4] A finding of incompetency does not preclude further prosecution.[5] The state can attempt to restore the defendant to competency.[6] These attempts could include education and psychotropic medication.[7] If this restoration is successful, the defendant can proceed to trial.[8] 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.

Courts have recognized that competent defendants may still be seriously mentally ill.

The United States Supreme Court has recognized that defendants can be significantly impaired by serious mental illness but still be determined competent to stand trial. In *Indiana v. Edwards*, the United States Supreme Court discussed the "borderline-competent" criminal defendant.[9] Such "an individual may well be able to satisfy mental competence standard, for he will be able to work with counsel at trial, yet at the same time he may be unable to carry out the basic tasks needed to present his own defense without the help of counsel."[10] These defendants may display "[d]isorganized thinking, deficits in sustaining attention and concentration, impaired expressive abilities, anxiety, and other common symptoms of severe mental illnesses."[11] Because of these limitations, the Court held that a state court could find a defendant competent to stand trial but too mentally impaired to represent himself.
The Ohio Supreme Court has also rejected challenges to the competency of defendants who were admittedly seriously mentally ill.[12]
Competency determinations are insufficient to protect seriously mentally ill defendants from being sentenced to death. This is not their purpose. They are focused on whether a defendant has sufficient capacity to participate in a trial, not on whether the defendant is deserving of the most severe punishment possible.

> "Incompetency must not be equated with mere mental or emotional instability or even with outright insanity. A defendant may be emotionally disturbed or even psychotic and still be capable of understanding the charges against him and of assisting his counsel."
>
> *State v. Bock*, 28 Ohio St.3d 108, 110, 502 N.E.2d 1016 (1986).

INSANITY DEFENSE

Purpose and Standards

The insanity defense is based upon a fundamental understanding that not everyone can be held criminally responsible for their actions: "A central significance of the insanity defense ... is the separation of non-blameworthy from blameworthy offenders."[13] The exact definition of who lacks responsibility due to mental illness has changed over time. [14] 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."[15]

The insanity defense only applies to a miniscule number of cases & has become increasingly restrictive.

Studies of the insanity defense have shown that it is only raised in a small percentage of cases. It is successful in even fewer cases. [16] In fact, one older study showed that capital defendants who raise the insanity defense are *more* likely to be sentenced to death.[17]

> "While surveys have shown that the public believes the [insanity] defense is raised in as many as 50% of all trials, in reality the defense is raised infrequently, with one study reporting its use in only 0.9% of all felony indictment cases tried."
>
> Stephen G. Valdes, *Frequency and Success: An Empirical Study of Criminal Law Defenses, Federal Constitutional Evidentiary Claims, and Plea Negotiations*, 153 U. Pa. L. Rev. 1709, 1723 (2005).

Traditionally, Ohio had a broader definition of insanity than that provided in common law.[18] In addition to those who did not appreciate the wrongfulness of their acts, Ohio recognized as insane individuals who could not control their acts due to a mental disease.[19] However, this definition of insanity has been significantly narrowed. Now, Ohio rejects volitional impairments as a basis for an insanity defense.[20] In addition, Ohio's insanity defense does not apply to those whose ability to understand right and wrong is substantially impaired.[21] This definition of insanity excludes a number of people that society would recognize as seriously mentally ill.

MENTAL HEALTH MITIGATION

Purpose and Standards

The mitigation provisions of the Ohio Revised Code are meant to allow the sentencer to review a broad range of factors in order to determine whether the death penalty should be imposed.[22] Evidence of mental illness can be considered in mitigation under subsections (B)(3) or (B)(7) of RC 2929.04. The R.C. 2929.04(B)(3) mitigating factor applies where "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." The R.C. 2929.04(B)(7) mitigating factor allows the sentencer to consider any other factor that could mitigate the sentence.

Mental illness mitigation: a double-edged sword.

Some would argue that all of the deficits caused by serious mental illness can be considered in mitigation. Of course, testimony about the defendant's impairment should be developed at the sentencing stage. However, individualized consideration of serious mental illness is insufficient to protect defendants from the risk of wrongful imposition of the death penalty. As the Supreme Court found about evidence of youth (*Roper v. Simmons*) and intellectual disability (*Atkins v. Virginia*), sentencers may not give appropriate mitigating effect to evidence of serious mental illness.[23] Because of the stigma surrounding mental illness, juries can be hostile to evidence of mental illness and often harbor an exaggerated perception of the dangerousness of mentally ill defendants.[24] As a result, mental illness evidence can act as "a two-edged sword," acting as an argument in favor of the death penalty instead of against it.[25]

Consideration of mental illness in mitigation does not negate the problems caused by serious mental illness.

