



# Ohio Legislative Service Commission

## 122nd Senate Bill Analysis

### S.B. 32

122nd General Assembly  
(As Introduced)

Sens. Howard, Gillmor, White, Cupp, Dix, Latta

- Expands the offense of aggravated murder to also prohibit purposely causing the death of a victim under 13 years of age and to prohibit causing the death of a victim under 13 years of age as a proximate result of committing or attempting to commit the offense of felonious assault or aggravated assault against the victim.
- Includes as a capital offense aggravating circumstance the commission of an aggravated murder against a victim under 13 years of age when the offender was the principal offender in the commission of the offense or, if not the principal offender, committed the offense with prior calculation and design.

## CONTENT AND OPERATION

### Existing law

#### Aggravated murder

The existing offense of aggravated murder prohibits a person from doing either of the following: (1) purposely, and with prior calculation and design, causing the death of another or the "unlawful termination of another's pregnancy" (see **COMMENT**), or (2) purposely causing the death of another or the "unlawful termination of another's pregnancy" while committing or attempting to commit, or while fleeing immediately after committing or attempting to commit, kidnapping, rape, aggravated arson, arson, aggravated robbery, robbery, aggravated burglary, burglary, or escape. No person can be convicted of the offense unless the person is specifically found to have intended to cause the death of another or the unlawful termination of another's pregnancy.

In a case involving a charge of aggravated murder against a person, the law contains a prohibition on the use of a conclusive presumption, and limitations on the use of a permissive instruction, as a jury instruction as to whether the person, by committing or attempting to commit any offense listed in clause (2) of the preceding paragraph and by engaging in a common design with others to commit the offense by force or violence or by committing the offense in a manner that would be likely to produce death or the unlawful termination of another's pregnancy, intended to cause the death of any person killed or the unlawful termination of another's pregnancy. A person who is convicted of aggravated murder must be sentenced to death or to one of several different types of terms of life imprisonment, determined in the manner described below in "Aggravated murder sentencing law." (Sec. 2903.01.)

#### Aggravated murder sentencing law

The sentence of a person who is convicted of aggravated murder is determined in accordance with a special aggravated murder sentencing law. That special sentencing law specifies *the only circumstances in which Ohio law authorizes the imposition of a sentence of death*. Briefly, that special sentencing law provides as follows:

(1) If the indictment or count in the indictment charging the offender with the aggravated murder did not include one or more specifications of an aggravating circumstance, or if the indictment or count charging the aggravated murder included one or more such specifications but the offender is not convicted of any of the specifications, the court must impose upon the offender a sentence of life imprisonment with parole eligibility after serving 20 years of imprisonment (the 20 years cannot be reduced by any "earned credit" under existing section 2967.193) or, if the offender is within the scope of the existing Sexual Predator Sentencing Law, the special type of life sentence required under that Law. (Secs. 2929.03(A) and 2929.04.)

(2) If the indictment or count in the indictment charging the offender with the aggravated murder included one or more

specifications of an aggravating circumstance, and the offender is convicted of one or more of those specifications, the court must impose upon the offender a sentence of death or life imprisonment without parole, life imprisonment with parole eligibility after serving 25 full years of imprisonment, life imprisonment with parole eligibility after serving 30 full years of imprisonment (the 25 or 30 full years cannot be reduced by any "earned credit" under existing section 2967.193) (hereafter "aggravated murder life sentences"), or the special type of life sentence without parole required under the Sexual Predator Sentencing Law (sec. 2929.03(B)). The court must comply with a statutorily specified procedure in determining which of the authorized sentences it will impose. Briefly, that procedure provides as follows (secs. 2929.03(D) to (G), 2929.05, and 2929.06):

(a) If the offender was tried by a three-judge panel, the panel, upon consideration of specified evidence, testimony, and information, must weigh the aggravating circumstances the offender was found guilty of committing against the mitigating factors, set forth in existing sec. 2929.04(B), present in the case. If the panel unanimously finds, by proof beyond a reasonable doubt, that the aggravating circumstances outweigh the mitigating factors present in the case, it must impose a sentence of death on the offender. Absent such a finding, the panel must sentence the offender to one of the aggravated murder life sentences, or, if applicable, the special type of life sentence without parole required under the Sexual Predator Sentencing Law.

(b) If the offender was tried by a jury, the trial jury, upon consideration of specified evidence, testimony, and information, must weigh the aggravating circumstances the offender was found guilty of committing against the mitigating factors present in the case. If the jury unanimously finds, by proof beyond a reasonable doubt, that the aggravating circumstances outweigh the mitigating factors present in the case, it must recommend to the court that the sentence of death be imposed on the offender. Absent such a finding, it must recommend to the court that the offender be sentenced to one of the aggravated murder life sentences, or, if applicable, the special type of life sentence without parole required under the Sexual Predator Sentencing Law. If the trial jury recommends one of the types of life sentences, the court must impose the recommended sentence upon the offender. If the trial jury recommends a sentence of death, the court must conduct its own balancing test, in the same manner and subject to the same considerations as are described in the preceding paragraph regarding sentencing by a three-judge panel.

(c) If the offender raised the matter of age at trial and was not found to have been at least 18 years of age at the time of the commission of the offense, the three-judge panel or the court, if the offender was tried by a jury, may not impose a sentence of death on the offender. Rather, the panel or court must sentence the offender to one of the aggravated murder life sentences, or, if applicable, the special type of life sentence without parole required under the Sexual Predator Sentencing Law.

