Dennis M. Papp *Legislative Service Commission*

Sub. S.B. 122*

124th General Assembly
(As Reported by S. Judiciary on Criminal Justice)

Sen. Oelslager

BILL SUMMARY

- Replaces the procedures that govern the disposition and treatment of a criminal defendant who is found to be incompetent to stand trial (IST) with comprehensive new procedures to govern the disposition and treatment of those criminal defendants.

- Bases the new procedures on the procedures that were enacted in Am. Sub. S.B. 285 of the 121st General Assembly and that the Ohio Supreme Court, in *State v. Sullivan* (2001), 90 Ohio St.3d 502, found to be unconstitutional, with numerous modifications, including modifications that: (1) require the trial court to order treatment for a criminal defendant who is found to be IST if there is a substantial probability that the defendant will become competent to stand trial within one year if provided with treatment, (2) require the trial court to discharge a criminal defendant who is found to be IST if there is not a substantial probability that the defendant will become competent to stand trial within one year if provided with treatment, unless the court pursuant to existing provisions seeks to retain jurisdiction over, or seeks the civil commitment of, the defendant, and (3) provide for possible discontinuation of treatment to a criminal defendant who is found to be IST if the treating physician or examiner of the defendant reports to the trial court that there is not a substantial probability that the defendant will become competent to stand trial even if provided with treatment.

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* *This analysis was prepared before the report of the Senate Judiciary on Criminal Justice Committee appeared in the Senate Journal. Note that the list of co-sponsors and the legislative history may be incomplete.*

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CONTENT AND OPERATION

Background

Existing law contains a series of statutes that govern the issue of whether a person who has been charged with a criminal offense is incompetent to stand trial on the charge, the issue of whether a person who has been so charged is not guilty of the offense by reason of insanity, and the issue of what must be done when a person who has been so charged is found to be incompetent to stand trial on the charge or is found to be not guilty of the offense by reason of insanity (R.C. 2945.37 to 2945.402). The provisions were significantly and substantially rewritten by Am. Sub. S.B. 285 of the 121st General Assembly (hereafter, S.B. 285), which took effect on July 1, 1997.

One of the provisions resulting from S.B. 285, R.C. 2945.38, specified what must be done when a person was charged with a criminal offense and the court hearing the case found that the person was incompetent to stand trial (hereafter, "IST"). In a recent decision, the Supreme Court held that R.C. 2945.38, as amended by S.B. 285, is unconstitutional, that S.B. 285's repeal of the version of R.C. 2945.38 that was in effect prior to S.B. 285's enactment and that the act replaced was invalid, and that, thus, *the version of R.C. 2945.38 that was in effect prior to S.B. 285's enactment remained in effect and controlled on the issue*. *State v. Sullivan* (2001), 90 Ohio St.3d 502. Briefly, in its decision the Court determined that: (1) the S.B. 285 version of R.C. 2945.38 was unconstitutional because it contained no assurance that the nature and duration of the mandatory

treatment to be provided to a person found IST was related to the treatment's purpose of restoring the defendant's competency to stand trial, and (2) S.B. 285 eliminated that assurance by removing from R.C. 2945.38 all provisions allowing for treatment of the person found IST to be discontinued upon the court's finding that the person could not be restored to competency in the foreseeable future. The Court favorably noted that the pre-S.B. 285 version of the section contained such an assurance by requiring the trial court in ordering treatment to take into consideration the ability of the person found IST to attain competency and by providing for discontinuation of treatment to the person found IST if the person supervising the treatment reports that it is not effective and that the person found IST would not attain competency to stand trial in the near future. The version of R.C. 2945.38 that resulted from S.B. 285 and that *Sullivan*, *supra*, found to be unconstitutional, is set forth in **COMMENT** 1.

The bill modifies the law resulting from *Sullivan*, *supra*, that specifies what must be done when a person is charged with a criminal offense, the issue of the person's competence to stand trial on the charge is raised, and the appropriate court finds that the person is IST, and also modifies a related provision of law regarding evaluations of the person. Generally, the bill restores much of the S.B. 285 version of R.C. 2945.38, changes the provisions of that version of the section in light of the problems expressed by the Supreme Court in *Sullivan*, *supra*, and makes a few other changes in those provisions. The bill does not modify the existing law that governs the issue of whether a person who has been charged with a criminal offense is not guilty of the offense by reason of insanity.

Evaluations of a person charged with a criminal offense when the issue of competence to stand trial is raised

Existing law

Existing law prescribes procedures for raising the issue of whether a person who is charged with a criminal offense is IST and for the appropriate court to conduct a hearing to decide the matter after the issue is raised. The court in which a person is charged with a criminal offense, the prosecutor in the case, or the person charged with the offense may raise the issue. (R.C. 2945.37(B) to (H)--not in the bill; see **COMMENT** 2.)

Existing law specifies that, if the issue of a criminal defendant's competence to stand trial is raised, the court may order one or more evaluations of the defendant's present mental condition. An "examiner" (see "***Definitions***," below) must conduct the evaluation. If the court orders more than one evaluation, the "prosecutor" (see "***Definitions***," below) and the defendant may recommend to the court an examiner whom each prefers to perform one of the evaluations. If the court orders an evaluation, the defendant must be available at the times and places

established by the examiners who are to conduct the evaluation. (R.C. 2945.371(A) and (B).)

The court may order a defendant who has been released on bail or recognizance to submit to the evaluation. If a defendant who has been so released refuses to submit to the evaluation, the court may amend the conditions of bail or recognizance and order the sheriff to take the defendant into custody and deliver the defendant to a center, program, or facility operated or certified by the Department of Mental Health (DMH) or the Department of Mental Retardation and Developmental Disabilities (DMRDD) where the defendant may be held for evaluation for a reasonable period of time not to exceed 20 days. A defendant who has not been released on bail or recognizance may be evaluated at the defendant's place of detention. Upon the request of the examiner, the court may order the sheriff to transport the defendant to a program or facility operated by DMH or DMRDD and to return the defendant to the place of detention after the evaluation. The defendant may be held at the program or facility for evaluation for a reasonable period of time not to exceed 20 days. (R.C. 2945.371(C) and (D).)

