TESTIMONY

of

Richard L. Travis

on behalf of the

AMERICAN BAR ASSOCIATION

for the

Hearing on House Bill 1099

before the

92nd SESSION OF THE
SOUTH DAKOTA LEGISLATIVE ASSEMBLY

February 13, 2017
Chair Rhoden and distinguished members of the House of Representatives State Affairs Committee:

My name is Richard L. Travis and I am a member of the May & Johnson, PC law firm in Sioux Falls, South Dakota. I submit this written testimony on behalf of the American Bar Association, for which I serve as the South Dakota State Delegate to the House of Delegates. The American Bar Association is among the world’s largest voluntary professional organizations, with a membership of over 400,000 lawyers, including a broad cross-section of prosecuting attorneys and criminal defense counsel, judges, academics, and law students worldwide. The ABA continuously works to improve the American system of justice and to advance the rule of law throughout the world. I submit this testimony at the request of ABA President Linda Klein to present to the Committee the ABA’s position on the imposition of capital punishment on individuals with severe mental illnesses. This position, as with all policies of the ABA, reflects the collaborative efforts of representatives of every aspect of the profession, including prosecutors, defense attorneys, judges, and academics.

The American Bar Association does not have a policy that either supports or opposes the death penalty generally, but it has extensive policies that are helping ensure capital punishment is administered fairly and with adequate due process. Since 2006, it has had a specific policy opposing the execution of individuals with severe mental illness.

This policy was developed in 2003 when the ABA Section of Civil Rights and Social Justice convened legal and medical practitioners and scholars from the ABA, the American Psychological Association, the American Psychiatric Association, the National Alliance on Mental Illness, and other interdisciplinary experts to form the Task Force on Mental Disability and the Death Penalty. After more than two years of study and deliberation, the ABA House of Delegates adopted the Task Force’s recommendations.

Among its key recommendations was that an individual with severe mental disorders or disabilities should not be subject to capital punishment if, at the time of the crime, mental illness impaired his capacity to appreciate the nature, consequences or wrongfulness of his conduct, to exercise rational judgment in relation to his conduct, or conform his conduct to the law.

A similar policy was adopted by our partners, the American Psychiatric Association, American Psychological Association, National Alliance on Mental Illness, and Mental Health America. This policy is based largely on the concept that executing individuals who have a severe mental illness is no more justifiable than executing people who have intellectual disabilities or were juveniles who committed capital crimes. The Supreme Court ruled in two seminal cases in 2002 and 2005 that it is unconstitutional to execute intellectually disabled inmates and juveniles who committed a capital offense when they were under the age of 18.

As ABA President-Elect Hilarie Bass has explained in recent occasions, and as was expressed in previous ABA legislative testimony, executing defendants in these two
vulnerable groups has been deemed unconstitutional because our society considers both
groups less morally culpable than the “worst of the worst” murderers for whom the death
penalty is intended. They are less able to appreciate the consequences of their actions,
less able to participate fully in their own defense, and more likely to be wrongly
convicted. These exact characteristics apply to individuals with severe mental illness.

Some people mistakenly believe that South Dakota’s legal system already protects
severely mentally ill defendants because there are processes for determining competency
or because a defendant can raise an insanity defense. We can tell you, as a professional
association of lawyers that these are very rare claims and do not occur as often as crime
dramas would have us believe.

HB 1099 would fill an important gap in the current standards. First, the very narrow
competency or insanity procedures are meant to determine whether a defendant can go to
trial in the first place – or can be found legally guilty at all. They are not limited, as the
exemption to the death penalty supported by the ABA would be, to the question of the
penalty a defendant should receive once he has been found guilty. We think it is
important to have the ultimate punishment off the table, but still allow life without the
possibility of parole for those defendants who are deemed competent to stand trial and do
not fit the very narrow standard for a complete insanity defense, but whose behavior was
severely impacted by their mental illness when they committed their crime.

Not only do we think that exception would fill an important gap in how the law handles
mental illness, it would also help minimize the risk of other types of errors that can occur
when individuals with mental illness face serious criminal charges.

First, juror studies have shown that mental illness is often erroneously considered
“aggravating” by jurors when it is only a “mitigating” factor by law. In other words,
juries confuse the legal standard and think mental illness should increase someone’s
punishment — including a death sentence — when it really is only supposed to be
considered to decrease punishment.

Second, individuals with severe mental illness, like defendants with intellectual
disabilities, tend to be more vulnerable to being wrongly accused and convicted. Studies
have shown that people with mental illness are over-represented in cases of proven false
confessions.

Third, certain severe mental illnesses can affect a defendant’s ability to make informed
decisions on whether to waive Miranda rights, to cooperate with his lawyers or represent
himself, to allow evidence to be presented as “mitigation” at his sentencing hearing, or to
waive appeal. For example, a defendant who has delusional thinking or symptoms of
paranoia may withhold important information about the crime or his personal history –
wrongly giving the impression to the judges, prosecutors, jurors, and even sometimes his
own lawyers that there are no mitigating factors. A defendant may be unable to work
effectively with his counsel on his defense because of his symptoms. In those cases, the
defendant’s functional impairments may increase the risk of getting a death sentence, when they should be a mitigating factor.

Finally, at trial, defendants with severe mental illness who are experiencing active symptoms may sometimes become agitated, are unable to control their movements and make inappropriate comments — all symptoms that can be wrongly interpreted by jurors as dangerous behavior. And yet, when heavily medicated to stop those symptoms, defendants may instead display a flat demeanor or look asleep as a side effect of the medication, all of which may wrongly give the impression that they are remorseless.

Resolving all these issues is a complex and evolving area for the mental health as well as the legal profession. Nonetheless, we think an exemption from the death penalty for severe mental illness is a good starting point. Plus, these factors support the inevitable conclusion that the current legal procedures in South Dakota are insufficient. Although some may argue that juries already have the ability to consider mental health as one of many mitigating factors in the sentencing phase, the issues noted above make clear that juries will benefit from more guidance about how to consider severe mental illness when evaluating a case. Our Task Force recognized this legal inadequacy, as did the American Psychological Association, American Psychiatric Association, and NAMI, when adopting our policy on this issue. Thus, the ABA believes that HB 1099 would provide important clarification on what jurors need to evaluate and what the impacts of severe mental illness will be on sentencing.

It is important to note that the proposed exemption in HB 1099 would not create a total defense for murder, nor would it mean that the defendant would escape punishment if found guilty. A defendant with serious mental illness would still receive a prison sentence of life without the possibility of parole in South Dakota.

It also would not exempt from the death penalty defendants who claim to have mental health conditions that are not seriously impairing or were not present at the time of their crime. Any severe mental illness claim would have to be supported by testimony and evidence from a licensed psychiatrist or psychologist who would evaluate the defendant and his mental illness history, as well as other testimony or evidence about what symptoms the defendant was displaying at or near the time of the crime.

Certainly our legal system has a duty to seek justice for the victims of violent crime, but we also have a duty to fit the punishment to the offender. The ABA is committed to the support of the just and equitable application of the rule of law to all citizens, including the severely mentally ill, and has expressed this position recently in front of major relevant stakeholders, including other state legislatures.

In closing, we appreciate the Committee’s consideration of the ABA’s perspective on these important issues and are happy to provide any additional information that the Committee might find helpful. Thank you for the opportunity to provide these remarks.