

**Proponent Testimony
Senate Bill 162
Senate Criminal Justice Committee
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Chairman Eklund, Vice-Chair Obhof, Ranking Minority Member Thomas and members of the Senate Criminal Justice Committee:

Thank you for the opportunity to address the committee today regarding Senate Bill 162. My name is David Niven, I am a political science professor at the University of Cincinnati and I conduct research on death penalty policy.

The sum of available research on mental illness and the death penalty makes absolutely clear the imperative for this legislation. In short, though it is legally a mitigating factor in sentencing, serious mental illness frequently functions as an aggravating factor in jurors' thinking.¹

Evidence of this misapplication of a defendant's mental illness in death penalty trials is in abundant supply. Studies that compare defense arguments in the courtroom with the outcomes of those cases find mental illness regularly misused as an aggravating factor.² Studies that survey jurors after their service in capital cases find that they report having used mental illness to the detriment of the defendant.³ Studies that supply otherwise death qualified individuals with the fact pattern of a case find clear, causal evidence that

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).

² "A Study of the California Penalty Jury in First-Degree-Murder Cases," 21 *Stan. L. Rev.* 1302 (1969); Deana Logan, "Pleading for Life: An Analysis of Themes in 21 Penalty Arguments by Defense Counsel in Recent Capital Cases," 4 *Cal. Death Penalty Def. Manual* 2SN-19 (1982).

³ William Bowers et al., "Foreclosed Impartiality in Capital Sentencing, Jurors' Predispositions, Guilt-Trial Experience, and Premature Decisions-Making," 83 *Cornell L. Rev.* 1476 (1998).

invocation of serious mental illness – such as schizophrenia – is the “least effective” mitigating evidence and is directly cited as *a reason to impose the death penalty*.⁴

How could evidence that is unquestionably a mitigating factor under the law be misapplied in the jury room? In my own work I document a long line of cases in which the U.S. Supreme Court has had to grapple with jurors confused by the instructions they must apply during the sentencing phase of a death penalty case.⁵ More to the point here, researchers find that an assertion of serious mental illness makes jurors more confident in the defendant’s guilt and more fearful of the defendant, thus a mitigating factor under the law can morph into an aggravating factor that increases the likelihood of a death sentence.⁶

Imagine for a moment this situation were reversed and an aggravating factor was being widely misapplied by jurors to reduce the likelihood of a death sentence. Lawmakers would – no doubt – seek a legislative correction. Nothing less is due here.

In ongoing research I have analyzed how state legislators across the nation define the objectives of the death penalty. Among legislators who support its continued use, there is a very strong sentiment that the sentence of death should be reserved for the “worst of the worst,” the individuals who are most culpable, most clearly guilty, and perpetrators of the worst crimes. Leaving serious mental illness as a mitigating factor – rather than an excluding factor as this bill would do – thus thwarts the intent of most legislators by increasing the likelihood that less culpable individuals could be sentenced to death.

I think it is also important to understand that it is up to the state legislature to address this unintended result. While the courts might be expected to closely scrutinize and perhaps narrow the application of the death penalty for those with serious mental illness, in fact the courts have been following legislative leads. In case after case the U.S. Supreme Court has relied on the pattern of state legislative action to define acceptable death penalty practice rather than defining it for the states.⁷

Advancing this bill will help square court outcomes with the law. The bill is consistent with the objectives of legislators and indeed is consistent with the clear preference of the American people, as a remarkable consensus seeking to exclude those with serious mental illness from the death penalty has developed. 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

⁴ White, Lawrence T. “Juror decision making in the capital penalty trial: An analysis of crimes and defense strategies.” *Law and Human Behavior* 11.2 (1987): 113.

⁵ Miller, Kenneth, and David Niven. “Mixed Messages: The Supreme Court's Conflicting Decisions on Juries in Death Penalty Cases.” *Crim. L. Brief* 5 (2009): 69.

⁶ Ellsworth, P. C., Bukaty, R. M., Cowan, C. L., & Thompson, W. C.. The death-qualified jury and the defense of insanity. *Law and Human Behavior* (1984) 8(1-2), 81.

⁷ For example: *Atkins v. Virginia*, 536 U.S. 304 (2002); *Roper v. Simmons*, 543 U.S. 551 (2005).

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

Finally, it should be clearly noted that this is not merely a solution for a theoretical possibility but for a real and continuing problem. Reviews by independent medical professionals have continually found individuals with serious mental illness nonetheless being sentenced to death.⁹ Thus the path to reserving death sentences for the most culpable requires removing those with serious mental illness from eligibility for the death penalty.

I thank you for the opportunity to speak with you today on this important bill.

⁹ For example: Lewis, Dorothy Otnow, et al. "Psychiatric, neurological, and psychoeducational characteristics of 15 death row inmates in the United States." *American Journal of Psychiatry* 143.7 (1986): 838-845