The examiner must file a written report with the court within 30 days after entry of a court order for evaluation. The court must provide copies of the report to the prosecutor and defense counsel. The examiner's report must include all of the following: (1) the examiner's findings, (2) the facts in reasonable detail on which the findings are based, (3) findings as to whether the defendant is capable of understanding the nature and objective of the proceedings against the defendant or of assisting in the defendant's defense, (4) if the examiner's opinion is that the defendant is incapable of understanding the nature and objective of the proceedings against the defendant or of assisting in the defendant's defense, findings as to whether the defendant presently is mentally ill or mentally retarded and, if the examiner's opinion is that the defendant presently is mentally retarded, as to whether the defendant appears to be a "mentally retarded person subject to institutionalization by court order" (see "***Definitions***," below), and (5) if the examiner's opinion is that the defendant is incapable of understanding the nature and objective of the proceedings against the defendant or of assisting in the defendant's defense and that the defendant presently is mentally ill or mentally retarded, a recommendation as to the least restrictive treatment alternative, consistent with the defendant's treatment needs for restoration to competency and with the safety of the community. (R.C. 2945.371(G).)

If the examiner's report indicates that in the examiner's opinion the defendant is incapable of understanding the nature and objective of the proceedings against the defendant or of assisting in the defendant's defense and that in the examiner's opinion the defendant appears to be a mentally retarded

person subject to institutionalization by court order, the court must order the defendant to undergo a separate mental retardation evaluation conducted by a psychologist designated by DMRDD's Director. The provisions regarding examiner evaluations apply in relation to a separate mental retardation evaluation so conducted. The psychologist appointed to conduct the separate mental retardation evaluation must file a written report with the court within 30 days after the entry of the court order requiring the separate mental retardation evaluation, and the court must provide copies of the report to the prosecutor and defense counsel. The report must include all of the information required of examiner's reports. If the court orders the separate mental retardation evaluation of a defendant, the court cannot conduct a hearing on the issue (see **COMMENT** 2) until a report of the separate mental retardation evaluation has been filed. Upon the filing of that report, the court must conduct the hearing on the issue, within the period of time specified for the hearing, as described in **COMMENT** 2. (R.C. 2945.371(H).)

No statement that a defendant makes in an evaluation or hearing under the above-described provisions relating to the defendant's competence to stand trial (or to the defendant's mental condition at the time of the offense charged) may be used against the defendant on the issue of guilt in any criminal action or proceeding. But, in a criminal action or proceeding, the prosecutor or defense counsel may call as a witness any person who evaluated the defendant or prepared a report pursuant to a referral under those provisions. Neither the appointment nor the testimony of an examiner appointed under those provisions precludes the prosecutor or defense counsel from calling other witnesses or presenting other evidence on competency or insanity issues. (R.C. 2945.371(J).)

Operation of the bill

The bill modifies existing law regarding evaluations of a person charged with a criminal offense when the issue of competence to stand trial is raised by expanding, in specified circumstances, the information that must be included in an examiner's report. Under the bill, if the examiner's opinion is that the defendant is incapable of understanding the nature and objective of the proceedings against the defendant or of assisting in the defendant's defense, the report, in addition to the information and recommendations required under existing law, also must include the examiner's opinion as to the likelihood of the defendant becoming capable of understanding the nature and objective of the proceedings against the defendant or of assisting in the defendant's defense within one year if the defendant is provided with a course of treatment. (R.C. 2945.371(G)(3)(c).)

What must be done when a person charged with a criminal offense is found to be incompetent to stand trial on the charge

Background

As stated above, in *Sullivan*, *supra*, the Supreme Court held that R.C. 2945.38, as amended by S.B. 285, is unconstitutional, that S.B. 285's repeal of the version of R.C. 2945.38 that was in effect prior to S.B. 285's enactment and that the act replaced was invalid, and that, thus, the version of R.C. 2945.38 that was in effect prior to S.B. 285's enactment remained in effect and controlled on the issue. Consistent with that holding, the version of R.C. 2945.38 that appears in the bill as existing law and that is discussed in this analysis as existing law is the version of that section that was in effect prior to S.B. 285's enactment (Section 3). The version of R.C. 2945.38 that resulted from S.B. 285 and that *Sullivan*, *supra*, found to be unconstitutional, is set forth in **COMMENT** 1.

Operation of the bill

The bill modifies the existing provisions that specify what must be done after the issue of a defendant's competence to stand trial is raised and the court decides the issue. The existing provisions on these matters are described in detail below.

Finding of competence. The bill makes no substantive changes in the existing provisions that apply after the issue of a defendant's competence to stand trial is raised and the court finds, upon conducting a hearing, that the defendant is competent to stand trial (R.C. 2945.38(A)).

Finding of IST in general. The bill replaces the existing provisions that apply after the issue of a defendant's competence to stand trial is raised and the court finds upon conducting the hearing that the defendant is IST, with a new mechanism to govern the matter. The new mechanism is described in detail in the following portions of this analysis. (R.C. 2945.38(B) to (I).)

Finding of IST and not likely to become competent within one year or unable to determine likelihood. The bill provides that, if the court finds that the defendant is IST and that, even if the defendant is provided with a course of treatment, there is not a substantial probability that the defendant will become competent to stand trial within one year, the court must order the discharge of the defendant, unless upon motion of the prosecutor or upon its own motion, it either seeks to retain jurisdiction over the defendant pursuant to R.C. 2945.39, as described below in "***Finding of IST--civil commitment action or retention of jurisdiction***," or files an affidavit in the probate court under the Civil Commitment Provisions of the MH Law or MRDD Law alleging that the defendant is a

mentally ill person subject to hospitalization by court order or a mentally retarded person subject to institutionalization by court order. As under existing law: (1) if an affidavit is filed in the probate court, the trial court must send to the probate court copies of specified written reports of the defendant's mental condition, (2) the trial court may issue temporary orders of detention that a probate court may issue under specified provisions of existing law, and (3) further proceedings in the probate court are civil proceedings governed by the MH Law or the MRDD Law. (R.C. 2945.38(B)(2).)

