TESTIMONY

of

W. Lawrence Fitch

on behalf of the

AMERICAN BAR ASSOCIATION

for the

Hearing on House Bill 1522

before the

VIRGINIA GENERAL ASSEMBLY
HOUSE COURTS OF JUSTICE COMMITTEE
CRIMINAL LAW SUBCOMMITTEE

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Chair Bell and distinguished members of the House of Representatives Courts of Justice Committee:

My name is Lawrence Fitch and I teach mental disability and criminal law at the University of Maryland Law School. I submit this written testimony on behalf of the American Bar Association, for which I serve as the reporter for the Criminal Justice Standards project on mental health issues in criminal cases. I am not, however, an employee of the ABA, and I am not being compensated by the ABA for my appearance here today. 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 illnesses.

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 individuals with severe mental disorders or disabilities should not be subject to capital punishment if, at the time of the crime, their disorders or disabilities significantly impaired their capacity to appreciate the nature, consequences or wrongfulness of their conduct, to exercise rational judgment in relation to their conduct, or to conform their conduct to the the requirements of the law.

A similar policy was adopted by our partners, the American Psychiatric Association, the American Psychological Association, the 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, the symptoms of which influenced their thinking or behavior at the time of a capital crime, 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 either intellectually disabled offenders or juveniles who committed a capital crime when they were under the age of 18.
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 Virginia’s legal system already protects severely mentally ill defendants because there are processes in place for determining a defendant’s competency to stand trial and for allowing a defendant to raise an insanity defense. We can tell you, as a professional association of lawyers, that these issues, while important, have little bearing on the question of whether a defendant who has been properly convicted of a capital crime should be sentenced to death.

Competency to stand trial has to do with whether a defendant can go to trial in the first place. The insanity defense has to do with whether a defendant can be found guilty at all. Neither addresses the question of the penalty a mentally ill defendant should receive once he or she has been convicted. House Bill 1522 would fill this gap. We believe 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 satisfy the very narrow insanity defense standard, but whose behavior was severely impacted by their mental illness when they committed their crime.

Not only do we think this 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, jury studies have shown that mental illness is often erroneously considered “aggravating” by jurors, when the law intends it to be considered only as a “mitigating” factor. In other words, juries confuse the legal standard and may 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 illnesses, 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 an informed decision on whether to waive Miranda rights, to cooperate with defense counsel (or even choose to represent him or herself), to allow evidence to be presented in “mitigation” at the 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 about their personal history, wrongly giving the impression to judges, prosecutors, jurors, and even sometimes their own lawyers that there are no mitigating factors. A defendant may be unable to work effectively with counsel on their defense because of their
symptoms. In these cases, the defendant’s functional impairments may increase the risk of receiving a death sentence, when they should be serving as a mitigating factor.

Finally, during the trial, defendants with severe mental illnesses who are experiencing active symptoms may become agitated, or otherwise unable to comport themselves appropriately, and this may be wrongly interpreted by jurors as signs of dangerousness. And yet, when medicated to relieve these symptoms, defendants may instead display a flat demeanor or look sleepy or disengaged, common side effects of these medications, and may wrongly give the impression that they do not care or are remorseless.

Resolving these issues fairly is a complex and evolving challenge for both the mental health and legal professions. Because the issues are, as yet, unresolved, and because so much hangs in the balance in capital cases, we believe an exemption from the death penalty must be established for individuals with severe mental illnesses.

The current legal procedures in Virginia are insufficient. Although some may note that juries in Virginia already may consider a defendant’s mental illness as a mitigating factor in the sentencing phase, we believe that when the symptoms of the defendant’s illness are so powerful as to significantly impair the defendant’s ability to appreciate the nature, consequences or wrongfulness of their conduct, or to exercise rational judgment in relation to their conduct, or to conform their conduct to the requirements of the law, consideration in mitigation is simply inadequate. Our Task Force recognized this inadequacy, as did the American Psychological Association, the American Psychiatric Association, and NAMI, when adopting our policy on this issue. Thus, the ABA believes that HB 1522 would provide important direction for jurors who must evaluate the significance of a defendant’s severe mental illness when deciding what the defendant’s sentence shall be.

It is important to note that the proposed exemption in HB 1522 would not create a defense for murder, nor would it mean that the defendant would escape punishment if found guilty. A defendant with a severe mental illness, meeting the requirements of the exemption standard, would still receive a prison sentence of life without the possibility of parole in Virginia.

Neither would House Bill 1522 exempt from the death penalty defendants who have mental health conditions that were not symptomatic at the time of the crime or that did not meet the exemption’s functional requirements (i.e., significant impairment in the capacity to appreciate the nature, consequences or wrongfulness of the conduct, to exercise rational judgment in relation to the conduct, or to conform behavior to the requirements of the law). 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, as well as other testimony or evidence about the defendant’s thinking and behavior 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
just and equitable application of the rule of law to all citizens, including those with severe mental illness.

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.