



Office of the Ohio Public Defender

Timothy Young, State Public Defender

Interested Party Testimony Regarding HB136 Death Penalty - Serious Mental Illness Sponsors: Rep. Hillyer

Chairman Eklund, Vice Chair Manning, Ranking Member Thomas, and members of the Senate Judiciary Committee. My name is Tim Young, I am the State Public Defender. Thank you for the opportunity to testify as an interested party regarding HB136.

In *Atkins v. Virginia*¹ and *Roper v. Simmons*² the U.S. Supreme Court created categorical bars to executing individuals with an intellectual disability and juveniles, respectively. In *Atkins*, the defendant Daryl Atkins and his codefendant robbed Eric Nesbitt near Langley Air Force Base where Nesbitt was stationed.³ They kidnapped Nesbitt in his own vehicle and drove to an ATM where they forced Nesbitt to withdraw more money.⁴ Atkins and his codefendant drove Nesbitt to an isolated location and shot him eight times with a semiautomatic handgun.⁵ In *Roper*, Christopher Simmons was 17-years-old when he started telling people he wanted to kill someone and he would “get away with it” because he was juvenile.⁶ Simmons and two codefendants reached into the Shirley Crook’s open window to unlock her door and enter her home.⁷ Upon seeing her, Simmons realized he recognized Mrs. Crook from a “previous car accident involving them both.” “Simmons later admitted this confirmed his resolve to murder her.”⁸ Simmons and his codefendants covered Mrs. Crook’s eyes and mouth with duct tape and they tied her hands and feet with an electrical cord.⁹ They threw her over a bridge at a state park into the water where she drowned.¹⁰

Despite the terrible and tragic facts in each of these cases, the U.S. Supreme Court ruled that neither Atkins nor Simmons should be executed. Because Atkins had an intellectual

of the death penalty for prospective offenders who do not have a serious mental illness and can act rationally.¹⁶

Like the facts in *Atkins* and *Roper*, when the death penalty is sought in a case, by definition the facts in that case are tragic and horrific. Death penalty cases involving a person with a serious mental illness are no exception. Part of the reason the U.S. Supreme Court made the categorical bars against execution in *Atkins* and *Ropers* was because they did not trust juries to not impose the death penalty when faced with horrific fact patterns.¹⁷ We know from research that juries do not find the reduce culpability caused by a serious mental illness to be a mitigating factor but rather an aggravating factor.¹⁸ Just like the Court did in *Atkins* and *Roper*, HB136 seeks to protect these individuals from juries who may not be able to appreciate the science regarding mental illness when met with bad facts in a case.

The opponents of this bill are trying to do exactly what the U.S. Supreme Court feared juries would do when confronted with these cases. They are using the bad facts that are present in all death penalty cases to invoke an emotional response so this legislature will not do the moral thing and refuse to execute those who, by no fault of their own, cannot act rationally. Opponents of this bill want this legislature to think that by passing HB136, you are making defendants the winner and victims the loser. However, HB136 ensures that the individuals who receive relief under this bill are sentenced to life without the possibility of parole. To quote U.S. District Judge Michael H. Watson during a case that involved a defendant found NGRI, “[n]o one wins in this situation, there’s only loss and heartache.” Cases where the defendant would qualify under this bill are no different. In these cases, no one wins. But this legislature is obligated to ensure that there is not the “purposeless and needless imposition of pain and suffering.”¹⁹