Finding of IST but likely to become competent within one year or unable to determine likelihood. The bill provides that, if the court, after taking into consideration all relevant reports, information, and other evidence, finds that the defendant is IST and that there is a substantial probability that the defendant will become competent to stand trial within one year if provided with a course of treatment, the court must order the defendant to undergo treatment. If the defendant has been charged with a felony offense and if, after taking into consideration all relevant reports, information, and other evidence, the court finds that the defendant is IST but the court is unable at that time to determine whether there is a substantial likelihood that the defendant will become competent to stand trial within one year if provided with a course of treatment, the court must order continuing evaluation and treatment of the defendant for a period not to exceed four months to determine whether there is a substantial probability that the defendant will become competent to stand trial within one year if provided with a course of treatment.

The court order for treatment or for continuing evaluation and treatment must specify that the treatment or the continuing evaluation and treatment occur at a facility operated by DMH or DMRDD, at a facility certified by either of those departments as being qualified to treat mental illness or mental retardation, at a public or private community mental health or mental retardation facility, or by a psychiatrist or another mental health or mental retardation professional. The order may restrict the defendant's freedom of movement as the court considers necessary. The prosecutor in the defendant's case must send to the chief clinical officer of the hospital or facility, the managing officer of the institution, the director of the program, or the person to which the defendant is committed copies of relevant police reports and other background information that pertains to the defendant and is available to the prosecutor, unless the prosecutor determines that the release of any of the information in the police reports or any of the other background information to unauthorized persons would interfere with the effective prosecution of any person or would create a substantial risk of harm to any person.

In determining placement alternatives, the court must consider the extent to which the person is a danger to the person and to others, the need for security, and

the type of crime involved and must order the least restrictive alternative available that is consistent with public safety and treatment goals. In weighing these factors, the court must give preference to protecting public safety. If the defendant is found IST, if the chief clinical officer of the hospital or facility, the managing officer of the institution, the director of the program, or the person to which the defendant is committed for treatment or continuing evaluation and treatment determines that medication is necessary to restore the defendant's competency to stand trial, and if the defendant lacks the capacity to give informed consent or refuses medication, the chief clinical officer, managing officer, director, or person to which the defendant is so committed may petition the court for authorization for the involuntary administration of medication. Upon receiving such a petition, the court must hold a hearing on the petition and may authorize the involuntary administration of medication. (R.C. 2945.38(B)(1)(c).)

No defendant may be required to undergo treatment, including any continuing evaluation and treatment, under the above-described provision for longer than whichever of the following periods is applicable (R.C. 2945.38(C); hereafter, these periods are referred to as the "maximum time for treatment or for evaluation and treatment"):

(1) One year, if the most serious offense with which the defendant is charged is one of the following offenses: (a) aggravated murder, murder, or an offense of violence for which a sentence of death or life imprisonment may be imposed, (b) an offense of violence that is a felony of the first or second degree, or (c) a conspiracy to commit, an attempt to commit, or complicity in the commission of an offense described in clause (a) or (b) of this paragraph if the conspiracy, attempt, or complicity is a felony of the first or second degree.

(2) Six months, if the most serious offense with which the defendant is charged is a felony other than a felony described above in paragraph (1);

(3) Sixty days, if the most serious offense with which the defendant is charged is a misdemeanor of the first or second degree;

(4) Thirty days, if the most serious offense with which the defendant is charged is a misdemeanor of the third or fourth degree, a minor misdemeanor, or an unclassified misdemeanor.

Under the bill, the person who supervises the treatment or continuing evaluation and treatment of a defendant ordered to undergo treatment or continuing evaluation and treatment must file a written report with the court at the following times: (1) whenever the person believes the defendant is capable of understanding the nature and objective of the proceedings against the defendant *or* of assisting in his or her defense, (2) for a felony offense, 14 days before

expiration of the maximum time for treatment or for evaluation and treatment, and, for a misdemeanor offense, ten days before the expiration of the maximum time for treatment, (3) at a minimum, after each six months of treatment, and (4) whenever the person believes there is not a substantial probability that the defendant will become capable of understanding the nature and objective of the proceedings against the defendant *or* of assisting in his or her defense even if provided with a course of treatment.

The report must contain the examiner's findings, the facts in reasonable detail on which the findings are based, and the examiner's opinion as to the defendant's capability of understanding the nature and objective of the proceedings against the defendant *or* of assisting in his or her defense. The report also must contain the examiner's recommendation as to the least restrictive treatment alternative that is consistent with the defendant's treatment needs for restoration to competency and with the safety of the community if, in the examiners' opinion, the defendant remains incapable of understanding the nature and objective of the proceedings against the defendant *or* of assisting in his or her defense and there is a substantial probability that the defendant will become capable of doing either of those things if provided with a course of treatment, if in the examiner's opinion the defendant remains mentally ill or mentally retarded, and if the maximum time for treatment has not expired. The court must provide copies of the report to the prosecutor and defense counsel. (R.C. 2945.38(F) and (G).)

Finding of IST--restrictions on a defendant who is committed after an IST finding. Under the bill, a defendant who is committed under any of the above-described provisions after a finding of IST is prohibited from voluntarily admitting himself or herself or being voluntarily admitted to a hospital or institution under the Civil Commitment Provisions of the MH Law or MRDD Law. Further, under the bill, a defendant charged with an offense and committed to a hospital or other institution by the court under the above-described provisions generally may not be granted unsupervised on-grounds movement, supervised off-grounds movement, or "nonsecured status" (see "***Definitions***," below). The court may grant a defendant supervised off-grounds movement to obtain medical treatment or specialized habilitation treatment services if the person who supervises the treatment of the continuing evaluation and treatment of the defendant informs the court that the treatment or continuing evaluation and treatment cannot be provided at the hospital or the institution to which the defendant is committed. The chief clinical officer of the hospital or the managing officer of the institution to which the defendant is committed or a designee of either of those persons may grant a defendant movement to a medical facility for an emergency medical situation with appropriate supervision to ensure the safety of the defendant, staff, and community during that emergency medical situation. The chief clinical officer or managing officer must notify the court within 24

hours of the defendant's movement to the medical facility for an emergency medical situation under this provision. (R.C. 2945.38(D) and (E).)

