

Submission by

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To the Ohio House  
Criminal Justice Committee

Regarding H.B. 136

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Thank you, Chairman Lang, Vice Chairman Plummer, Ranking Member Leland and members of the Committee, for the opportunity to submit this written testimony in support of H.B. 136.

For most of my life I have been a supporter of the death penalty. As a member of the legislature in 1981, I served on the House Judiciary Subcommittee that crafted S.B. 1, our statute. I advocated for passage of the bill to assure public safety and to lessen the costs that were expected if life without parole were the other option, and though somewhat uncertain, I hung my hat on the death penalty as a deterrent. When we talked about application of the new law, we expected it would apply only to the most heinous of crimes, and to only the worst of the worst, those who acted with full moral culpability, where there was proof beyond a reasonable doubt of specific intent to kill and premeditation on the act of killing.

As Attorney General from 2003 to 2007, I oversaw 18 executions and reviewed many other death sentence cases. Like former Justice Evelyn Lundberg Stratton, my work gave me an up-close view of our death penalty system in practice, which is much different from theory or intention. I learned that none of these standards we had envisioned ever came to pass -- the death penalty is not meeting the standards it was adopted for, certainly not deterrence or cost-savings. And the risk of error in imposing the death penalty on the innocent and/or undeserving, and the unequal application of the penalty, have caused me to have deep second thoughts. On balance, I am not sure the value of retribution is worth the risk of error and arbitrariness in this system. Indeed, I've concluded that the risk of executing an innocent person is greater than that of a convict escaping and presenting a danger to the public.

The difficult truths about the death penalty must be met with honesty, integrity, and a willingness to improve Ohio's justice system so that we don't risk having Ohio on record as having executed an innocent person. This is not an idle concern, to date 9 persons sentenced to death in Ohio have been released after convincing evidence they were innocent, and 165 have been nationwide, according to the Death Penalty Information Center. There is widespread belief that some innocent persons have already been executed in this country. The credible estimated error rate - that approximately 4 percent of those we have sentenced to death are innocent - would not be even remotely tolerated in the U.S. airline or pharmaceutical industries, and demands our attention and action.

I appreciate the comprehensive work of the Supreme Court Joint Task Force on the Administration of Ohio's Death Penalty to address and help assure the fairness and accuracy of Ohio's death penalty system.

I firmly support the great majority of its 2014 recommendations, including Recommendation 8, implemented in H.B. 136, excluding those with severe mental illness from execution.

One reason I support this bill is it helps avert the risk of a false confession leading to a wrongful execution. My wife Nancy and I have written in our book, "False Justice: Eight Myths that Convict the Innocent", that twenty five percent of DNA-proven wrongful convictions involved a false confession, self-incriminating statement, or guilty plea. We related that diminished reasoning ability is often a factor in these cases. Too, dreams and offhand remarks have been interpreted by law enforcement as admissions, and used in a manner very similar to a confession. Like juveniles and those with intellectual disabilities, the mentally or psychologically impaired appear to be especially vulnerable to police interrogation tactics, especially long interrogations. The Reid Technique often used by police frequently involves an interrogator suggesting a moral excuse for the crime, or making improper threats or promises, or engaging hypothetical crime scenarios and dream analysis, or lying about the evidence against an individual. Impaired individuals are particularly vulnerable to all of these tactics which ensnare the innocent. We have recommended reforms to the interrogation process. S.B. 40 will at least help avert a wrongful execution, even if it is not sufficient to avert a wrongful conviction.

Even where a severely mentally ill person has killed and there is no mistake regarding identity of the killer, I do not believe that retribution is proportional when the law's most severe penalty is imposed on one whose culpability or blameworthiness is diminished, as stated in the 2005 *Roper v. Simmons* Supreme Court decision and restated in Justice Stratton's testimony. For this reason, I support H.B. 136 and urge its adoption.

Finally, I support this bill because executing those who were severely mentally ill at the time of their crime does not deter murder. What the U.S. Supreme Court stated with respect to those who are intellectually disabled in the *Atkins v. Virginia* decision in 2002 holds true for the severely mentally ill at the time of their crime: the same cognitive and behavioral impairments that make them less morally culpable also make it less likely they can process the information of the possibility of execution as a penalty, and as a result, control their conduct based upon that information.

We who were legislators in 1981 expected that we had written a law that would assure public safety and that only those with the highest of moral culpability, the worst of the worst, would be executed. I am confident we thought we had written a statute that would foreclose executing the intellectually disabled or mentally ill. But we did not. Ohio law lacked adequate safeguards. We were sentencing to death those who were intellectually disabled, as witnessed by the eight Ohio cases of those resentenced to life in the wake of the Supreme Court's *Atkins v. Virginia* decision. And we continue to sentence to death and execute those with significant mental illness. During my tenure as Attorney General, at least three persons with some level of mental illness were executed: Stephen Vrabel had a history of paranoid delusions, and three members of our highest Court found him undeserving of death; Scott Mink had depression; and Rocky Barton had major depression with psychotic features. All three waived their rights at some point and volunteered for execution.

Whether H.B. 136 would have led to a life sentence in any of their cases is not known. What is known is that our present laws on competency, insanity, and mitigation do not do enough to assure against execution of the innocent or those undeserving of death due to their severe mental illness, as ably stated by David Singleton in his testimony before you on behalf of the Ohio Justice and Policy Center.

H.B. 136 creates the appropriate structure and necessary safeguards to address this deeply flawed system. You have both the opportunity and moral imperative to fix this weakness in our capital punishment system, and I urge you to implement this reform recommended by the Joint Task Force.