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- ¹ *Atkins v. Virginia*, 122 S.Ct. 2242 (2002).
- ² *Roper v. Simmons*, 125 S.Ct. 1183 (2005).
- ³ *Atkins*, at 2245.
- ⁴ *Id.*
- ⁵ *Id.*
- ⁶ *Roper*, at 1187.
- ⁷ *Id.*
- ⁸ *Id.*, at 1188.
- ⁹ *Id.*
- ¹⁰ *Id.*
- ¹¹ *Roper v. Simmons*, at 1185, quoting *Atkins*, 122 S.Ct. 2242.
- ¹² *Roper v. Simmons*, 125 S.Ct. 1183, 1194, quoting *Atkins v. Virginia*, 122 S.Ct. 2242 (2002).
- ¹³ *Atkins v. Virginia*, 122 S.Ct. 2242, 2251 (2002).
- ¹⁴ See generally *Atkins v. Virginia*, 122 S.Ct. 2242; *Roper v. Simmons*, 125 S.Ct. 1183.
- ¹⁵ *Atkins*, at 2251, quoting *Enmund v. Florida*, 458 U.S. 782, 798 (1976).
- ¹⁶ There is research that suggests the death penalty is never a deterrent as murder rates in states with the death penalty are consistently higher than in states without the death penalty. See *the Cost of Ohio's Death Penalty*, Ohioans to Stop Execution, March 14, 2014, <http://otse.org/deathpenalty-cost/>
- ¹⁷ *Roper*, at 1186 ("An unacceptable likelihood exists that the brutality or cold-blooded nature of any particular crime would overpower mitigating arguments based on youth as matter of course, even where the juvenile's objective immaturity, vulnerability, and lack of true depravity should require a sentence less severe than death"); *Atkins*, at 2252.
- ¹⁸ David Niven, Ph.D., University of Cincinnati, Proponent Testimony House Bill 136, House Criminal Justice Committee, May 2, 2019.
- ¹⁹ *Atkins*, at 2251, quoting *Enmund*, 458 U.S. 782, 798 (1976).
- ²⁰ *Ford v. Wainwright*, 477 U.S. 399 (1986).
- ²¹ J. Blume, *et al.*, "A Tale Of Two (and Possibly Three) *Atkins*: Intellectual Disability and Capital Punishment Twelve Years After the Supreme Court's Creation of a Categorical Bar," 23 *William & Mary Bill of Rights Journal* 393 (2014), <https://scholarship.law.wm.edu/wmborj/vol23/iss2/4/>.
- ²² Data is accurate as of March 28, 2018—data collected from *Attorney General's Annual Capital Crimes Report 2017*; US Department of Justice, *Bureau of Justice Statistics Bulletin, Capital Punishment 2002*; Supreme Court of Ohio website; Lexis case reports.
- ²³ J. Blume, *et al.*, "A Tale of Two (and Possibly Three) *Atkins*: Intellectual Disability and Capital Punishment Twelve Years After the Supreme Court's Creation of a Categorical Bar," 23 *William & Mary Bill of Rights Journal* 393 (2014), <https://scholarship.law.wm.edu/wmborj/vol23/iss2/4/>.
- ²⁴ *Id.*
- ²⁵ According to the June 2019 Fact Sheet from the Ohio Department of Rehabilitation and Corrections, there are 138 people on death row.





DEATH PENALTY: Serious Mental Illness Bills

Myths & Misconceptions v. Facts

M&M	Everyone will avoid the death penalty by faking a serious mental illness.
FACT	<ul style="list-style-type: none">• When <i>Atkins v. Virginia</i> was decided, Justice Scalia dissented arguing that everyone facing the death penalty would avoid it by faking an intellectual disability. He was wrong.¹• Nationally, from 2002, when <i>Atkins</i> was decided, to 2013, only 7.7% of individuals on death row or those charged with a capital offense penalty filed <i>Atkins</i> claims.²• Of those individuals, 55% were successful with their <i>Atkins</i> claim with decreasing success rates as the obvious post-conviction cases were resolved early on.³
M&M	A SMI exception will end the future of the death penalty in Ohio.
FACT	<ul style="list-style-type: none">• There have been 56 executions in Ohio since 1999, when Ohio had its first execution under the modern scheme, 52 of which occurred after <i>Atkins</i>. Clearly, <i>Atkins</i> did not end capital punishment in Ohio, nor will the SMI bill.• In the 17 years prior to <i>Atkins</i>, the 29 states that have legal death penalty executed 705 individuals. In the 17 years since <i>Atkins</i>, those same states executed 711 individuals.⁴
M&M	Everyone currently on death row will successfully litigate an SMI claim.
FACT	<ul style="list-style-type: none">• After <i>Atkins</i>, there was also concern that every individual on death row would claim they could not be executed because of an intellectual disability.• Of the individuals on death row in Ohio when <i>Atkins</i> was decided, only 9.26% pursued an <i>Atkins</i> claim for relief.⁵• Only 3.9% of the individuals on death row in Ohio—eight individuals—were successful with their <i>Atkins</i> claim.⁶• In 2017, the Fair Punishment Project found that only six men on death row with a scheduled execution date had a mental illness.⁷• Mental health experts have ethical standards they must adhere to that prevent them from making a false diagnosis.⁸