Finding of IST--court hearing to determine continued IST status and action after the hearing. The bill specifies that if a defendant is committed under the provisions described above under "***Finding of IST but likely to become competent within one year or unable to determine likelihood***," within ten days after the treating physician of the defendant or the examiner of the defendant who is employed or retained by the treating facility advises that there is not a substantial probability that the defendant will become capable of understanding the nature and objective of the proceedings against the defendant *or* of assisting in his or her defense even if provided with a course of treatment, within ten days after the expiration of the maximum time for treatment or for continuing evaluation and treatment, within 30 days after a defendant's request for a hearing that is made after six months of treatment, within 30 days after the defendant's request for a hearing that is made after six months of treatment or within 30 days after being advised by the treating physician that the defendant is competent to stand trial, whichever is earlier, the court must conduct another hearing to determine if the defendant is competent to stand trial and must do whichever of the following is applicable (R.C. 2945.38(H)):

(1) If the court finds that the defendant is competent to stand trial, the defendant must be proceeded against as provided by law.

(2) If the court finds that the defendant is IST but there is a substantial probability that the defendant will become competent to stand trial if provided with a course of treatment, and the maximum time for treatment has not expired, the court, after consideration of the examiner's recommendation, must order that treatment be continued, may change the facility or program at which the treatment is to be continued, and must specify whether the treatment is to be continued at the same or a different facility or program.

(3) If the court finds that the defendant is IST, if the defendant is charged with aggravated murder, murder, an offense of violence for which a sentence of death or life imprisonment may be imposed, an offense of violence that is a felony of the first or second degree, or a conspiracy to commit, an attempt to commit, or complicity in the commission of any such offense when the conspiracy, attempt, or complicity is a felony of the first or second degree, and if the court finds that there is not a substantial probability that the defendant will become competent to stand trial even if provided with a course of treatment, or if the maximum time for treatment relative to that offense has expired, further proceedings must be as provided in the provisions of the bill described below in "***Finding of IST--civil commitment action or retention of jurisdiction***" and as provided in existing R.C. 2945.401 and 2945.402--not in the bill.

(4) If the court finds that the defendant is IST, if the most serious offense with which the defendant is charged is a misdemeanor or a felony other than a felony described in the preceding paragraph, and if the court finds that there is not a substantial probability that the defendant will become competent to stand trial even if provided with a course of treatment, or if the maximum time for treatment relative to that offense has expired, the court must dismiss the indictment, information, or complaint against the defendant. A dismissal under this provision is not a bar to further prosecution based on the same conduct. The court must discharge the defendant unless the court or prosecutor files an affidavit in the probate court for civil commitment pursuant to the Civil Commitment Provisions of the MH Law or MRDD Law, in which case the court may detain the defendant for ten days pending a civil commitment. All of the following provisions apply to persons charged with a misdemeanor or a felony other than a felony described in the preceding paragraph who are committed by the probate court subsequent to the court's or prosecutor's filing of an affidavit for civil commitment under authority of this provision:

(a) The chief clinical officer of the hospital or facility, the managing officer of the institution, the director of the program, or the person to which the defendant is committed or admitted must do all of the following: (i) notify the prosecutor, in writing, of the discharge of the defendant, send the notice at least ten days prior to the discharge, unless the discharge is by the probate court, and state in the notice the date on which the defendant will be discharged, (ii) notify the prosecutor, in writing, when the defendant is absent without leave or is granted "unsupervised, off-grounds movement" (see "***Definitions***," below), and send this notice promptly after the discovery of the absence without leave or prior to the granting of the unsupervised, off-grounds movement, whichever is applicable, and (iii) notify the prosecutor, in writing, of the change of the defendant's commitment or admission to voluntary status, send this notice promptly upon learning of the change to voluntary status, and state in the notice the date on which the defendant was committed or admitted on a voluntary status.

(b) Upon receiving notice that the defendant will be granted unsupervised, off-grounds movement, the prosecutor either must reindict the defendant or promptly notify the court that the prosecutor does not intend to prosecute the charges against the defendant.

Finding of IST--reduction of sentence of defendant sentenced to a jail or workhouse. The bill expands the existing provision that specifies that, if a defendant is convicted of a crime and sentenced to a jail or workhouse, the defendant's sentence must be reduced by the total number of days he or she is confined for evaluation to determine his or her competence to stand trial or to undergo treatment to also require the reduction to include the total number of days

the defendant is confined for evaluation to determine the defendant's mental condition at the time of the offense charged (R.C. 2945.38(I)).

Existing law

Consistent with *Sullivan*, *supra*, existing law specifies, in the manner described in this part of the analysis, what must be done when the issue of a defendant's competence to stand trial is raised and the court decides the issue (R.C. 2945.38). This is the law changed by the bill in the manner described above.

Finding of competence. If a person is charged with a criminal offense, if the issue of the person's competence to stand trial is raised, and if the court, upon conducting the required hearing on the issue, finds that the defendant is competent to stand trial, the defendant must be proceeded against as provided by law. If the defendant is found competent to stand trial and is receiving psychotropic drugs or other medication, the court must authorize the continued administration of the drugs or medication or other appropriate treatment in order to maintain the defendant's competence to stand trial, unless the defendant's attending physician advises the court against continuation of the drugs, other medication, or treatment. (R.C. 2945.38(A).)

Finding of IST--determination of likelihood to become competent within one year. If the court, upon conducting the required hearing on the issue, finds that the defendant is IST, it must also make a finding based on the evidence as to whether there is a substantial probability that the defendant will become competent to stand trial within one year, if the defendant is provided with a course of treatment (R.C. 2945.38(B)).

