



OHIO LEGISLATIVE SERVICE COMMISSION

Bill Analysis

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S.B. 40

132nd General Assembly
(As Introduced)

Sens. Eklund and Williams, LaRose, Schiavoni, Brown, Thomas, Coley, Yuko, Terhar

BILL 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 and instead requires that the person be sentenced to life imprisonment.
 - Requires the resentencing of a person previously sentenced to death who proves that the person had a serious mental illness at the time of the offense to life imprisonment, and provides a mechanism for resentencing.
 - Defines a "serious mental illness" for purposes of the bill's provisions.
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CONTENT AND OPERATION

Introduction

Current Ohio law allows the death penalty only for the offense of aggravated murder when the offender also is convicted of one or more specifications of an "aggravating circumstance" (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. 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.¹

¹ R.C. 2903.01 and 2909.24, not in the bill, and R.C. 2929.02 to 2929.06.

Sentencing a person with serious mental illness

The bill provides that a person convicted of aggravated murder who shows 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 bill, a person has a "serious mental illness" if both of the following apply to the person:²

(1) The person has been diagnosed with one or more of the following conditions: schizophrenia; schizoaffective disorder; bipolar disorder; major depressive disorder; or delusional disorder (hereafter, collectively referred to as "SMI condition");

(2) At the time of the alleged aggravated murder, the SMI condition or conditions with which the person has been diagnosed, while not meeting the standard to be found either "not guilty by reason of insanity" (NGRI) or "incompetent to stand trial" (IST),³ nevertheless significantly impaired the person's capacity to: exercise rational judgment in relation to the person's conduct; conform the person's conduct to the requirements of law; or appreciate the nature, consequences, or wrongfulness of the person's conduct (hereafter, collectively referred to as "SMI impairment").

A disorder manifested primarily by repeated criminal conduct or attributable solely to the acute effects of voluntary use of alcohol or any other drug of abuse does not, standing alone, constitute a serious mental illness.⁴

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 aggravated murder. Diagnosis of the condition or conditions 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 or from having the

² R.C. 2929.025(A)(1).

³ R.C. 2901.01 and 2945.37(G), respectively, not in the bill.

⁴ R.C. 2929.025(A)(2).



benefit of the rebuttable presumption provided in the bill, as described below, in the circumstances in which that presumption is available.⁵

Raising matter of serious mental illness and initial proceedings

Under the bill, a person charged with aggravated murder and one or more specifications of an aggravating circumstance may, before trial, raise the matter of the person's serious mental illness at the time of the alleged commission of the offense (hereafter, a "capital defendant who alleges serious mental illness"). If a person raises that matter, the court must order an evaluation of the person (see "**Evaluation**," below) and hold a pretrial hearing on the matter. The person who raises the matter may present evidence that the person had a serious mental illness at the time of the alleged commission of the offense. The person 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. If the person submits *prima facie* evidence that the person has been diagnosed with an SMI condition and that the condition existed at the time of the alleged commission of the offense, it is rebuttably presumed under the bill that the condition significantly impaired the person's capacity at the time of the alleged offense in such a manner that it constituted an SMI impairment.⁶

Prosecution's contesting of diagnosis or rebuttal presumption

Under the bill, if a capital defendant who alleges serious mental illness submits *prima facie* evidence that the person has been diagnosed with an SMI condition and that the condition existed at the time of the alleged commission of the offense, the prosecution may present evidence to contest the diagnosis, to rebut the presumption that the condition, if present, was an SMI impairment, or to do both. The prosecution has the burden of proving, by a preponderance of the evidence, that the diagnosis of the SMI condition was erroneous or that the condition, if present, did not constitute an SMI impairment.⁷

Outcome of pretrial hearing

No finding in favor of prosecution

Under the bill, if a capital defendant who alleges serious mental illness submits *prima facie* evidence that the person has been diagnosed with an SMI condition and that the condition existed at the time of the alleged commission of the offense, unless the

⁵ R.C. 2929.025(B).

