Testimony by Jeffrey L. Smalldon, Ph.D., ABPP (Forensic)
Before the Senate Criminal Justice Committee
on S.B. 162
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Thank you Chairman Eklund, Vice Chairman Obhof, Ranking Member Thomas, and other members of the committee for allowing me this opportunity to speak to you today regarding several aspects of S.B. 162 that I regard as especially important.

First, a few words about my background. Last April, I retired after a quarter-century of private practice as a clinical and forensic psychologist. Most of my work has been forensic, broadly defined. I'm still working on several capital cases but for the most part I'm retired.

I obtained my Ph.D. in psychology from Ohio State in 1989, and I was licensed for independent practice in 1990. For many years, in my role as an Adjunct Assistant Professor in the Department of Psychology at Ohio State, I taught an annual seminar called "Topics in Forensic Psychological Assessment." Since 1990, in addition to working on literally thousands of civil and criminal cases, I've provided consultation to the State Board of Psychology (acting as the Board's expert witness), the Office of the Ohio Attorney General, Franklin County Children Services, Riverside Methodist Hospital's Physician Effectiveness

Committee, the Ohio Bureau of Criminal Investigation and Identification or BCI, and any number of other public and private agencies and organizations.

I'm one of approximately 300 psychologists in the United States who have obtained the Diplomate in Forensic Psychology from the American Board of Professional Psychology. It's the most prestigious credential available for psychologists who do work in the forensic arena.

As I mentioned a moment ago, I've worked on thousands of forensic cases over the course of my career. They've included approximately 1000 domestic court cases – in about 20 different Ohio jurisdictions – where I've served as the Court's expert; more competency to stand trial, sanity, and sex offender assessments than I can count; and, perhaps most important given the current context, approximately 300 death penalty cases, in both state and federal court. My work on capital cases has taken place in about 50 counties throughout Ohio. I'd estimate that I have appeared as an expert witness at somewhere between 75 and 100 capital case sentencing hearings.

Today, I'll focus my observations on four important points.

One is that the proposed "carve-out" exemption from the death penalty for defendants found to have one of the serious mental illnesses specified in the Bill's language is extremely *narrow*. The vast majority of capital defendants are *not* diagnosed as having one of the five specified diagnoses. I don't have a precise number to share with you, but I'd say that of the 300 or so capital defendants I've evaluated, less than 5% received one of those diagnoses.

The point, then, is this: We're talking about a very small number of capital case defendants who would even have a *chance of* being exempted from the death penalty as a result of being diagnosed with Schizophrenia, Schizoaffective Disorder, Delusional Disorder, Bipolar Disorder, or Major Depression

There's a second point that I'd like to emphasize: It's true that Ohio law permits the trier-of-fact's consideration of mental illness as one so-called mitigating factor in determining whether the defendant should be sentenced to death. However, that's hardly equivalent to a carve-out exemption prohibiting the execution of defendants afflicted with serious mental illness. I know this committee has heard testimony from other witnesses who have pointed to something that may seem paradoxical but is, in my experience, absolutely true. For all practical purposes, some juries hold mental illness *against* the perpetrator of a death-eligible offense, apparently because their members believe that being mentally ill makes a person *more* unpredictable, *more* dangerous, and an even greater threat to society than someone who's *not* diagnosed as having a serious mental illness.

I want to shift gears for a minute. Let's consider a capital case that involves a seriously mentally ill defendant and a jury whose members *don't* think that way, *don't* see the presence of serious mental illness as a factor that causes them to tilt in the direction of a death verdict.

The defendant in such a case *still* might end of being sentenced to death, perhaps because the jury concludes that no matter *how* mentally ill he is, he should still die due to the nature and circumstances of the crime he committed. It happens. I've seen it happen. I've worked on cases where I had no doubt whatsoever of the

defendant's severe mental illness, and where no other mental health professional appeared to rebut my testimony about it – but the defendant still ended up being sentenced to death.

Now I want to address a third issue. Some people – though I'm quite sure they wouldn't be mental health professionals – might contend that the insanity defense as it's enshrined in Ohio law means that seriously mentally ill people won't be found guilty and ultimately sentenced to death. That's untrue.

As I always used to emphasize to my students at Ohio State, the law's so-called "insanity window" is an extremely narrow one. Without going into a lot of detail, I can tell you that *very* few criminal defendants of any kind are able to pass through it, by which I mean able to convince the trier of fact that the symptoms associated with their severe mental illness were so severe at the time of the alleged criminal offense that they prevented him from knowing the wrongfulness of his actions.

The bottom line? Many seriously mentally ill people are still found to be "sane" under Ohio law. In the context of a capital case, a seriously mentally ill defendant could easily be found guilty and then get sentenced to death. Again, I know it happens. I've witnessed it firsthand.

I want to address one final issue. As I know you're all aware, the United States Supreme Court has found it unconstitutional for states and the federal government to execute defendants found to be *intellectually disabled* (or to have what used to be referred to as "mental retardation"). It's also carved out an exemption from the

death penalty for juvenile defendants who were under the age of 18 at the time their offense was committed.

Let me say just a few words about the nature of serious mental illness. Of course mental illness can take many forms, and the severity of its symptoms vary – across time in any given case and, obviously, from one person to another. However, few mental health professionals speak in terms of "curing" a serious mental illness. The challenge is learning how best to manage the symptoms associated with it.

That challenge can be complicated by many things, for example how invested the afflicted person is in maintaining close, ongoing contact with one or more treaters; how medication -compliant the person is (and, incidentally, many psychiatrists will tell you how difficult it is to get their mentally ill patients to be consistent about taking the medication or medications that have been prescribed for their condition); and how much or how little familial and social support the afflicted person has. Of course there are others – but those are some of the most common complicating factors in treating someone who is seriously mentally ill.

It's simply not accurate to suggest that as a condition that might be seen as reducing culpability to the point where it would warrant a carve-out exemption from the death penalty, serious mental illness is fundamentally different from intellectual disability (or "mental retardation"). Both conditions often result in the afflicted person having chronic problems with such things as judgment, self-regulation, perspective-taking, basic self-care, successful management of interpersonal relationships, and impulse control. Like persons with intellectual disability, persons with serious mental illness can be treated and their problems

managed. The approaches might be different but the goals are often similar. Sometimes those goals are achieved. Regrettably, often they're not.

The point I want to emphasize for present purposes is that people with a serious mental illness of the kind specified in S. B. 162 are no less likely than intellectually disabled individuals to have symptoms – resulting from their condition – that cause serious problems like the ones I've cited above. Those are precisely the kinds of problems that caused the Supreme Court of the United States to decide that intellectually disabled individuals should be exempt from the death penalty.

Symptoms of serious mental illness often fluctuate over time. Even during periods of relative stability, however, the afflicted person should not be regarded as "cured" of his condition. Symptom management typically requires close, ongoing treatment, with relapse an ever-present possibility, particularly under conditions of heightened stress or rapid environmental change.

Thank you for allowing me the opportunity to address your committee. I appreciate your time and attention, and I'll do my best to answer any questions that you might like to ask me.