Finding of IST and not likely to become competent within one year. If the court finds that a defendant is IST and also finds that, even if the defendant is provided with a course of treatment, there is not a substantial probability that he or she will become competent to stand trial within one year, and it appears to the court, through a review of the report of an examiner under R.C. section 2945.371 or otherwise, that the defendant is mentally ill or mentally retarded, the court may cause an affidavit to be filed in the probate court under the Mental Health Law (the MH Law) or the Mental Retardation and Developmental Disabilities Law (the MRDD Law) alleging that the defendant is a "mentally ill person subject to hospitalization by court order" or a "mentally retarded person subject to institutionalization by court order," as defined in those Laws. When the affidavit is filed, the trial court must send to the probate court a copy of all written reports of the defendant's mental condition that were prepared pursuant to R.C. 2945.371. The court may issue a temporary order of detention that a probate court may issue under specified provisions of the MH Law and the MRDD Law, with the order to remain in effect until the probable cause or initial hearing in the probate court.

Further proceedings in the probate court are then civil proceedings governed by the Civil Commitment Provisions of those Laws.

The chief clinical officer of the hospital or facility, managing officer of the institution, director of the program, or person to which the defendant is committed or admitted, at least ten days prior to the discharge or immediately upon learning of a change to voluntary status, must send written notice to the prosecutor of the date on which the defendant will be discharged or has been admitted on voluntary status. (R.C. 2945.38(C).)

Finding of IST but likely to become competent within one year. If the court finds that a defendant is IST, if it appears to the court, through a review of the report of an examiner or otherwise, that the defendant is mentally ill or mentally retarded but that there is a substantial probability he or she will become competent to stand trial within one year if provided a course of treatment, and if the offense is one for which the defendant could be incarcerated if convicted, the court must order the defendant to undergo treatment at a facility operated by DMH or DMRDD, at a facility certified by the Department as qualified to treat mental illness or mental retardation, or at a public or private community mental health or mental retardation facility, or it may order private treatment by a psychiatrist or other mental health or mental retardation professional. The order may restrict the defendant's freedom of movement, as the court considers necessary. In determining placement alternatives, the court must consider the defendant's dangerousness to himself or herself and others, the need for security, and the type of crime involved, and must order the least restrictive alternative available that is consistent with public safety and treatment goals. (R.C. 2945.38(D).)

No defendant may be required to undergo treatment as described in the preceding paragraph for longer than the lesser of 15 months or one-third of the longest minimum sentence that might be imposed for conviction of a felony or one-third of the longest maximum sentence that might be imposed for conviction of a misdemeanor if the defendant is found guilty of the most serious crime with which he or she was charged at the time of the hearing. No treatment order may remain in effect after the indictment, information, or complaint is dismissed. The court must notify the prosecutor, the defense counsel, and the chief clinical officer of the facility or the managing officer of the institution or facility at which, or the person with whom, the defendant was ordered to undergo treatment whenever an indictment, information, or complaint against the defendant is dismissed and whenever the court revokes the treatment order. If the maximum time during which an order of the court may be in effect expires, the court, within three days, must conduct another hearing to determine if the defendant is competent to stand trial, but, at the close of such a hearing, a disposition must be made as described above under "***Finding of competence***" or "***Finding of IST and not likely to***

become competent within one year." No defendant committed pursuant to the provisions described in this paragraph and the preceding paragraph may voluntarily admit himself or herself or be voluntarily admitted to a hospital or institution pursuant to Civil Commitment Provisions of the MH Law or the MRDD Law. (R.C. 2945.38(D).)

The person who supervises the treatment of a defendant ordered to undergo treatment under the provisions described in the two preceding paragraphs must file a written report with the court and send copies to the prosecutor and defense counsel at the following times: (1) after the first 90 days of treatment and after each 180 days of treatment thereafter, (2) whenever the person believes the defendant is competent to stand trial, (3) whenever the person believes that there is not a substantial probability that the defendant will become competent to stand trial, and (4) 14 days before expiration of the maximum time a treatment order issued under the provisions described in the two preceding paragraphs may be in effect. Such a report must contain the examiner's findings, the facts in reasonable detail on which the findings are based, and the examiner's opinion as to the defendant's competence to stand trial. If the examiner finds that the defendant is IST, the examiner must state an opinion in the report on the likelihood of the defendant's becoming competent to stand trial within one year. (R.C. 2945.38(E).)

Within ten days after receipt of the report described in the preceding paragraph, the court must hold a hearing on the issue of the defendant's competence to stand trial, under the provisions described in **COMMENT** 2. If at the conclusion of the hearing the court finds the defendant is competent to stand trial, the defendant must be proceeded against as provided by law. If the court finds that the defendant is IST, but that there is a substantial probability he or she will become competent to stand trial before expiration of the time limit specified for treatment, it may modify or continue in effect orders made at a previous hearing, still subject to the maximum time orders may be in effect. If the court finds the defendant is IST and that there is not a substantial probability that he or she will become competent to stand trial within the maximum time orders may be in effect, the court must make a disposition as described above in "***Finding of IST and not likely to become competent within one year***." (R.C. 2945.38(F).)

Dismissal of charges against a defendant finally found IST. Existing law requires the court to dismiss the indictment, information, or complaint against a defendant finally found IST under any of the above-described provisions or whenever the prosecutor notifies the court that he or she does not intend to prosecute the charges specified in the indictment, information, or complaint. Such a dismissal bars further criminal proceedings based on the same conduct unless all of the following conditions are present (R.C. 2945.38(G) and (H)):

(1) After a finding under the above-described provisions that the defendant was IST, an affidavit alleging that the defendant was mentally ill and subject to hospitalization by court order or mentally retarded and subject to institutionalization by court order was filed, and the defendant either: (a) was found mentally ill or mentally retarded and subject to hospitalization or institutionalization by court order but was later released, or (b) was not so found. Whenever the issue of competence to stand trial is raised, but no finding under the above-described provisions occurs because, before such a finding, the court dismisses the indictment, information, or complaint upon notice from the prosecutor that the prosecutor does not intend to prosecute the charges, the dismissal does not bar further criminal proceedings based on the same conduct, but the provisions described below in (2), (3), and (4) may bar further proceedings, if the conditions they specify are not present.

(2) The time the defendant has been involuntarily detained for examination or treatment described above under the MH Law or the MRDD Law pursuant to the filing of an affidavit under the above-described provisions and under the law relating to the issue of determinations of competence to stand trial does not exceed one-third of the maximum sentence the defendant might have received if convicted of the most serious charge that was dismissed.