(d) Whenever a sentence of death is imposed, the law provides for a mandatory appellate review, to be conducted in accordance with specified procedures and evidentiary standards, by the Supreme Court and, in cases involving an aggravated murder committed before January 1, 1995, by the appropriate court of appeals. The reviewing court may affirm a sentence of death only if the court is persuaded from the record that the aggravating circumstances the offender was found guilty of committing outweigh the mitigating factors present in the case and that the sentence of death is the appropriate sentence in the case.

(e) If a sentence of death imposed upon an offender is vacated upon appeal because the reviewing court could not affirm the sentence under the standards described in the preceding paragraph, is vacated upon appeal for the sole reason that Ohio's existing procedure for imposing death sentences is unconstitutional, or is vacated because it was imposed erroneously upon an offender who was not 18 years of age or older at the time of the commission of the offense, the trial court must hold a hearing and resentence the offender to one of the aggravated murder life sentences, or, if applicable, the special type of life sentence without parole required under the Sexual Predator Sentencing Law. If a sentence of death is vacated upon appeal because of error that occurred in the sentencing phase of the trial and if the provisions described in the preceding sentence do not apply, the trial court must conduct a new sentencing hearing to determine the new sentence to impose upon the offender. If the offender originally was tried by a jury, the court must impanel a new jury to conduct the sentencing hearing, and, if the offender originally was tried by a three-judge panel, the original panel or, if necessary, a new three-judge panel must conduct the hearing.

### **Capital offense aggravating circumstances**

Existing law precludes imposition of the death penalty for aggravated murder unless one or more of the following aggravating circumstances is specified in the indictment or count in the indictment charging the aggravated murder and unless the offender is convicted of both the aggravated murder and one or more of the specified aggravating circumstances (sec. 2929.04(A)):

(1) The aggravated murder was the assassination of the United States President or a person in line of succession to that office, the Ohio Governor or Lieutenant Governor, the United States President-elect or Vice-President-elect, the Ohio Governor-elect or Lieutenant Governor-elect, or a candidate for any of those offices.

(2) The aggravated murder was committed for hire.

(3) The aggravated murder was committed for the purpose of escaping detection, apprehension, trial, or punishment for another offense committed by the offender.

(4) The offense was committed while the offender was a prisoner in a detention facility.

(5) Prior to the offense at bar, the offender was convicted of an offense an essential element of which was the purposeful killing of or attempt to kill another, or the offense at bar was part of a course of conduct involving the purposeful killing of or attempt to kill two or more persons by the offender.

(6) The victim of the aggravated murder was a peace officer whom the offender had reasonable cause to know or knew to be a peace officer, and either the victim, at the time of the commission of the offense, was engaged in the victim's duties, or it was the offender's specific purpose to kill a peace officer.

(7) The aggravated murder was committed while the offender was committing, attempting to commit, or fleeing immediately after committing or attempting to commit kidnapping, rape, aggravated arson, aggravated robbery, or aggravated burglary, and either the offender was the principal offender in the commission of the aggravated murder or, if not the principal offender, committed the aggravated murder with prior calculation and design.

(8) The victim of the aggravated murder was a witness to an offense who was purposely killed to prevent the witness' testimony in any criminal proceeding, and the aggravated murder was not committed during the commission, attempted commission, or flight immediately after the commission or attempted commission of the offense to which the victim was a witness, or the victim of the aggravated murder was a witness to an offense and was purposely killed in retaliation for the victim's testimony in any criminal proceeding.

### **Operation of the bill**

#### **Aggravated murder**

The bill expands the offense of aggravated murder to also prohibit purposely causing the death of another who is under 13 years of age at the time of the commission of the offense and to prohibit causing the death of another who is under 13 years of age at the time of the commission of the offense as a proximate result of committing or attempting to commit the offense of felonious assault or aggravated assault against the person who is under 13 years of age. The existing mechanism for imposing sentence on an offender convicted of aggravated murder, described above in "**Aggravated murder sentencing law**" and unchanged by the bill other than as described in the next paragraph, applies to a person convicted of aggravated murder in violation of these new prohibitions. (Sec. 2903.01(C), (D), and (E).)

Under the bill, the provision in existing law specifying that no person can be convicted of aggravated murder unless the person is specifically found to have intended to cause the death of another or the unlawful termination of another's pregnancy does not apply to these new prohibitions. The provisions in existing law regarding the use of permissive and conclusive presumptions in jury instructions as to whether the offender intended to cause the death of any person killed or the unlawful termination of another's pregnancy also do not apply to these new prohibitions. (Sec. 2903.01(F).)

#### **Capital offense aggravating circumstances**

The bill expands the existing list of capital offense aggravating circumstances to also include the commission of an aggravated murder against a victim under 13 years of age at the time of the commission of the offense and either the offender was the principal offender in the commission of the offense or, if the offender was not the principal offender, the offender committed the offense with prior calculation and design (sec. 2929.04(A)(9)). Thus, an offender who is convicted of aggravated murder and who also is convicted of this new aggravating circumstance will be subject to the existing mechanism for imposing sentence on an offender convicted of aggravated murder, described above in "**Aggravated murder sentencing law**."

## **COMMENT**

Existing section 2903.09 defines "unlawful termination of another's pregnancy," for purposes of the aggravated murder statute and other homicide-related and assault-related statutes as causing the death of an unborn member of the species *Homo Sapiens*, who is or was carried in the womb of another, as a result of injuries inflicted during the period that begins with fertilization and that continues unless and until live birth. The section also specifies certain circumstances in which the definition cannot be applied so as to subject a person to criminal prosecution relative to a legal abortion and certain circumstances related to acts of a pregnant woman in which the definition cannot be applied so as to subject the pregnant woman to criminal prosecution relative to the acts.

## **HISTORY**

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