

Proponent Testimony
House Bill 136
House Criminal Justice Committee
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Chairman Lang, Vice Chair Plummer, Ranking Member Leland and members of the House Criminal Justice Committee:

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

Let me boil what I have to say down to two points.

One, mental illness is legally a mitigating factor in capital cases, but in actual practice, it can function as an aggravating factor.¹

Two, turning law upside down defies what this legislature intended.

How do we know that serious mental illness mutates from a mitigating factor under the law to an aggravator in practice? We know because jurors have told us.

A group of researchers created the Capital Jury Project to find out how jurors in capital cases weigh the evidence and make their decisions. These are the actual citizens who made life and death decisions in these cases. Well more than a thousand jurors have sat down for three and four hour interviews to explain what they heard, what they decided, and why.

What these jurors said demands our attention.

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).

There were jurors who reported that evidence of serious mental illness made them “much more likely to vote for death.”²

Asked for the single strongest piece of evidence supporting a death sentence, one juror said, and I quote, “The defense attorney’s psychiatric evaluation of the defendant.”³

Think about that for a moment.

The single strongest piece of evidence supporting a death sentence wasn’t the testimony of a police officer, a forensic expert, a witness, a victim, an accomplice. No. The most damning moment of the entire trial was the defense’s doctor offering evidence that the defendant was mentally ill.

Another juror reported being reluctant to support a death sentence, but finding evidence of mental illness a decisive reason to vote for death. “So what we decided was that regardless of his illness...the only solution would be capital punishment,” the juror said.⁴

These are not isolated outcomes. As the authors of one study put it, “Jurors often pointed to the mental health expert’s testimony regarding a particular point as a reason why the defendant should receive a sentence of death.”⁵

The rationale can vary. Jurors associate mental illness with future dangerousness. Jurors associate mental illness with guilt. Often jurors just find such defendants really unpleasant.

Scores of jurors spoke of the demeanor of the defendant as making a powerful impression on them – and on this measure the mentally ill failed woefully to sit up straight, look people in the eye, and nod or frown or otherwise follow the dictates of Emily Post.

In the process, a mitigating factor in the law becomes an aggravating factor in the jury room. In the process, the defense works on behalf of the prosecution. And justice is not served.

Let me be perfectly clear. This is not what state legislators intend.

How do we know that?

Every single state with the death penalty includes at least one mental health related circumstance as a statutory mitigator.⁶ Every single one.

² Sandys, Marla, Heather Pruss, and Sara M. Walsh. "Capital jurors, mental illness, and the unreliability principle: Can capital jurors comprehend and account for evidence of mental illness?" *Behavioral sciences & the law* 36, no. 4 (2018): 470-489.

³ Ibid.

⁴ Ibid.

⁵ Ibid.

⁶ Ibid.

And my own research speaks to this question. Along with a colleague, we read what state legislators had to say in their floor speeches before casting votes on the death penalty.⁷

All told, we read and then categorized more than 300,000 words uttered by state representatives and state senators.

And not one of them suggested that the death penalty was meant for those suffering from mental illness. Not one speech. Not one word.

The law is being misapplied.

In defiance of its plain meaning.

In defiance of legislative intent.

And you have it in your power to fix it.

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.⁸

For this and previous versions of this bill, bipartisan supporters have come forward from the most liberal and most conservative corners of the legislature.

Clearly, correcting this misapplication of the law is not a partisan endeavor. It is not an ideological crusade. It is common sense.

I respectfully request not only your support, but your commitment to see this bill through to passage.

I know that this legislation concerns people who have done unconscionable things. But in truth, this bill is not about them, it's about us.

You and me. And our capacity to say we sought justice.

I'll be the first to admit, passing this bill won't go anywhere on your resume. But it will be in your legacy. That you saw a wrong and tried to right it. That you made a system of justice as fair as you knew how to make it.

⁷ Niven, David, and Aliza Plener Cover. "The Arbiters of Decency: A Study of Legislators' Eighth Amendment Role." *Wash. L. Rev.* 93 (2018): 1397.

⁸ Nationwide survey of 943 respondents overseen by Robert Smith, University of North Carolina College of Law, December 1, 2014.