(3) Further criminal proceedings are not barred under the existing "speedy trial" provisions (R.C. 2945.71 to 2945.73--not in the bill).

(4) The period of limitation for the offense committed has not expired.

Reduction of sentence of defendant sentenced to a jail or workhouse. Existing law provides that a defendant convicted of a crime and sentenced to a jail or workhouse must have his or her sentence reduced by the total number of days he or she is confined for examination to determine his or her competence to stand trial or undergo treatment (R.C. 2945.38(I)).

Use of defendant's statements. Existing law provides that no statement made by a defendant in an examination or hearing relating to his or her competence to stand trial may be used in evidence against him or her on the issue of guilt in any criminal action (R.C. 2945.38(J)).

Finding of IST--civil commitment action or retention of jurisdiction

Existing law

Existing law provides that, if a defendant who is charged with aggravated murder, murder, an offense of violence for which a sentence of death or life imprisonment could be imposed, an offense of violence that is a felony of the first

or second degree, or a conspiracy to commit, an attempt to commit, or complicity in the commission of any such offense when the conspiracy, attempt, or complicity is a felony of the first or second degree and if the defendant is found to be IST, after the expiration of the maximum time for treatment, one of the following applies (R.C. 2945.39(A) and (B)):

(1) The court or prosecutor may file an affidavit in the probate court for civil commitment of the defendant under the Civil Commitment Provisions of the MH Law or MRDD Law. If the court or prosecutor files an affidavit of that nature, the court may detain the defendant for ten days pending civil commitment. If the probate court commits the defendant subsequent to the court's or prosecutor's filing of the affidavit, the chief clinical officer of the hospital or facility, the managing officer of the institution, the director of the program, or the person to which the defendant is committed or admitted must send to the prosecutor the same types of notices as are required in the cases of alleged misdemeanants and other types of alleged felons who are civilly committed following the filing of a trial court's or prosecutor's affidavit for civil commitment.

(2) On the motion of the prosecutor or on its own motion, the court may retain jurisdiction over the defendant if, at a hearing, the court finds both of the following by clear and convincing evidence: (a) the defendant committed the offense charged, and (b) the defendant is a mentally ill person subject to hospitalization by court order or a mentally retarded person subject to institutionalization by court order. In making its determination as to whether to retain jurisdiction over the defendant under this provision, the court may consider all relevant evidence, including, but not limited to, any relevant psychiatric, psychological, or medical testimony or reports, the acts constituting the offense charged, and any history of the defendant relevant to the defendant's ability to conform to the law.

If the court conducts a hearing to determine whether to retain jurisdiction over the defendant, as described in the preceding paragraph, and if the court does not make both findings described in clauses (2)(a) and (b) as set forth in the preceding paragraph by clear and convincing evidence, the court dismiss the indictment, information, or complaint against the defendant. Upon the dismissal, the court must discharge the defendant unless the court or prosecutor files an affidavit in the probate court for civil commitment of the defendant. If the court or prosecutor files an affidavit of that nature, the court may order that the defendant be detained for up to ten days pending the civil commitment; if the probate court commits the defendant subsequent to the court's or prosecutor's filing of the affidavit, the chief clinical officer of the hospital or facility, the managing officer of the institution, the director of the program, or the person to which the defendant is committed or admitted must send to the prosecutor the same types of notices as

are required in the cases of alleged misdemeanants and other types of alleged felons who are civilly committed following the filing of a trial court's or prosecutor's affidavit for civil commitment. A dismissal under this provision is not a bar to further criminal proceedings based on the same conduct. (R.C. 2945.39(C).)

If the court conducts a hearing to determine whether to retain jurisdiction over the defendant and if the court makes both findings described in clauses (2)(a) and (b) of the second preceding paragraph by clear and convincing evidence, the court must commit the defendant to a hospital operated by DMH, a facility operated by DMRDD, or another medical or psychiatric facility, as appropriate. In determining the place and nature of the commitment, the court must order the least restrictive commitment alternative available that is consistent with public safety and the welfare of the defendant. In weighing these factors, the court must give preference to protecting public safety. If a court makes a commitment of a defendant under this provision, the prosecutor must send to the place of commitment all reports of the defendant's current mental condition, and, except as otherwise described in this paragraph, any other relevant information, including, but not limited to, a transcript of the court's hearing, copies of relevant police reports, and copies of any prior arrest and conviction records that pertain to the defendant and that the prosecutor possesses. The prosecutor must send the reports of the defendant's current mental condition in every case of commitment, and unless the prosecutor determines that the release of any of the other relevant information to unauthorized persons would interfere with the effective prosecution of any person or create a substantial risk of harm to any person, the prosecutor also must send the other relevant information. Upon admission of a defendant committed under this provision, the place of commitment must send to the board of alcohol, drug addiction, and mental health services (the "ADAMHS board") or the community mental health board serving the county in which the charges against the defendant were filed a copy of all reports of the defendant's current mental condition and a copy of the other relevant information the prosecutor provided. If a court makes a commitment under this provision, all further proceedings must be in accordance with existing R.C. 2945.401 and 2945.402, which are not in the bill (R.C. 2945.39(D)).

Operation of the bill

The bill extends these existing provisions so that, if a defendant is charged with any of the specified offenses and is found to be IST, the provisions also apply after the court finds that there is not a substantial probability that the defendant will become competent to stand trial even if provided with a course of treatment. Thus, under the bill, in those circumstances, one of the occurrences described above in (1) or (2) under the "***Existing law***" portion of "***Finding of IST--civil***

commitment action or retention of jurisdiction" applies, and all the existing provisions related to the applicable occurrence also apply. (R.C. 2945.39.)

Definitions

Existing law contains the following definitions that apply to the bill (R.C. 2945.37(A)--not in the bill):

(1) "Prosecutor" means a prosecuting attorney or a city director of law, village solicitor, or similar chief legal officer of a municipal corporation who has authority to prosecute a criminal case that is before the court or the criminal case in which a defendant in a criminal case has been found incompetent to stand trial or not guilty by reason of insanity.

