

Testimony of
Professor Emeritus Margery M. Koosed,
University of Akron School of Law,

On behalf of Ohio law professors,

To the Ohio House
Criminal Justice Committee
Regarding H.B. 136

May 2, 2019

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

My name is Marge Koosed and I am a professor emeritus at the University of Akron School of Law where I have been a faculty member since 1974. My focus has been Criminal Law, Constitutional Criminal Procedure, and seminars in criminal process, capital punishment litigation and mistaken convictions. I am here this morning speaking on behalf of 52 law professors from across Ohio who have dedicated their professional careers to improving the criminal justice and health systems, and to training those who would become our state's future lawyers, legislators, and judges. We submit to you a letter expressing our support for House Bill 136.

The Ohio law professors support House Bill 136 and Recommendation 8 of the Ohio Supreme Court's Joint Task Force to Review the Administration of Ohio's Death Penalty. We believe that it is necessary to pass this bill in order to prohibit the execution of Ohioans who suffered from severe mental illness at the time of their offense. The current system creates a

substantial risk that capital punishment in Ohio has been, and will continue to be, imposed on those who are less culpable for their crimes owing to severe mental disorders.

Those who commit violent crimes while in the grip of a psychotic delusion, hallucination, or other disabling psychological condition lack the judgment, understanding, or self-control to be labeled the worst of the worst who are deserving of death. Their culpability is inherently so limited that while they may be convicted of capital murder, they should not be subject to the death penalty.

House Bill 136 exempts capital defendants from death if at the time of the crime they had a severe mental illness that significantly impaired their capacity to exercise rational judgments in relation to their conduct, to conform their conduct to the requirements of the law, or to appreciate the nature, consequences or wrongfulness of their conduct. This is akin to the Model Penal Code Section 4.01 test for insanity, but instead of acquitting a defendant of guilt as the model code would do, the proposed bill simply assures that the severely mentally ill defendant will not be executed. It would thus prevent troubling executions like that of Stephen Vrabel, who was put to death by the State of Ohio despite the belief of three distinguished Supreme Court justices that there was clear evidence in the record that Mr. Vrabel suffered from a severe mental illness that should have rendered him ineligible for capital punishment. *State v. Vrabel*, 790 N.E.2d 303, 319-21 (Oh. 2003)(Moyer, C.J., dissenting).

We agree with the diverse Task Force members, Ohio Supreme Court Justice Paul Pfeiffer, former Ohio Supreme Court Justices Wright, Lundberg-Stratton, and Chief Justice Moyer, former Attorney General Jim Petro, several Courts of Appeals judges, the American Bar Association, the National Association on Mental Illness, and countless others who have concluded the death penalty is not the appropriate penalty for these individuals, and certainly not

the answer to the problem of violence committed by persons with severe mental disorders. Like juveniles and the individuals with intellectual disabilities, persons with severe mental illness lack the culpability to be sentenced to death. Moreover, those who suffer from severe mental illness will often be unable to effectively assist their counsel with their defense, creating a risk that capital punishment will be imposed on them arbitrarily.

Persons with severe mental illness have been and will continue to be sentenced to death and executed unless this exemption is granted. The severely mentally ill often cannot meet Ohio's highly demanding M'Naghten-type standard for acquittal by reason of insanity, *see* O.R.C. 2901.01 (14) [requiring that the defendant did not know (at all) the wrongfulness of his act]. Because a mentally ill defendant cannot often meet that standard, they are precluded from presenting expert testimony in the trial phase regarding their illness and impairment, and are convicted of capital murder. *See State v. Wilcox*, 70 Ohio St.2d 182 (1980). Thus, the trial jury generally will not learn of the defendant's mental illness during the trial phase. Once convicted, their mental illness is to be considered in mitigation at the penalty phase, *see* O.R.C. 2929.04(B)(3) and (7), but as often as not is treated as aggravating, a reason to impose death, instead of a grounds for mercy, as respect for human dignity, understanding of moral culpability, and judicial integrity requires.

H.B. 136 devises fair procedures for reliably determining whether the severely mentally ill exemption applies in an individual case, procedures that are consistent with our existing ones for excluding those who are ineligible for capital punishment by reason of age and intellectual impairment. The defendant has the burden to raise the issue of SMI. When raised, the judge holds a pre-trial hearing. The defendant then has the burden of presenting evidence to meet the

severe mental illness criteria, including diagnosis and substantial impairment, and the prosecutor can present rebuttal evidence. The defendant has the burden of ultimately proving both his severe mental illness and substantial impairment, by a preponderance of the evidence.

Precluding death when there is a severe mental illness is not a new notion in Ohio. Ohio has long been committed to this. The 1974 Ohio death penalty law was a quasi-mandatory death sentencing law: death was required unless one of three exceptions was present. Severe mental illness was one of those: death was precluded if the trial judge found, after conviction, that “the offense was primarily the product of the offender’s psychosis or mental deficiency.” [*Lockett v. Ohio*, 438 U.S. 586, 593-594 (1978), referencing then O.R.C. 2929.03 and 2929.04.] The U.S. Supreme Court struck down that law as being too limited in its list of relevant mitigating factors, i.e., circumstances that called for a life sentence. The 1981 law we presently work under provided for weighing many additional mitigating factors, and included mental illness and mental deficiency among them. Its sponsors and supporters anticipated the mentally ill and mentally retarded (or as we say now, intellectually disabled) would not end up on death row under the new law, the law simply added more reasons for a life sentence – I vividly recall then-House Representative Ron Mottl coming to my capital punishment class in the early 90’s and declaring no mentally retarded persons could wind up on Ohio’s death row under the 1981 statute. But in the wake of the Ohio litigation following the *Atkins v. Virginia*, 536 U.S. 304 (2002) decision excluding the intellectually disabled from death, we know that Ohio’s weighing approach towards mental deficiency did not protect these defendants from a death sentence -- eight inmates have been resentenced to life due to the decision. [Ohio Attorney General’s Office *Capital Crimes Annual Report*, “Ineligible for death sentence based on mental retardation”.] That experience makes clear that there is no assurance the current statute’s weighing approach

adequately prevents execution of the severely mentally ill at the time of their crimes, though it was thought to do so.

