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H.B. 136  
133<sup>rd</sup> General Assembly

## Final Analysis

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**Version:** As Passed by the General Assembly

**Primary Sponsor:** Rep. Hillyer

**Effective date:** April 12, 2021

Dennis M. Papp, Attorney

### SUMMARY

- Specifies that a person convicted of aggravated murder who shows that the person had a serious mental illness at the time of the offense may not be sentenced to death for the offense, but instead must be sentenced to life imprisonment without parole.
- Requires that a person previously sentenced to death who proves that the person had a serious mental illness at the time of the offense be resentenced to life imprisonment without parole, and provides a mechanism for resentencing.
- Defines a “serious mental illness” for purposes of the act’s provisions.

### DETAILED ANALYSIS

#### Introduction

Ohio law allows the death penalty only for the offense of aggravated murder when the offender also is convicted of one or more “aggravating circumstance” specifications (e.g., committed for hire, repeat offense, felony murder, law enforcement officer victim, under age 13 victim, etc.), or for the offense of terrorism when the most serious offense comprising terrorism is aggravated murder and the offender also is convicted of one or more such specifications. The court must determine after applying a specified balancing test that the death penalty is appropriate. A defendant must have been at least 18 at the time the crime was committed to be sentenced to death.<sup>1</sup>

<sup>1</sup> R.C. 2903.01 and 2909.24, not in the act; R.C. 2929.02 to 2929.06.

## Sentencing a person with serious mental illness

The act provides that a person convicted of aggravated murder who shows, under the procedures described below, that the person had a “serious mental illness” at the time of committing the offense cannot be sentenced to death.

### Definition of “serious mental illness”

As used in the act, a person has a “serious mental illness” if:<sup>2</sup>

1. The person has been diagnosed with one or more of the following conditions: schizophrenia; schizoaffective disorder; bipolar disorder; or delusional disorder (hereafter, collectively referred to as “SMI condition”); and
2. At the time of the alleged aggravated murder, the diagnosed SMI condition or conditions, while not meeting the standard to be found either “not guilty by reason of insanity” (NGRI) or “incompetent to stand trial” (IST),<sup>3</sup> nevertheless significantly impaired the person’s capacity to exercise rational judgment with respect to either (hereafter, collectively referred to as “SMI impairment”):
  - a. Conforming the person’s conduct to the requirements of law; or
  - b. Appreciating the nature, consequences, or wrongfulness of the person’s conduct.

A disorder manifested primarily by repeated criminal conduct or attributable primarily to the acute effects of alcohol or drug of abuse use does not, standing alone, constitute a serious mental illness.<sup>4</sup>

### When diagnosis may be made

The diagnosis of a person with one or more SMI conditions may be made at any time prior to, on, or after the day of the alleged aggravated murder with which the person is charged or the day on which the person raises the matter of the person’s serious mental illness at the time of the alleged commission of that offense. A diagnosis made after the date of the alleged aggravated murder does not preclude the person from presenting evidence that the person had a serious mental illness at the time of the alleged commission of that offense.<sup>5</sup>

### Raising matter of serious mental illness and initial proceedings

A person charged with aggravated murder and one or more aggravating circumstance specifications may, before trial, raise the matter of the person’s serious mental illness at the time of the alleged commission of the offense (hereafter, such a person is referred to as a “capital defendant who alleges serious mental illness”). If a person raises that matter, the court

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<sup>2</sup> R.C. 2929.025(A)(1).

<sup>3</sup> R.C. 2901.01 and 2945.37(G), respectively, not in the act.

<sup>4</sup> R.C. 2929.025(A)(2).

<sup>5</sup> R.C. 2929.025(B).

must order an evaluation of the person (see “**Evaluation**,” below) and hold a pretrial hearing on the matter. The person may present evidence that the person had a serious mental illness at the time of the alleged commission of the offense (subject to the declaration of inadmissibility of evaluation results described below), and has the burden of raising that matter and of going forward with the evidence relating to the diagnosis of the SMI condition and the SMI impairment.<sup>6</sup>

### **Prosecution’s contesting of diagnosis or rebuttal presumption**

If a capital defendant who alleges serious mental illness submits evidence that the person has been diagnosed with one or more SMI conditions and that the diagnosed condition or conditions was an SMI impairment that existed at the time of the alleged commission of the offense, the prosecution may present evidence to contest the diagnosis. The defendant has the burden of proving, by a preponderance of the evidence, that the person has been diagnosed with one or more SMI conditions and that the condition or conditions constituted an SMI impairment at the time of the alleged offense.<sup>7</sup>