(2) "Examiner" means either: (a) a psychiatrist or a licensed clinical psychologist who satisfies the criteria of R.C. 5122.01(I)(1) or is employed by a certified forensic center designated by the Department of Mental Health to conduct examinations or evaluations, or (b) for purposes of a separate mental retardation evaluation ordered by a court pursuant to R.C. 2945.371(H), a psychologist designated by DMRDD's Director pursuant to that section to conduct that separate mental retardation evaluation.

(3) "Nonsecured status" means any "unsupervised, off-grounds movement" (see (4), below) or "trial visit" (see (5), below) from a hospital or institution, or any "conditional release" (see (6), below), that is granted to a person who is found IST and is committed pursuant to R.C. 2945.39 or to a person who is found not guilty by reason of insanity and is committed pursuant to R.C. 2945.40.

(4) "Unsupervised, off-grounds movement" includes only off-grounds privileges that are unsupervised and that have an expectation of return to the hospital or institution on a daily basis.

(5) "Trial visit" means a patient privilege of a longer stated duration of unsupervised community contact with an expectation of return to the hospital or institution at designated times.

(6) "Conditional release" means a commitment status under which the trial court at any time may revoke a person's conditional release and order the rehospitalization or reinstitutionalization of the person as described in R.C. 2945.402(A) and pursuant to which a person who is found IST or not guilty by reason of insanity lives and receives treatment in the community for a period of time that does not exceed the maximum prison term or term of imprisonment that the person could have received for the offense in question had the person been

convicted of the offense instead of being found IST on the charge of the offense or being found not guilty by reason of insanity relative to the offense.

(7) "Licensed clinical psychologist," "mentally ill person subject to hospitalization by court order," and "psychiatrist" have the same meanings as in the DMH Law.

(8) "Mentally retarded person subject to institutionalization by court order" has the same meaning as in the MRDD Law.

COMMENT

1. The version of R.C. 2945.38 that resulted from S.B. 285 and that the Supreme Court, in *Sullivan*, *supra*, found to be unconstitutional reads as follows:

> R.C. 2945.38. (A) If the issue of a defendant's competence to stand trial is raised and if the court, upon conducting the hearing provided for in section 2945.37 of the Revised Code, finds that the defendant is competent to stand trial, the defendant shall be proceeded against as provided by law. If the court finds the defendant competent to stand trial and the defendant is receiving psychotropic drugs or other medication, the court may authorize the continued administration of the drugs or medication or other appropriate treatment in order to maintain the defendant's competence to stand trial, unless the defendant's attending physician advises the court against continuation of the drugs, other medication, or treatment.
>
> (B) After taking into consideration all relevant reports, information, and other evidence, the court shall order a defendant who is found incompetent to stand trial to undergo treatment at a facility operated by the department of mental health or the department of mental retardation and developmental disabilities, treatment at a facility certified by either of those departments as being qualified to treat mental illness or mental retardation, treatment at a public or private community mental health or mental retardation facility, or private treatment by a psychiatrist or another mental health or mental retardation

professional. The order may restrict the defendant's freedom of movement as the court considers necessary. The prosecutor in the defendant's case shall send to the chief clinical officer of the hospital or facility, the managing officer of the institution, the director of the program, or the person to which the defendant is committed copies of relevant police reports and other background information that pertains to the defendant and is available to the prosecutor unless the prosecutor determines that the release of any of the information in the police reports or any of the other background information to unauthorized persons would interfere with the effective prosecution of any person or would create a substantial risk of harm to any person.

In determining placement alternatives, the court shall consider the extent to which the person is a danger to the person and to others, the need for security, and the type of crime involved and shall order the least restrictive alternative available that is consistent with public safety and treatment goals. In weighing these factors, the court shall give preference to protecting public safety.

If the defendant is found incompetent to stand trial, if the chief clinical officer of the hospital or facility, the managing officer of the institution, the director of the program, or the person to which the defendant is committed determines that medication is necessary to restore the defendant's competency to stand trial, and if the defendant lacks the capacity to give informed consent or refuses medication, the chief clinical officer, managing officer, director, or person to which the defendant is committed may petition for, and the court may authorize, the involuntary administration of medication.

(C) No defendant shall be required to undergo treatment under this section for longer than whichever of the following periods is applicable:

(1) One year, if the most serious offense with which the defendant is charged is one of the following offenses:

(a) Aggravated murder, murder, or an offense of violence for which a sentence of death or life imprisonment may be imposed;

(b) An offense of violence that is a felony of the first or second degree;

(c) A conspiracy to commit, an attempt to commit, or complicity in the commission of an offense described in division (C)(1)(a) or (b) of this section if the conspiracy, attempt, or complicity is a felony of the first or second degree.

(2) Six months, if the most serious offense with which the defendant is charged is a felony other than a felony described in division (C)(1) of this section;

(3) Sixty days, if the most serious offense with which the defendant is charged is a misdemeanor.

(D) Any defendant who is committed pursuant to this section shall not voluntarily admit the defendant or be voluntarily admitted to a hospital or institution pursuant to section 5122.02, 5122.15, 5123.69, or 5123.76 of the Revised Code.

(E) A defendant charged with an offense and committed to a hospital or other institution by the court under this section shall not be granted unsupervised on-grounds movement, supervised off-grounds movement, or nonsecured status.

(F) The person who supervises the treatment of a defendant ordered to undergo treatment under division (B) of this section shall file a written report with the court at the following times:

(1) Whenever the person believes the defendant is capable of understanding the nature and objective of the proceedings against the defendant and of assisting in the defendant's defense;

(2) For a felony offense, fourteen days before expiration of the maximum time for treatment as specified in division (C) of this section, and, for a misdemeanor offense, ten days before the expiration of the maximum time for treatment as specified in division (C) of this section;

(3) At a minimum, after each six months of treatment.

(G) A report under division (F) of this section shall contain the examiner's findings, the facts in reasonable detail on which the findings are based, and the examiner's opinion as to the defendant's capability of understanding the nature and objective of the proceedings against the defendant and of assisting in the defendant's defense. If, in the examiner's opinion, the defendant remains incapable of understanding the nature and objective of the proceedings against the defendant or of assisting in the defendant's defense and also remains mentally ill or mentally retarded, and if the maximum time for treatment as specified in division (C) of this section has not expired, the report also shall contain the examiner's recommendation as to the least restrictive treatment alternative that is consistent with the defendant's treatment needs for restoration to competency and with the safety of the community. The court shall provide copies of the report to the prosecutor and defense counsel.