Enacting H.B. 36 would not empty death row or mean the end of the death penalty in Ohio. As the Akron Beacon Journal related a few days ago [“Spare those with severe illness from execution”, April 28, 2019], “[i]n 2017, Harvard law school researchers evaluated the 26 men then scheduled for execution in Ohio and found 6 suffering from a mental illness. Yet just 2 [of the 26] would meet the afflictions defined in the legislation.”

Furthermore, relying on the current weighing process to exempt those with severe mental illness is fiscally unsound. Waiting until the penalty phase to resolve this question means conducting a capital trial and penalty phase - that is ten times more expensive than the non-capital life sentence trial that would be conducted if the judge found severe mental illness in a pre-trial proceeding. [In 2017, the Akron Beacon Journal reviewed Summit County Common Pleas Court records and compared two aggravated murder trial costs; when prosecutors sought the death penalty, the trial cost was \$267,875; when seeking life without parole, the cost was \$19,365. Akron Beacon Journal, “Death penalty needed for ‘worst of the worst’, chief counsel for Summit County reports”, Feb. 19, 2017 (original chart reprinted in Ohioans to Stop Executions’ “2017 report on Ohio’s death penalty”, at 12.) By adopting H.B. 136, the legislature will be avoiding wasteful spending.

We urge passage of H.B. 136 and companion legislation in the Ohio Senate. The fairness, reliability, and integrity of Ohio’s criminal justice system demand that individuals with severe mental illness at the time of their crime be spared the ultimate sanction.

An Open Letter to the Members of the
OHIO HOUSE CRIMINAL JUSTICE COMMITTEE
in support of
HOUSE BILL 136
Exempting the Severely Mentally Ill from Execution

MAY 2019

We are law professors from across Ohio teaching in the areas of Criminal Law, Criminal Procedure, Health and Disability Law, and Constitutional Law. We have dedicated ourselves to improving the criminal justice and health systems, and to training those who would become our state's future lawyers, legislators, and judges.

We write in support of H.B. 136 and Recommendation 8 of the Ohio Supreme Court's Joint Task Force to Review the Administration of Ohio's Death Penalty. **We ask that you prohibit the execution of Ohioans who suffered from severe mental illness at the time of their offense.**

Those who commit violent crimes while in the grip of a psychotic delusion, hallucination, or other disabling psychological condition lack the judgment, understanding, or self-control to be labeled the worst of the worst or deserving of death. Their culpability is inherently so limited that while they may be convicted of capital murder, they are as a group undeserving of the death penalty.

H.B. 136 exempts capital defendants from death if at the time of the crime they had a serious mental illness that significantly impaired their capacity to exercise rational judgments in relation to their conduct, to conform their conduct to the requirements of the law, or to appreciate the nature, consequences or wrongfulness of their conduct. This is akin to the Model Penal Code Section 4.01 test for insanity,

but instead of acquitting a defendant of guilt, the proposed bill would simply assure that while convicted, the severely mentally ill defendant will not be executed.

We agree with the diverse Task Force members, Ohio Supreme Court Justice Paul Pfeiffer, former Ohio Supreme Court Justices Wright, Lundberg-Stratton, and Chief Justice Moyer, former Attorney General Jim Petro, several Courts of Appeals judges, the American Bar Association, the National Association on Mental Illness, and countless others who have concluded the death penalty is not the appropriate penalty for these individuals, and certainly not the answer to the problem of violence committed by persons with severe mental disorders. Like juveniles and those with mental disabilities, these persons lack the culpability to be sentenced to death.

Persons with severe mental illness have been and will continue to be sentenced to death and executed unless this exemption is granted. The severely mentally ill often cannot meet Ohio's highly demanding M'Naghten-type standard for acquittal by reason of insanity, *see* O.R.C. 2901.01 (14), and because of this are unable to present expert testimony in the trial phase regarding their impairment and are convicted of capital murder. *See State v. Wilcox*, 70 Ohio St.2d 182 (1980). Once convicted, their mental illness is to be considered in mitigation, *see* O.R.C. 2929.04(B)(3) and (7), but as often as not is treated as aggravating, a reason to impose death, instead of a grounds for mercy, as respect for human dignity, understanding of moral culpability, and judicial integrity requires.

H.B. 136 devises fair procedures for reliably determining whether the severely mentally ill exemption applies in an individual case, procedures that are consistent with our existing ones for determining age and mental disability. The defense has the burden of going forward and of establishing by a preponderance of the evidence that the defendant suffered from one of five forms of severe mental illness at the time of the offense, and that this significantly impaired the defendant. There is ample opportunity for investigation and evaluation for both the prosecution and defense. The trial judge will review the evidence and determine if the exemption applies at a pretrial hearing, averting a costly capital trial if the defendant is found ineligible for death, and proceeding as a capital trial if found eligible.

We urge passage of H.B. 136 and companion legislation in the Ohio Senate. The fairness, reliability, and integrity of Ohio's criminal justice system demand that individuals with severe mental illness at the time of their crime be spared the ultimate sanction.

Signed:

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