If, prior to, on, or after the act’s April 12, 2021, effective date, a capital defendant who alleges serious mental illness has or has had an evaluation performed other than pursuant to a court order as described below in “**Evaluation**,” the defendant must provide the evaluation results to the prosecution at least 30 days prior to the pretrial hearing. If the person does not provide those results to the prosecution at least 30 days prior to the pretrial hearing, the results are inadmissible at the hearing.<sup>8</sup>

### **Outcome of pretrial hearing**

#### **No finding in favor of defendant**

Unless the court at the pretrial hearing finds that the defendant has proved, by a preponderance of the evidence, that the person has been diagnosed with one or more SMI conditions and that the condition or conditions constituted an SMI impairment at the time of the alleged offense, the court must issue a finding that the person is not ineligible for a sentence of death due to serious mental illness.<sup>9</sup>

#### **Finding in favor of defendant**

If the court at the pretrial hearing finds that the defendant has proved, by a preponderance of the evidence, that the person has been diagnosed with one or more SMI conditions and that the condition or conditions constituted an SMI impairment at the time of

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<sup>6</sup> R.C. 2929.025(C).

<sup>7</sup> R.C. 2929.025(D)(1).

<sup>8</sup> R.C. 2929.025(D)(2).

<sup>9</sup> R.C. 2929.025(E)(1).

the alleged offense, the court must issue a finding that the defendant is ineligible for a death sentence due to serious mental illness.<sup>10</sup>

### **Effect of finding that the person is ineligible for death sentence**

If a court issues a finding that a capital defendant who has alleged serious mental illness is ineligible for a sentence of death due to serious mental illness, the person cannot be sentenced to death.<sup>11</sup> Instead, the court or panel of three judges imposing sentence in the case must sentence the person to life imprisonment without parole.<sup>12</sup>

The act corrects several erroneous cross-references in provisions regarding the sentencing of an offender who was convicted of aggravated murder and one or more aggravating circumstance specifications, raised the matter of age at trial, and was not found to have been age 18 or older.<sup>13</sup>

### **Evaluation**

If a capital defendant alleges serious mental illness, the court must order an evaluation of the person. If the person refuses to submit to the ordered evaluation, the court must issue a finding that the person is not ineligible for a sentence of death due to serious mental illness.<sup>14</sup> With respect to an evaluation, if the court determines that investigation services, experts, or other services are reasonably necessary for the proper representation of the defendant at trial or at the sentencing hearing, the court must authorize the defendant's counsel to obtain the necessary services for the defendant and order that payment of the fees and expenses for those services be made in the same manner that payment for appointed counsel is made under continuing law. If the court determines that the necessary services had to be obtained prior to court authorization for payment of the related fees and expenses, the court may, after the services have been obtained, authorize the defendant's counsel to obtain the services and order that payment of the fees and expenses for those services be made. The act retains the preexisting manner in which these provisions apply in a case in which the court determines that investigation services, experts, or other services are reasonably necessary for the proper representation of an indigent defendant charged with aggravated murder.<sup>15</sup>

### **Use of statements made in evaluation, hearing, or proceeding**

Under the act, no statement that a person makes in an evaluation or pretrial hearing relating to the person's serious mental illness at the time of the alleged commission of the aggravated murder may be used against the person on the issue of guilt in any criminal action

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<sup>10</sup> R.C. 2929.025(E)(2).

<sup>11</sup> R.C. 2929.02(A), 2929.022(A)(2)(b), 2929.03(C) and (D), and 2929.04(B).

<sup>12</sup> R.C. 2929.03(E)(2).

<sup>13</sup> R.C. 2929.03(E)(1); also R.C. 2929.14(E)(5), 2941.148, 2971.03, 2971.07, and 5120.61(A)(1)(e).

<sup>14</sup> R.C. 2929.025(F)(1).

<sup>15</sup> R.C. 2929.024 and 2929.025(F)(1).

or proceeding. But in a criminal action or proceeding, the prosecutor or defense counsel may call as a witness any examiner who evaluated the person or prepared a report pursuant to a referral under the act. Neither the appointment nor the testimony of an examiner in such an evaluation precludes the prosecutor or defense counsel from calling other witnesses or presenting other evidence on the issue of the person's serious mental illness at the time of the alleged commission of the aggravated murder or on competency or insanity issues.<sup>16</sup> As used in this provision, an "examiner" is a person who makes an evaluation ordered by the court and a "prosecutor" is a prosecuting attorney with authority to prosecute a charge of aggravated murder that is before the court.<sup>17</sup>

### **Effect of other pleas**

Under the act, a person's pleading of NGRI or IST, or a finding after such a plea that the person is not insane or that the person is competent to stand trial, does not preclude the person from raising the matter of the person's serious mental illness at the time of the alleged commission of the offense. If a person so raises that matter, such a plea or finding does not limit or affect any of the procedures described above or a court's authority to make any finding described in them.<sup>18</sup>

### **Resentencing of person previously sentenced to death**

The act also provides a mechanism, described below, for resentencing a person who has been sentenced to death for aggravated murder, and who had a serious mental illness at the time the offense was committed, to a sentence of life imprisonment without parole.