⁶ R.C. 2929.025(C).

⁷ R.C. 2929.025(D).



court at the pretrial hearing finds that the prosecution has proved, by a preponderance of the evidence, that the diagnosis of the SMI condition was erroneous or that the condition, if present, did not constitute an SMI impairment, the court must issue a finding that the person is ineligible for a sentence of death due to serious mental illness.⁸

Finding in favor of prosecution and possible jury question

If a capital defendant who alleges serious mental illness submits *prima facie* evidence that the person has been diagnosed with an SMI condition and that the condition existed at the time of the alleged commission of the offense and the court finds that the prosecution has proved, by a preponderance of the evidence, that the diagnosis of the SMI condition was erroneous or that the condition, if present, did not constitute an SMI impairment, the next step depends upon whether the aggravated murder charge is to be tried by a jury or by the court. If the aggravated murder charge is not to be tried by a jury, the court must issue a finding that the defendant is not ineligible for a sentence of death due to serious mental illness.⁹ If the aggravated murder charge is to be tried by a jury, the defendant may request that the matter of serious mental illness be submitted to the jury at trial. If the defendant does not make that request, the court must issue a finding that the defendant is not ineligible for a sentence of death due to serious mental illness. If the defendant makes that request, the matter must be submitted to the jury at trial. The procedures and rules regarding introduction of evidence and burden of proof at the pretrial hearing that are described above apply, and the defendant may introduce all relevant evidence, including evidence that is different from or in addition to the evidence introduced at the pretrial hearing. If the matter is submitted to the jury at trial, one of the following applies:¹⁰

(1) Unless the jury finds that the prosecution has proved, by a preponderance of the evidence, that the diagnosis of the SMI condition was erroneous or that the condition, if present, did not constitute an SMI impairment, the court must issue a finding that the person is ineligible for a sentence of death due to serious mental illness.

(2) If the jury finds that the prosecution has proved, by a preponderance of the evidence, that the diagnosis of the SMI condition was erroneous or that the condition, if present, did not constitute an SMI impairment, the court must issue a finding that the person is not ineligible for a sentence of death due to serious mental illness.

⁸ R.C. 2929.025(E)(1).

⁹ R.C. 2929.025(E)(2)(a).

¹⁰ R.C. 2929.025(E)(2)(b).

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.¹¹ Instead, the court or panel of three judges imposing sentence in the case must sentence the person to life imprisonment without parole, life imprisonment with parole eligibility after serving 25 or 30 full years of imprisonment, or a special type of life imprisonment under the Sexually Violent Predator Sentencing Law.¹²

Evaluation

Under the bill, if a capital defendant alleges serious mental illness, the court must order an evaluation of the person.¹³ 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 capital 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 must order that payment of the fees and expenses for the necessary services be made in the same manner that payment for appointed counsel is made under current law. If the court determines that the necessary services had to be obtained prior to court authorization for payment of the fees and expenses for the necessary services, the court may, after the services have been obtained, authorize the defendant's counsel to obtain the necessary services and order that payment of the fees and expenses for the necessary services be made. The bill retains the current application of these provisions 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 at trial or at the sentencing hearing.¹⁴

Use of statements made in evaluation, hearing, or proceeding

The bill specifies that no statement that a person makes in an evaluation ordered as described above or in a pretrial hearing or a proceeding before a jury under its provisions 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 or proceeding. But, in a criminal action or proceeding, the

¹¹ R.C. 2929.02(A), 2929.022(A)(2)(b), 2929.03(B)(3), (C), (D), and (E), 2929.04(B).

¹² R.C. 2929.03(E).

¹³ R.C. 2929.025(F)(1).

¹⁴ R.C. 2929.024 and 2929.025(F)(1).



