OHIO LEGAL UPDATE 2015

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I. Recent Ohio Legislation

A. Ohio Revised Code, Chapter 5122: Civil Commitment Law

1. On September 17, 2014, 5122.01(B) modified to allow court-ordered outpatient treatment by adding a fifth standard to the definition of "mentally ill person subject to court order."

    (1) Represents a substantial risk of physical harm to self;
    (2) Represents a substantial risk of physical harm to others;
    (3) Is unable to provide for needs, and immediate community provisions not available;
    (4) Is in need of treatment for behavior that creates a risk to the rights of others;
    (5) Would benefit from treatment as manifested by evidence of behavior that indicates all of the following:
        (i) The person is **unlikely to survive safely in the community** without supervision, based on a clinical determination.
        (ii) The person has a **history of lack of compliance** with treatment for mental illness **and one of the following applies**:
            (I) **At least twice within the 36 months** prior to the filing of an affidavit seeking court-ordered treatment of the person, the lack of compliance has been a significant factor in necessitating **hospitalization** or receipt of services in a forensic or other mental health unit of a correctional facility, provided that the 36-month period must be extended by the length of any hospitalization or incarceration of the person that occurred within the 36-month period.
            (II) **Within the 48 months** prior to the filing of an affidavit seeking court-ordered treatment of the person, the lack of compliance resulted in **one or more acts of serious violent behavior** toward self or others or threats of, or attempts at, serious physical harm to self or others, provided that the 48-month period must be extended by the length of any hospitalization or incarceration of the person that occurred within the 48-month period.
        (iii) The person, as a result of mental illness, is **unlikely to voluntarily participate in necessary treatment**.
        (iv) In view of the person's treatment history and current behavior, the person **is in need of treatment in order to prevent a relapse or deterioration** that would be likely to result in substantial risk of serious harm to the person or others.

2. Process starts with "pink slip" or affidavit, and if probate court determines probable cause, a hearing occurs with standard of clear and convincing evidence
3. Outpatient commitment = treatment plan

B. **Ohio Marijuana Legalization Initiative**, Issue 3 (2015)

1. Ohio-initiated constitutional amendment on ballot November 3, 2015
2. "Yes" legalizes limited sale and use of marijuana and creates 10 facilities with exclusive commercial rights to grow marijuana.

3. Use:
    a. Anyone 21 years of age or older, with a license purchased from the Ohio Marijuana Control Commission, could use, possess, grow, cultivate, and share up to eight ounces of homegrown marijuana and four flowering marijuana plants
    b. Anyone 21 years or older, with our without a license, could purchase, possess, transport, use and share up to one ounce of marijuana
    c. Anyone with a certified debilitating medical condition could use medicinal marijuana
4. Facilities:
    a. Marijuana Growth, Cultivation and Extraction (MGCE) facilities
    b. Exclusive rights to commercial production
    c. Run independently, with no direct sales to public

II. Police and the Mentally Ill

San Francisco v. Sheehan, 135 S. Ct. 1765 (2015)

A. In 2008, Teresa Sheehan was a mentally ill woman living in group home. She became non-compliant with medication and threatened to stab a social worker. Police were called to assist with transporting her to hospital. Sheehan refused to allow police into her room, and when they entered, she wielded a knife. They retreated and entered again. She again waved the knife, was shot, and survived.
B. Sheehan sued for violation of Title II of ADA, as well as 4th amendment under Section 1983
C. District court granted summary judgement, but Ninth court of appeals said ADA applied and jury should decide if lack of accommodation. Court also said police not entitled to qualified immunity.
D. S.C. left ADA question for lower courts, and said police entitled to immunity as no clear law when incident occurred in 2008

III. Mental Health Testimony Regarding Malingering

State v. Harris, 142 Ohio St.3d 211, 28 N.E.3d 1256 (2015)

A. When a defendant asserts mental capacity defense and then abandons it, a psychologist's testimony regarding the defendant's feigning of mental illness during a CST/NGRI evaluation is inadmissible under O.R.C. § 2945.37(J).
B. Admission of such testimony violates defendant's right against self-incrimination guaranteed by the Ohio Constitution art. I §10 and the Fifth Amendment of the U.S. Constitution.
C. Admitting such testimony was a harmless error.
D. Defendant granted a new trial.