### **Postconviction relief proceeding to void sentence of death**

The act expands the law governing postconviction relief (PCR)<sup>19</sup> so that it also applies to a person who has been convicted of aggravated murder and sentenced to death, and who claims in a petition that the person had a serious mental illness at the time of the commission of the offense and that as a result the court should void the death sentence. The petition must be filed in the court that imposed the sentence, stating that ground for relief and asking the court to render the sentence void and to order the resentencing of the offender. The filing of the petition waives any right to be sentenced under the law that existed at the time the offense was committed, waives any right to be sentenced to any sentence other than life imprisonment without parole if the death sentence is voided in the proceeding, and constitutes consent to be sentenced to life imprisonment without parole, as described below in "**Resentencing after voiding of sentence of death.**" The petition must be filed not later than 365 days after the act's effective date, subject to limited exceptions involving unavoidable prevention of discovery of relevant facts or a specified Constitutional claim. The rules regarding other PCR

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<sup>16</sup> R.C. 2929.025(F)(2).

<sup>17</sup> R.C. 2929.025(A).

<sup>18</sup> R.C. 2929.025(G).

<sup>19</sup> R.C. 2953.21 to 2953.23; R.C. 2953.22 is not in the act.

claims under preexisting law with respect to the length of the petition and the prosecuting attorney's response, depositions and postconviction discovery, and the duties of the clerk of the court apply regarding a petition under the act's mechanism. The prosecuting attorney must respond to the petition and the court, after considering specified information, must determine whether there are substantive grounds for relief. Unless the petition and the case files and records show the petitioner is not entitled to relief, the court must proceed to a prompt hearing on the issues.<sup>20</sup>

The procedures and rules regarding introduction of evidence and burden of proof at the act's pretrial hearing that are described above apply in considering the PCR petition. The petitioner may amend the petition under the same authority as applies to other PCR claims by a person sentenced to death. With respect to a petition under the act's mechanism, the grounds for granting relief are that the person has been diagnosed with one or more SMI conditions and that, at the time of the aggravated murder that was the basis of the death sentence, the condition or conditions constituted an SMI impairment.

If the court does not find grounds for granting relief, it must make and file findings of fact and conclusions of law and enter judgment denying relief on the petition. If the court finds grounds for relief, it must void the death sentence and order the resentencing of the offender, as described below.

If a person sentenced to death intends to file a PCR petition, the court must appoint counsel to represent the person if it finds that the person is indigent and the person either accepts the appointment or is unable to make a competent decision whether to accept or reject the appointment. The court may decline to appoint counsel for the person only if the person rejects the appointment and understands the decision's legal consequences or the court finds that the person is not indigent.<sup>21</sup>

### **Resentencing after voiding of sentence of death**

If a death sentence that has been imposed on an offender is voided by a court in a PCR proceeding under the act's mechanism described above, the offender has waived any right to be sentenced to any sentence other than life imprisonment without parole (see above) and the trial court that sentenced the offender must conduct a hearing to resentence the offender. At the resentencing hearing, the court must impose on the offender a sentence of life imprisonment without parole.<sup>22</sup>

### **Nonseverability clause**

Generally, if a court holds that a Revised Code provision is invalid, its invalidity does not affect any other Revised Code provisions that can still be given effect. However, the act

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<sup>20</sup> R.C. 2953.21(A) to (E) and 2953.23.

<sup>21</sup> R.C. 2953.21(F) to (J).

<sup>22</sup> R.C. 2929.06.

declares that if any part of it is determined to be unconstitutional or otherwise invalid in a final judgment by a court of last resort, the remainder of its provisions are void.<sup>23</sup>

## HISTORY

Action	Date
Introduced	03-19-19
Reported, H. Criminal Justice	05-30-19
Passed House (76-18)	06-05-19
Reported, S. Judiciary	06-03-20
Passed by Senate (27-3)	12-09-20
House concurred in Senate amendments (72-14)	12-17-20

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<sup>23</sup> Section 3. See R.C. 1.50, not in the act.