

Proponent Testimony
House Bill 81
House Criminal Justice Committee
May 9, 2017

David Niven, Ph.D.
University of Cincinnati

Chairman Manning, Vice Chair Rezabek, and members of the House Criminal Justice Committee:

Thank you for the opportunity to address the committee today regarding House Bill 81. My name is David Niven, I am a political science professor at the University of Cincinnati and I conduct research on death penalty policy.

Research on mental illness and the death penalty makes the imperative for this legislation absolutely clear. In short, though it is legally a mitigating factor in sentencing, serious mental illness frequently functions as an aggravating factor in jurors' thinking.¹

Evidence of this misapplication of a defendant's mental illness in death penalty trials is in abundant supply. Studies that compare defense arguments in the courtroom with the outcomes of those cases find mental illness regularly misused as an aggravating factor.²

Studies that survey jurors after their service in capital cases find that they report having misused mental illness to the detriment of the defendant.³ Studies that supply otherwise death qualified individuals with the fact pattern of a case find clear, causal evidence that

¹ 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); Steven Garvey, "Aggravation And Mitigation In Capital Cases: What Do Jurors Think?" 98 *Colum. L. Rev.* 1538 (1998); Joshua N. Sondheim, "A Continuing Source of Aggravation: The Improper Consideration Of Mitigating Factors In Death Penalty Sentencing." 41 *Hastings L. J.* 409 (1990).

² Kalven, Harry. "A Study of the California Penalty Jury in First-Degree-Murder Cases," 21 *Stan. L. Rev.* 1302 (1969); Deana Logan, "Pleading for Life: An Analysis of Themes in 21 Penalty Arguments by Defense Counsel in Recent Capital Cases," 4 *Cal. Death Penalty Def. Manual* 2SN-19 (1982).

³ William Bowers et al., "Foreclosed Impartiality in Capital Sentencing, Jurors' Predispositions, Guilt-Trial Experience, and Premature Decisions-Making," 83 *Cornell L. Rev.* 1476 (1998).

invocation of serious mental illness – such as schizophrenia – is the “least effective” mitigating evidence and is directly cited as *a reason to impose the death penalty*.⁴

A recent study of jurors from capital cases puts it quite simply.⁵ The more jurors come to see the defendant as *different*, as *other*, as *not fully human*, the more likely those jurors are to believe that the defendant deserves a death sentence.

Different. Other. Not fully human. Those are precisely the kind of feelings that can be evoked from the specter of serious mental illness.

Serious mental illness is a mitigating factor under the law. How could it be misapplied in the jury room? In my own work I document a long line of cases in which the U.S. Supreme Court has had to grapple with jurors confused by the instructions they must apply during the sentencing phase of a death penalty case.⁶ More to the point here, researchers find that an assertion of serious mental illness makes jurors more confident in the defendant’s guilt and more fearful of the defendant, thus a mitigating factor under the law can morph into an aggravating factor that increases the likelihood of a death sentence.⁷

Though jurors have distorted serious mental illness from a mitigating to an aggravating factor, it is clear from my own research that this is not what state legislators intend. Along with a colleague from the University of Idaho, I have been analyzing what kinds of arguments state legislators from across the country make when they talk about the death penalty. One phrase we see repeatedly from state legislators who support the death penalty is their belief that it is a punishment intended for the “worst of the worst.”

That phrase appears time and again, in every state where the issue has been debated. “Worst of the worst,” the individuals who are most culpable, most clearly guilty, and perpetrators of the worst crimes.

By contrast, what I have yet to see – from a single legislator in any state – is an argument that that death penalty is intended for those afflicted with a serious mental illness.

Leaving serious mental illness as a mitigating factor – rather than an excluding factor as this bill would do – thwarts the intent of most legislators by increasing the likelihood that less culpable individuals could be sentenced to death.

That is exactly why bills like this one are currently being debated in Arkansas, Indiana, South Dakota, Tennessee, Texas, and West Virginia.⁸ Because in practice we have a system that is operating outside both the letter and intent of the law.

⁴ White, Lawrence T. “Juror decision making in the capital penalty trial: An analysis of crimes and defense strategies.” *Law and Human Behavior* 11.2 (1987): 113.

⁵ Sheri Lynn Johnson, Amelia Courtney Hritz, Caisa Elizabeth Royer, and John H. Blume, *When Empathy Bites Back: Cautionary Tales from Neuroscience for Capital Sentencing*, 85 *FORDHAM L. REV.* 573 (2016).

⁶ Miller, Kenneth, and David Niven. “Mixed Messages: The Supreme Court's Conflicting Decisions on Juries in Death Penalty Cases.” *Crim. L. Brief* 5 (2009): 69.

⁷ Ellsworth, P. C., Bukaty, R. M., Cowan, C. L., & Thompson, W. C.. “The death-qualified jury and the defense of insanity.” *Law and Human Behavior* (1984) 8(1-2), 81.

⁸ Beitsch, Rebecca. “States Consider Barring Death Penalty for Severely Mentally Ill.” Pew Stateline Report, April 17, 2017.

Let me also briefly note that this bill is not only consistent with the objectives of state legislators, it also reflects the clear preference of the American people. Today in the United States, when we agree on so few things, a remarkable consensus has developed seeking to exclude those with serious mental illness from the death penalty. In fact, by a 2 to 1 margin Americans want to prevent those with a serious mental illness from being subject to a death sentence. That includes a majority of Democrats and Republicans and Independents, a majority of men and a majority of women.⁹

This bill is not merely a solution for a theoretical possibility, but for a real and continuing problem. Reviews by independent medical professionals have continually found individuals with serious mental illness nonetheless being sentenced to death.¹⁰ Reserving death sentences for the *worst of the worst* requires removing those with serious mental illness from eligibility for the death penalty.

I thank you for the opportunity to speak with you today on this important bill.

⁹ Nationwide survey of 943 respondents overseen by Robert Smith, University of North Carolina College of Law, December 1, 2014.

¹⁰ For example: Baumgartner, Frank. *Deadly Justice: A Statistical Portrait of the Death Penalty*. Oxford University Press, 2017.