Considering serious mental illness in mitigation is also insufficient to protect defendants because serious mental illness weakens the important procedural protections throughout the course of a death penalty case. The seriously mentally ill, like the intellectually disabled, may have a limited ability "to give meaningful assistance to their counsel."[26] Seriously mentally ill defendants may not allow defense attorneys to present evidence relating to the existence of an illness, not cooperate

with defense counsel, not be willing to participate in appeals, and volunteer to be executed.[27]

As the Supreme Court has recognized, the administration of psychotropic medications to treat serious mental illness may further compromise the fairness of trial. Psychotropic medications can interfere with a defendant's ability to testify, interact with counsel, and understand the proceedings against him.[28] Because of a defendant's serious mental illness, traditional procedural protections are weakened, resulting in a "special risk of wrongful execution."[29]

COMPETENCY TO BE EXECUTED

Purpose and Standards

The requirement that a person must be competent at the time of execution has similar roots to the requirement of competency to stand trial. English common law forbade the execution of someone who was "mad" even if the person was sane at the time of the commission of the crime and at the time of trial.[30] Several reasons have been offered for this common law prohibition on the execution of incompetent offenders: that they would not be able to provide information that might warrant a stay of execution; that their execution offends humanity; that they are incapable of preparing themselves for the afterlife; and that mental illness itself is its own punishment, making execution unnecessary.[31]

In *Ford v. Wainwright*, the United States Supreme Court relied upon this history and current national consensus to conclude that the execution of the insane would violate the Eighth Amendment of the United States Constitution.[32] The Court has declined to define with specificity the requirements for a person to be incompetent to be executed, but it has indicated that it is unconstitutional to execute an individual who does not rationally understand the reasons for his execution.[33] Claims of incompetency to be executed raised by Ohio prisoners are governed by R.C. 2949.28, which states that "insane" prisoners may not be executed. Section 2949.28(A) categorizes a person as "insane" 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."

Execution competency determinations will not protect many seriously mentally ill individuals.

It is extremely difficult for seriously mentally ill individuals to meet the competency to be executed standards. Throughout the history of Ohio's death penalty, only one death-row inmate has been found incompetent to be executed.[34] Several others have offered proof of severe and debilitating mental illness but have been executed despite this showing.[35]

This lack of success is unsurprising given the narrowness of the competency inquiry. A serious mental illness could make a person delusional, prone to hallucinations, or generally disconnected from the world around them. Under the current law, as long as such individuals understand why they are being executed, they will be found competent. Many inmates with serious mental illness will continue to be executed under this standard.

CONCLUSION

Trial stage competency standards ensure that a defendant can participate at trial. Insanity standards determine whether a person is criminally responsible at all. These standards are not meant to keep seriously mentally ill defendants from being executed, and as a result, many seriously mentally ill defendants will be found competent and will not be able to present a successful insanity defense. Mental illness may be considered at mitigation; however, this consideration is undermined by a jury's negative perception of mental illness.

Inquiries into competency to be executed are so narrow that many seriously mentally ill individuals are found competent. As a result, without a change in Ohio law, seriously mentally ill individuals will continue to be sentenced to death and executed.

NOTES

[1] This document discusses **how** to protect the seriously mentally ill from the death penalty and does not go into great detail about **why**. For more discussion of the justification for exempting this group, *see State v. Ketterer*, 111 Ohio St. 3d 70, 2006-Ohio-5283, 855 N.E.2d 48, ¶¶ 230-250 (Lundberg-Stratton, J., concurring in judgment only); Joint Task Force to Review the Administration of Ohio's Death Penalty, Final Report and Recommendations, 6-7 (April 2014); Ronald J. Tabak, *Overview of [ABA]Task Force Proposal on Mental Disability and the Death Penalty*, 54 Cath. U. L. Rev. 1123, 1123 (2005); American Psychiatric Association, Diminished Responsibility in Capital Sentencing: Position Statement, (2004).

[2] *Ford v. Wainwright*, 477 U.S. 399, 407, 106 S.Ct. 2595, 91 L.Ed.2d 335 (1986) (quoting 4 W. Blackstone, Commentaries 24-25).

[3] 40 American Jurisprudence Proof of Facts 2d 171, Defendant's Competency to Stand Trial, Section 1 (1984).

[4] R.C. 2945.37; *accord Dusky v United States*, 362 US 402, 402, 80 S.Ct. 788, 4 L.Ed.2d 824 (1960) (defendant's competence to stand trial depends on "whether he has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding and whether he has a rational as well as factual understanding of the proceedings against him.").

[5] R.C. 2945.37.

[6] R.C. 2945.38.

[7] *Id.*

[8] *Id.*

[9] 554 U.S. 164, 128 S.Ct. 2379, 171 L.Ed.2d 345 (2008).

[10] *Edwards*, 554 U.S. at 175-176.

[11] *Edwards*, 554 U.S. at 176 (quoting Brief for American Psychiatric Association et al. as Amici Curiae 26).