(H) Within ten days after the expiration of the maximum time for treatment as specified in division (C) of this section, within thirty days after a defendant's request for a hearing that is made after six months of treatment, or within thirty days after being advised by the treating physician that the defendant is competent to stand trial, whichever is earlier, the court shall conduct another hearing to determine if the defendant is competent to stand trial and shall do whichever of the following is applicable:

(1) If the court finds that the defendant is competent to stand trial, the defendant shall be proceeded against as provided by law.

(2) If the court finds that the defendant is incompetent to stand trial and the maximum time for treatment as specified in division (C) of this section has not expired, the court, after consideration of the examiner's recommendation, shall order that treatment be continued until the expiration of the maximum time for treatment, may change the facility or program at which the treatment is to be continued, and shall specify whether the treatment is to be continued at the same or a different facility or program.

(3) If the court finds that the defendant is incompetent to stand trial, if the defendant is charged with an offense listed in division (C)(1) of this section, and if the maximum time for treatment relative to that offense as specified in that division has expired, further proceedings shall be as provided in sections 2945.39, 2945.401, and 2945.402 of the Revised Code.

(4) If the court finds that the defendant is incompetent to stand trial, if the most serious offense with which the defendant is charged is a misdemeanor or a felony other than a felony listed in division (C)(1) of this section, and if the maximum time for treatment relative to that offense as specified in division (C) of this section has expired, the court shall dismiss the indictment, information, or complaint against the defendant. A dismissal under this division is not a bar to further prosecution based on the same conduct. The court shall discharge the defendant unless the court or prosecutor files an affidavit in probate court for civil commitment pursuant to Chapter 5122. or 5123. of the Revised Code. If an affidavit for civil commitment is filed, the court may detain the defendant for ten days pending civil commitment. All of the following provisions apply to persons charged with a misdemeanor or a felony other than a felony listed in division (C)(1) of this section who are committed by the probate court subsequent to the court's or prosecutor's filing of an affidavit for civil commitment under authority of this division:

(a) The chief clinical officer of the hospital or facility, the managing officer of the institution, the director of the program, or the person to which the defendant is committed or admitted shall do all of the following:

(i) Notify the prosecutor, in writing, of the discharge of the defendant, send the notice at least ten days prior to the discharge unless the discharge is by the probate court, and state in the notice the date on which the defendant will be discharged;

(ii) Notify the prosecutor, in writing, when the defendant is absent without leave or is granted unsupervised, off-grounds movement, and send this notice promptly after the discovery of the absence without leave or prior to the granting of the unsupervised, off-grounds movement, whichever is applicable;

(iii) Notify the prosecutor, in writing, of the change of the defendant's commitment or admission to voluntary status, send the notice promptly upon learning of the change to voluntary status, and state in the notice the date on which the defendant was committed or admitted on a voluntary status.

(b) Upon receiving notice that the defendant will be granted unsupervised, off-grounds movement, the prosecutor either shall re-indict the defendant or promptly notify the court that the prosecutor does not intend to prosecute the charges against the defendant.

(I) If a defendant is convicted of a crime and sentenced to a jail or workhouse, the defendant's sentence shall be reduced by the total number of days the defendant is confined for evaluation to determine the defendant's competence to stand trial or treatment under this section and sections 2945.37 and 2945.371 of the Revised Code or by the total number of days the defendant is confined for evaluation to determine the defendant's mental condition at the time of the offense charged.

2. Existing R.C. 2945.37(B) to (H), not in the bill, prescribe procedures for raising the issue of whether a person who is charged with a criminal offense is competent to stand trial and for the appropriate court to conduct a hearing to decide the matter after the issue is raised. Under those provisions, in a criminal action in a court of common pleas, a county court, or a municipal court, the court, "prosecutor" (see '***Definitions***," above), or defense may raise the issue of the defendant's competence to stand trial. If the issue is raised before the trial has commenced, the court must hold a hearing on the issue as described below, but if it is raised after the trial has commenced, the court must hold a hearing on the issue only for good cause shown or on the court's own motion.

The court generally must conduct the hearing within 30 days after the issue is raised. However, if the defendant has been referred for evaluation, the court must conduct the hearing within ten days after the filing of the report of the evaluation or, in the case of a defendant who is ordered by the court to undergo a separate mental retardation evaluation conducted by a psychologist designated by the Director of Mental Retardation and Developmental Disabilities, within ten days after the filing of the report of the separate mental retardation evaluation. A hearing may be continued for good cause.

The defendant is to be represented by counsel at the hearing. If the defendant is unable to obtain counsel, the court must appoint counsel under the existing Public Defender/Appointed Counsel Law before proceeding with the hearing. The prosecutor and defense counsel may submit evidence on the issue of the defendant's competence to stand trial. A written report of the evaluation of the defendant may be admitted into evidence at the hearing by stipulation, but, if either the prosecution or defense objects to its admission, the report may be admitted under existing R.C. 2317.36 to 2317.38 or any other applicable statute or rule.

The court cannot find a defendant incompetent to stand trial solely because the defendant is receiving or has received treatment as a voluntary or involuntary mentally ill patient under the existing Mental Health Law or a voluntary or involuntary mentally retarded resident under the existing Mental Retardation and Developmental Disabilities Law or because the defendant is receiving or has received psychotropic drugs or other medication, even if the defendant might become incompetent to stand trial without the drugs or medication.

A defendant is presumed to be competent to stand trial. If, after a hearing, the court finds by a preponderance of the evidence that, because of the defendant's present mental condition, the defendant is incapable of understanding the nature and objective of the proceedings against the defendant or of assisting in the defendant's defense, the court must find the defendant incompetent to stand trial and must enter an order authorized by R.C. 2945.38.

Special provisions apply regarding municipal courts.

HISTORY

ACTION	DATE	JOURNAL ENTRY
Introduced	06-06-01	p. 620
Reported, S. Judiciary on Criminal Justice	---	---

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