M&M	The SMI bill is uniquely problematic and will cause unending litigation.
FACT	<ul style="list-style-type: none"> • The U.S. Supreme Court established categorical bars to the death penalty in <i>Atkins</i>, <i>Roper v. Simmons</i>, and <i>Ford v. Wainwright</i>, none of which have resulted in unending litigation.^{9,10} • In <i>Ford</i>, the U.S. Supreme Court ruled that individuals who were insane or incompetent at the time of their execution could not be executed. • After <i>Ford</i>, there was speculation that everyone on death row would file litigation to avoid execution. • Nationally, only 6.7% of the individuals on death row who procedurally could, filed a claim.¹¹ • Defense counsel has an ethical obligation to investigate their client's background and determined whether they could assert a serious mental illness claim in good faith.¹²

M&M	SMI will make it hard for prosecutors to negotiate pleas.
FACT	Once a SMI is established, it will be easier to negotiate plea bargains because the death penalty will no longer be applicable. ¹³

M&M	Future versions of the <i>Diagnostic and Statistical Manual of Mental Disorders (DSM)</i> will be written to make Ohio's death penalty inapplicable.
FACT	<ul style="list-style-type: none"> • The <i>DSM</i> is written by internationally recognized clinicians including psychiatrists, psychologists, social workers, psychiatric nurses, pediatricians, and neurologists from 16 countries.¹⁴ • Their deliberative process will not include concern about Ohio's death penalty law.

⁹*Atkins v. Virginia*, 536 U.S. 304 (2002).
¹⁰J. Blume, et al., "A Tale of Two (and Possibly Three) *Atkins*: Intellectual Disability and Capital Punishment Twelve Years After the Supreme Court's Creation of a Categorical Bar," 23 *William & Mary Bill of Rights Journal* 393 (2014), <https://scholarship.law.wm.edu/wmborj/vol23/iss2/4/>.
¹¹*Id.*
¹²Death Penalty Information Center, Execution Database, Aug. 9, 2019.
¹³Data is accurate as of March 28, 2018—data collected from *Attorney General's Annual Capital Crimes Report 2017*; US Department of Justice, *Bureau of Justice Statistics Bulletin, Capital Punishment 2002*; Supreme Court of Ohio website; Lexis case reports.
¹⁴*Id.*
¹⁵Most Ohio Death Row Inmates Mentally Disabled, report says, Alan Johnson, *The Columbus Dispatch*, Aug. 30, 2017, www.dispatch.com/news/20170830/most-ohio-death-row-inmates-mentally-disabled-report-says.
¹⁶American Psychological Association (2013). Specialty guidelines for forensic psychology, *American Psychologist*, 68, 7.19.
¹⁷*Roper v. Simmons*, 543 U.S. 551 (2005).
¹⁸*Ford v. Wainwright*, 477 U.S. 399 (1986).
¹⁹J. Blume, et al., "A Tale Of Two (and Possibly Three) *Atkins*: Intellectual Disability and Capital Punishment Twelve Years After the Supreme Court's Creation of a Categorical Bar," 23 *William & Mary Bill of Rights Journal* 393 (2014), <https://scholarship.law.wm.edu/wmborj/vol23/iss2/4/>.



¹²Ohio Rules of Professional Conduct 1.2(d)(1).
¹³See generally, Blume, et al., "A Tale of Two (and Possibly Three) *Atkins*: Intellectual Disability and Capital Punishment Twelve Years After the Supreme Court's Creation of a Categorical Bar," 23 *William & Mary Bill of Rights Journal* 393 (2014), <https://scholarship.law.wm.edu/wmborj/vol23/iss2/4/>.
¹⁴The People Behind DSM-5, American Psychiatric Association, C:/Users/10145036/Downloads/APA_DSM_People-Behind-DSM-5.pdf
¹⁵Available at <https://files.deathpenaltyinfo.org/documents/pdf/FactSheet.f1568209571.pdf>.