[12] *See*, *e.g.*, *State v. Braden*, 98 Ohio St. 3d 354, 2003-Ohio-1325, 785 N.E.2d 439, ¶ 116 ("Dr. Burch diagnosed Braden as suffering from paranoid schizophrenia, but this diagnosis is not synonymous with incompetence to stand trial."); *State v. Bock*, 28 Ohio St. 3d 108, 110, 502 N.E.2d 1016 (1986) ("A defendant may be emotionally disturbed or even psychotic and still be capable of understanding the charges against him and of assisting his counsel.").

[13] *Clark v. Arizona*, 548 U.S. 735, 768-769, 126 S. Ct. 2709, 165 L. Ed. 2d 842 (2006) (quoting Donald H. J Hermann, The Insanity Defense: Philosophical, Historical and Legal Perspectives, 4 (1983)).

[14] *See* Amy D. Gundlach-Evans, *State v. Calin: The Paradox of the Insanity Defense and Guilty but Mentally Ill Statute, Recognizing Impairment Without Affording Treatment*, 51 S.D. L. Rev. 122, 129-130 (2006).

[15] R.C. 2901.01(A)(14).

[16] Stephen G. Valdes, *Frequency and Success: An Empirical Study of Criminal Law Defenses, Federal Constitutional Evidentiary Claims, and Plea Negotiations*, 153 U. Pa. L. Rev. 1709, 1723 (2005) (survey found that insanity defense was raised in less than 1% of cases and successful in less than 25% of those in which it was raised); Henry J. Steadman et al., Before and After Hinckley: Evaluating Insanity Defense Reform at 28, Table 2.2 (1993) (insanity defense raised in less than 1% of felony indictments and successful in less than 25% of cases in which it was raised).

[17] Note, *A Study of the California Penalty Jury in First-Degree Murder Cases*, 21 Stan L Rev 1297, 1360 (1969).

[18] *State v. Staten,* 18 Ohio St. 2d 13, 15, 247 N.E.2d 293 (1969).

[19] *Id.*, paragraph one of the syllabus.

[20] R.C. 2945.391 ("Proof that a person's reason, at the time of the commission of an offense, was so impaired that the person did not have the ability to refrain from doing the person's act or acts, does not constitute a defense.").

[21] R.C. 2901.01(A)(14).

[22] *See Lockett v. Ohio*, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978).

[23] *See Roper v. Simmons*, 543 U.S. 551, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005); *Atkins v. Virginia*, 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002).

[24] Christopher Slobogin, *Mental Illness and the Death Penalty*, 1 Cal. Crim. L. Rev 3, 21, 23 (2000).

[25] *Atkins*, 536 U.S. at 321; *see Bryan v. Mullin*, 335 F.3d 1207, 1222-1223 (10th Cir.2003) (holding that defense counsel was not ineffective for failing to present evidence of mental illness because the evidence may have "done more harm than good"); Ellen F. Berkman, *Mental Illness as an Aggravating Circumstance in Capital Sentencing*, 89 Colum. L. Rev. 291 (1989).

[26] *Atkins*, 536 U.S. at 320.

[27] Liliana Lyra Jubilut, *Death Penalty and Mental Illness: The Challenge of Reconciling Human Rights, Criminal Law, and Psychiatric Standards*, 6 Seattle J. Soc. Just. 353, 376 (2007).

[28] *Riggins v. Nevada*, 504 U.S. 127, 137-138, 112 S.Ct. 1810, 118 L.Ed.2d 479 (1992).

[29] *Atkins*, 536 U.S. at 321.

[30] *Ford v. Wainwright*, 477 U.S. 399, 407, 106 S.Ct. 2595, 91 L.Ed.2d 335 (1986) (quoting 4 W. Blackstone, Commentaries 24-25); Christopher Seeds, The Afterlife of Ford and Panetti: Execution Competence and the Capacity to Assist Counsel, 53 St. Louis U. L.J. 309, 314-317 (2009).

31 Ford at 407-408.

32 Id. at 409-410.

33 *Panetti v. Quarterman*, 551 U.S. 930, 958-960, 127 S.Ct. 2842, 168 L.Ed.2d 662 (2007).

34 *State v. Awkal*, Cuyahoga C.P. No. CR-276801, 2012 WL 2277933 (July 15, 2012).

35 See *State v. Scott*, 92 Ohio St. 3d 1, 3, 748 N.E.2d 11 (2001) (allowing the execution of a death row inmate with chronic undifferentiated schizophrenia); *State v. Brooks*, 8th Dist. Cuyahoga Nos. 97455 and 97509, 2011-Ohio-5877, ¶ 18 (allowing the execution of a death row inmate with paranoid schizophrenia who suffered from grandiose delusions).

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