IV. Capital Punishment

A. Background for the two cases recent cases: *Atkins v. Virginia* (2002)

Atkins was convicted of capital murder in Virginia and sentenced to death. Following a series of appeals, the U.S. Supreme Court held that execution of criminals with intellectual disabilities—then termed "mental retardation"—is "cruel and unusual punishment" prohibited by the Eighth Amendment.

Left open for states to determine: what defines or constitutes mental retardation?

B. Hall v. Florida, 134 S. Ct. 1986 (2014)

1. 1978: Hall committed rape, murder; sentenced to death.
2. After the *Atkins* ruling, Hall asked a Florida state court to vacate his sentence, presenting evidence that included an IQ = 71. The court denied his motion, determining that a Florida statute mandated that he show an IQ score of 70 or below before being permitted to present any additional intellectual disability evidence. The Florida Supreme Court upheld, finding the State's 70-point threshold constitutional.
3. Florida's threshold requirement was unconstitutional. Reasoning:
    a. Courts should consider psychiatric and professional studies that elaborate on the purpose and meaning of IQ scores and how the scores.
    b. Florida's rule disregards established medical practice.
    c. An IQ test has a standard error of measurement (SEM), so that an individual score is best understood as a range of ~ 5 points on either side of the recorded score. Florida refused to acknowledge that an IQ score has inherent imprecision.
    d. An IQ score is not final and conclusive evidence of a defendant's intellectual capacity because experts would consider other evidence. Florida's IQ-based criterion bars consideration of other relevant evidence (deficits in adaptive functioning).
    e. The rejection of a strict 70-point cutoff in the vast majority of States and a "consistency in the trend" toward recognizing the SEM provide strong evidence of consensus that society does not regard this strict cutoff as proper or humane.
    f. Clinical definitions for intellectual disability that reject a strict IQ test score cutoff at 70 were a fundamental premise of *Atkins*.
4. Conclusion: When a defendant's IQ test score falls within the test's acknowledged and inherent margin of error, the defendant must be able to present additional evidence of intellectual disability, including testimony regarding adaptive deficits.
5. Reversed and remanded.

C. Brumfield v. Cain, 135 S. Ct. 2269 (2015)

1. Kevan Brumfield killed a police officer, was convicted of murder in a Louisiana court, and was sentenced to death before *Atkins*. After *Atkins*, Brumfield amended his pending state post conviction petition to raise a claim of MR. He pointed to evidence introduced at sentencing that he had an IQ = 75, a fourth-grade reading level, had been prescribed numerous medications and treated at psychiatric hospitals as a child, had been identified as having a learning disability, and had been in special ed classes. The trial court dismissed Brumfield's petition without holding a hearing or granting funds to conduct additional investigation. Brumfield federal court appeals led to the Supreme Court's hearing his case.
2. Holdings:
    a. Brumfield was entitled to have his *Atkins* claim considered on the merits in federal court.
    b. The state trial court's decision was premised on Brumfield's IQ score being inconsistent with intellectual disability and that he presented no evidence of adaptive impairment.
    c. Yet expert trial testimony showed that IQ=75 is entirely consistent with intellectual disability. Every IQ score has a margin of error.

d. Evidence suggested that Brumfield might well have a "substantial functional limitation" in three of six "areas of major life activity" as required under Louisiana's decision governing determining of MR for capital punishment purposes.

3. Outcome: case remanded for a new hearing on MR/ID.

D. S.B. 162: Death Penalty and Mental Illness

1. Introduced May 2015
2. Bipartisan sponsors
3. Prohibits a person convicted of aggravated murder who shows that the person had a "serious mental illness" at the time of the offense from being sentenced to death for the offense and instead requires the person to be sentenced to life imprisonment.
4. 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.
5. A "serious mental illness" for purposes of the bill's provisions mean:
   a. The defendant has been diagnosed with schizophrenia, schizoaffective disorder, bipolar disorder, major depressive disorder, or delusional disorder.
   b. At the time of the alleged aggravated murder, the SMI significantly impaired the defendant's capacity to exercise rational judgment in relation to his alleged conduct, conform his conduct to the requirements of the law, or appreciate the nature, consequences, or wrongfulness of his conduct.
   c. 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.