

**FINAL REPORT
OF THE
BOWSER COMMISSION**



**Indiana Legislative Services Agency
200 W. Washington St., Suite 301
Indianapolis, Indiana 46204-2789**

November 2007

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2007**

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Bowser Commission

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**Brent Waltz
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Legislative Services Agency Staff

Mark Goodpaster, Fiscal Analyst

Andrew Hedges, Attorney

November 1, 2007

A copy of this report is available on the Internet. Reports, minutes, and notices are organized by committee. This report and other documents for this Commission can be accessed from the General Assembly Homepage at <http://www.in.gov/legislative/>.

FINAL REPORT

Bowser Commission

I. LEGISLATIVE COUNCIL DIRECTIVE

The Legislative Council directed the Bowser Commission to study the imposition of the death penalty on mentally ill individuals (SCR 45).

II. INTRODUCTION AND REASONS FOR STUDY

Current Indiana law exempts criminal defendants in murder trials who are mentally retarded or who have been diagnosed with a mental disease or defect from the death penalty. However, criminal defendants in murder trials who are alleged to be mentally ill are not automatically exempted from the death penalty.

The Bowser Commission was named in honor of the late Senator Anita Bowser. Senator Bowser had a long-time interest in studying whether the death penalty was suitable in any case, but particularly in cases when the defendants were afflicted with either mental illness or mental retardation.

III. SUMMARY OF WORK PROGRAM

The Commission met three times over the course of the interim.

At the first meeting, on August 17, 2007, the Commission heard testimony from a law professor and persons representing both the criminal defense bar and prosecuting attorneys.

At the second meeting, on September 24, 2007, the Commission heard testimony from persons representing the National Association on Mental Illness and from the American Bar Association.

At the third meeting, on October 16, 2007, the Commission heard testimony from a psychiatrist practicing in Southern Indiana who has served as an expert witness in criminal procedures and from a law professor with a background in criminal psychology.

At the fourth and final meeting on October 29, 2007, the Commission reviewed and approved for introduction in the 2008 General Assembly the following:

- Draft language addressing the right to a jury trial for any person who was found guilty of murder and faces the death penalty, by a vote of 7 - 0.
- Draft language allowing a pretrial hearing to determine whether a criminal defendant in a murder case is severely mentally ill and ineligible for the death penalty, by a vote of 7 - 2.

IV. SUMMARY OF TESTIMONY

The Commission heard testimony from the following individuals:

Joseph Hoffmann, Acting Executive Associate Dean and Harry Pratter Professor of Law, Indiana University School of Law, Bloomington – Professor Hoffmann identified three instances in which the mental illness of a defendant in a capital case would be relevant: at the time of execution, at the time of trial, and at the time of the alleged capital crime. He also described U.S. Supreme Court decisions relating to the death penalty sentences of defendants who were mentally ill or who were mentally retarded.

Paula Sites, Assistant Executive Director, Indiana Public Defender Council – Ms. Sites reviewed several court decisions concerning the death penalty and changes in state law affecting criminal defendants who were mentally retarded and mentally ill. She suggested that some type of exemption for mentally ill defendants could allow these cases to be resolved with a fair and just outcome without conducting a full capital trial.

Steve Johnson, Prosecuting Attorneys Council – Mr. Johnson told the Commission members that at least five elements of fairness are included in current practice, statute, and Supreme Court rule.

Keith Henderson, Prosecuting Attorney, Floyd County, President of the Indiana Prosecuting Attorneys Council – Mr. Henderson described the capital litigation committee, which is composed of prosecuting attorneys who are experienced with trying death penalty cases. Frequently, when a person has been charged with murder, a prosecuting attorney will consult this committee to determine whether sufficient aggravating factors exist that would qualify the prosecuting attorney to seek and successfully obtain a death penalty from a jury.

Ron Honberg, Director of Policy and Legal Affairs for the National Alliance on Mental Illness (NAMI) – Mr. Honberg described key Supreme Court decisions involving mentally ill defendants who face the death penalty, the physiological differences between the brains of persons who have been diagnosed and not diagnosed with schizophrenia, the outcomes of mentally ill persons in the criminal justice system, and a proposal by the American Bar Association (ABA) to address the problems of mentally ill defendants in death penalty cases. _____

Joel Schumm, Indiana University School of Law, Indianapolis – Professor Schumm reviewed the Arthur Baird death penalty case, a chronology of the death penalty process, and issues dealing with exempting the mentally ill. He also recommended that the General Assembly include in statute a precise and limited definition of mental illness that would exempt some defendants from the death penalty.

Kathy Bayes, Executive Director of the Fort Wayne chapter of NAMI – Ms. Bayes described the experiences of her husband, who was diagnosed with an obsessive-

compulsive disorder.

David Crane, M.D., J.D., described his experience as a forensic psychiatrist. He also identified some of the limitations of identifying psychiatric disorders and determining whether a defendant is culpable for their actions. He also described the limitations to referring to the Diagnostic Statistical Manual (DSM) in the Indiana Code

Michael Jenuwine, J.D., Ph.D., Associate Professional Specialist in Law, University of Notre Dame described his experience as both a psychologist and attorney working with mentally ill criminal defendants. He also described how psychiatrists and psychologists use psychometric tests to judge whether defendants should be considered mentally ill and the extent of their culpability.

Glenn Tebbe, Indiana Catholic Conference, reminded the Commission that exempting a mentally ill defendant in a capital crime from the death penalty is not absolving the person of the crime. It is only proposing that execution as a punishment not be an option for this class of defendant.

V. COMMITTEE FINDINGS AND RECOMMENDATIONS

Findings: The Commission made no findings of fact.

Recommendations: The Commission made the following recommendations:

(1) A [draft](#) that provides that a jury will serve as the factfinder in a sentencing hearing in a capital case, even if the defendant pleads guilty or is tried to the court. It also permits a defendant to waive the right to impanel a jury during the sentencing hearing.

(2) A [draft](#) that establishes a procedure to determine whether a defendant charged with murder is an individual with a severe mental illness, and prohibits the imposition of the death penalty on a defendant found to be an individual with a severe mental illness.

WITNESSLIST

August 17, 2007

Joseph Hoffmann, Acting Executive Associate Dean and Harry Pratter Professor of
Law, Indiana University School of Law
Steve Johnson, Prosecuting Attorneys Council
Paula Sites, Assistant Executive Director, Indiana Public Defender Council

September 24, 2007

Ron Honberg, Director of Policy and Legal Affairs for NAMI
Joel Schumm, Clinical Associate Professor of Law IU School of Law, Indianapolis
Kathy Bayes, Executive Director of the Fort Wayne chapter of NAMI

October 16, 2007

David Crane, M.D., J.D. Private Practitioner
Michael Jenuwine, J.D., Ph.D. Associate Professional Specialist in Law, University of
Notre Dame
Glenn Tebbe, Indiana Catholic Conference