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 bill. 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.¹⁵ As used in this provision, "examiner" means a person who makes an evaluation ordered by the court and "prosecutor" means a prosecuting attorney who has authority to prosecute a charge of aggravated murder that is before the court.¹⁶

Effect of other pleas

The bill specifies that 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 pursuant to the bill's provisions. If a person so raises that matter, such a plea or finding does not limit or affect any of the procedures described above or the authority of a court to make any finding described in them.¹⁷

Resentencing of person previously sentenced to death

The bill also provides a mechanism for resentencing a person who was sentenced to death for aggravated murder, and who had a serious mental illness at the time the offense was committed, to a life sentence.

Postconviction relief proceeding to void sentence of death

The bill expands the existing Postconviction Relief Law to apply to a person who has been convicted of aggravated murder and sentenced to death, and who claims 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 sentence of death. Such a person may file a petition under that Law 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 petition must be filed not later than 365 days after the bill's effective date, subject to limited exceptions involving unavoidable prevention of discovery of relevant facts or a specified Constitutional claim. As with other postconviction relief

¹⁵ R.C. 2929.025(F)(2).

¹⁶ R.C. 2929.025(A).

¹⁷ R.C. 2929.025(G).



claims: there is no limit on the number of pages in or the length of the petition; if a court rule purports to impose such a limit and the petitioner exceeds the limit, the prosecuting attorney also may exceed the limit in the prosecuting attorney's response; the petitioner or prosecuting attorney may request depositions and postconviction discovery; and the clerk of the court in which the petition is filed must docket it and any request for postconviction discovery, bring it (or them) to the attention of the court, and forward a copy to the prosecuting attorney of the county or the petitioner or petitioner's counsel, as applicable. 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 files and records of the case show the petitioner is not entitled to relief, the court must proceed to a prompt hearing on the issues.¹⁸

The procedures and rules regarding introduction of evidence and burden of proof at the pretrial hearing that are described above apply in considering the petition. The petitioner may amend the petition under the same authority as applies to other postconviction relief claims by a person sentenced to death. With respect to such a petition, 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 sentence of death, 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 render void the sentence of death and order the resentencing of the offender.

If a person sentenced to death intends to file a postconviction relief petition, the court must appoint counsel to represent the person if it finds that the person is indigent and that 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 upon a finding that the person rejects the appointment and understands the legal consequences of that decision or upon a finding that the person is not indigent.¹⁹

¹⁸ R.C. 2953.21(A) to (E) and 2953.23.

¹⁹ R.C. 2953.21(F) to (J).



Resentencing after voiding of sentence of death

If a sentence of death that has been imposed upon an offender is voided by a court in a postconviction relief proceeding as previously described, the trial court that sentenced the offender must conduct a hearing to resentence the offender. At the resentencing hearing, the court must impose upon the offender a sentence of life imprisonment or an indefinite term consisting of a minimum term of 30 years and a maximum term of life imprisonment. If the Capital Punishment Sentencing Law²⁰ in effect at the time of the aggravated murder required the imposition (when a sentence of death was not imposed) of a sentence of life imprisonment without parole or an indefinite term consisting of a minimum term of 30 years and a maximum term of life imprisonment to be imposed pursuant to the Sexually Violent Predator Sentencing Law,²¹ the court must impose the required sentence. In all other cases, the sentences of life imprisonment that are available at the hearing, and from which the court must impose sentence, are the same sentences of life imprisonment that were available under the Capital Punishment Sentencing Law at the time the offender committed the offense.²²

Currently, those terms include life imprisonment without parole, life imprisonment with parole eligibility after serving 25 or 30 full years of imprisonment, life imprisonment with parole eligibility after serving 20 years of imprisonment, or a special type of life imprisonment under the Sexually Violent Predator Sentencing Law.²³

HISTORY

ACTION	DATE
Introduced	02-08-17

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²⁰ R.C. 2929.02 to 2929.06.

²¹ R.C. 2971.03, not in the bill.

²² R.C. 2929.06.

²³ R.C. 2929.02 to 2929.06.

