Testimony by
Evelyn Lundberg Stratton
Before Ohio House Criminal Justice Committee
on H.B. 81
May 9th, 2017

Thank you Chairman Manning, Vice Chairman Rezabek, and members of the House Criminal Justice Committee, my name is Evelyn Lundberg Stratton and I appreciate the opportunity to testify before you today in support of HB 81.

During the last General Assembly, I was pleased when Senator Seitz asked that I assist in the drafting of a bill to exempt individuals who were seriously mentally ill at the time of their offense from the death penalty. As a former Justice on the Ohio Supreme Court, it has been my long held belief that the Ohio General Assembly should enact provisions exempting people with serious mental illness from the death penalty. It was my view then, as it is today, that deterrence is of little value as a rationale for executing offenders with severe mental illness when they have diminished impulse control and planning abilities. The "evolving standards of decency" which prohibit the execution of juveniles and those with intellectual disabilities should prohibit execution of those with serious mental illness. However, recognizing that a finding of mental illness involves a more complicated analysis than the clinical tests used to diagnose developmental disabilities or the simple test of age for a juvenile offender, such a change requires the thoughtful consideration of this body after hearing from interested parties and experts in the field.

In keeping with the recommendation by the Ohio Supreme Court's Joint Task Force to Review the Administration of Ohio's Death Penalty which passed by a vote of 15 – 2, H.B. 81 exempts from the death penalty defendants who, at the time of the offense, had a serious mental illness. It is important to note that it only addresses the penalty phase. The bill in no way absolves defendants of legal responsibility for their crimes. They can still be tried, convicted, and sentenced to long terms of imprisonment, including life in prison.

Under the bill, a defendant has a "serious mental illness" if he or she has been diagnosed with Schizophrenia, Schizoaffective disorder, Bipolar disorder, Major depressive disorder, or Delusional disorder and, at the time of the offense, the condition(s), while not meeting the standard to be found not guilty by reason of insanity nevertheless significantly impaired the person's capacity to appreciate the nature, consequences, or wrongfulness of his/her conduct; exercise rational judgment in relation to his/her conduct, or conform his/her conduct to the requirements of the law. Additionally, the bill states that a disorder manifested primarily by repeated criminal conduct or attributable solely to the acute effects of voluntary use of alcohol or other drugs does not, standing alone, constitute a serious mental illness.

The procedure to determine whether a defendant is exempted from the death penalty due to serious mental illness is based upon the current procedures for determining whether a defendant was under age 18 at the time of the offense and whether a defendant is exempted from the death penalty due to an intellectual disability.

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 going forward with evidence to meet the serious mental illness criteria, including diagnosis and impairment. If defendant submits prima facie evidence of a diagnosis, there is a rebuttable presumption that the condition so significantly impaired the defendant's capacity at the time of the offense that the defendant should not be eligible for a sentence of death.

The state may then respond with evidence to rebut the defendant's diagnosis and/or the defendant's capacity at the time of the offense. Only if the trial judge finds that the state refutes the presumption by a preponderance of the evidence, is the defendant eligible for the death penalty. If the trial judge finds that the state refutes the presumption by a preponderance of the evidence, the defendant may submit the issue to a jury at trial.

The jury can then find that the defendant is not eligible for the death penalty based on serious mental illness. The jury can also follow the current procedure and find that aggravating evidence

does not outweigh mitigating evidence including the defendant's serious mental illness. If the jury does not find the defendant ineligible for the death penalty and recommends the death penalty, the trial judge will consider evidence and can find the defendant ineligible for the death penalty and can also follow the current procedure to determine whether aggravating evidence outweighs mitigating evidence including the defendant's serious mental illness.

Additionally, the bill allows a defendant currently in prison under a sentence of death to file a petition for post-conviction relief within 365 days from the effective date of the bill. This is consistent with the current procedure or individuals with intellectual disabilities and the current post-conviction timeline.

In Atkins v. Virginia, 536 U.S. 304 (2002), the U.S. Supreme Court held that it is unconstitutional to execute individuals with intellectual disabilities for two reasons. First, "because of their disabilities in areas of reasoning, judgment, and control of their impulses, they do not act with the level of moral culpability that characterizes the most serious adult criminal conduct." And second, "their impairments can jeopardize the reliability and fairness of capital proceedings."

The Atkins Court reasoned that individuals with intellectual disabilities have deficits in understanding and processing information, communication, the ability to learn from mistakes, to engage in logical reasoning, and to control their impulses. This "diminished capacity" diminished their personal blameworthiness and did not advance the traditional reasons for capital punishment, deterrence and retribution.

In Roper v. Simmons, 543 U.S. 551 (2005) the U.S. Supreme Court held that execution of juvenile offenders under 18 was unconstitutional. As in Atkins, the Roper Court reaffirmed that the death penalty must be limited to "those offenders…whose extreme culpability makes them the most deserving of execution.'" The Court decided that juveniles lacked that extreme culpability because of their immaturity and vulnerability and, again as in Atkins, held that "retribution is not proportional if the law's most severe penalty is imposed on one whose culpability or blameworthiness is diminished…."

These Eighth Amendment principles of diminished moral culpability or blameworthiness apply with equal force to defendants in capital cases whose serious mental illness has a causal relationship to the crime or crimes committed. People with serious mental illness are not intellectually impaired. But, like people with intellectual disabilities, people with serious mental illness experience both cognitive and behavioral impairments as a result of their mental illness.

H.B. 81 is not a categorical exemption like those for intellectual disabilities and juveniles. Rather, it is an individualized and functional assessment of each defendant's eligibility for the death sentence. Individuals with serious mental illness have diminished criminal culpability, but Ohio law fails to protect them from imposition of the ultimate penalty of death.

While I had considerable experience with serious mental illness while serving on the bench and as a family member, I am by no means a mental health professional. I believe you will be hearing from some of them in the weeks ahead. However, I do know that serious mental illness diagnoses are often associated with delusions, hallucinations, extremely disorganized thinking, or very significant disruption of consciousness, memory and perception of the environment. Thus, like people with intellectual disabilities, those with serious mental illness are significantly impaired in their reasoning, judgment, and impulse control. Therefore, they do not act with the level of moral culpability required for imposition of the death penalty.

Many people with serious mental illness lack insight into their illness and do not realize or think that they need treatment. Oftentimes they are convinced that their profound delusions and hallucinations are reality – and that those who are trying to convince them to take their medications are the ones who are sick.

Therefore, the Not Guilty by Reason of Insanity defense often does not apply in these cases because Ohio's statute limits the defense to those who do not understand the wrongfulness of their act. Individuals under the definition in H.B. 81 may know what they have done is wrong, but their delusional thinking may cause them to believe they are impervious to punishment or that some greater force compels them to act.

While there is no judicially-created exemption for capital defendants with serious mental illness in Ohio, for nearly 20 years, individual justices of the state supreme court, myself included, have questioned the appropriateness of executing capital defendants with demonstrated serious mental illness. In 2003, then Chief Justice Thomas Moyer, joined by Justices Pfeifer and myself, dissented from the court's affirmation of the death penalty for Stephen Vrabel stating, "I am persuaded by clear evidence in the record that the appellant suffers from a severe mental illness. On the record before us, I cannot conclude beyond a reasonable doubt that Vrabel's mental illness did not contribute to his tragic criminal conduct, thereby reducing his moral culpability to a level inconsistent with the ultimate penalty of death."

Thank you for giving this bill your serious consideration. I am happy to answer any questions.