

ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO

CASE NO. 08-2424

Plaintiff-Appellant,

On Appeal from the
Montgomery County
Court of Appeals,
Second Appellate District

vs.

THONEX WILLIAMS

**COURT OF APPEALS
CASE NO. 22532**

Defendant-Appellee.

APPELLANT'S MERIT BRIEF

MATHIAS H. HECK, JR.
PROSECUTING ATTORNEY
By **CARLEY J. INGRAM**
REG. NO. 0020084
Assistant Prosecuting Attorney
Montgomery County Prosecutor's Office
Appellate Division
Dayton-Montgomery County Courts Building
P.O. Box 972, 301 W. Third Street, 5th Floor
Dayton, Ohio 45422
(937) 225-4117

ANTHONY COMUNALE
One First National Plaza
130 W. Second Street
Suite 2050
Dayton, OH 45402-1504

**ATTORNEY FOR
THONEX WILLIAMS
APPELLEE**

**ATTORNEY FOR STATE OF OHIO
APPELLANT**

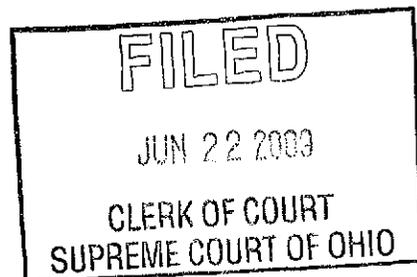


TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES	iii, iv, v
STATEMENT OF FACTS	1-2
ARGUMENT	2-23

Proposition of Law No. I: A commitment under R.C. 2945.39 is civil in nature. The purpose and effect of R.C. 2945.39, which operates in conjunction with 2945.38, 2945.401 and 2945.402, is to protect the public by allowing the involuntary commitment of dangerously mentally-ill individuals whose unrelieved mental incompetence prevents trial on a pending indictment for a violent felony. It is civil in nature and the Constitution does not require the person committed under the statute be given the Constitutional rights afforded to a defendant in a criminal prosecution.

2-13

Proposition of Law No. II: The involuntary commitment of a defendant under R.C. 2945.39 does not violate the defendant’s right to Equal Protection under the United States and Ohio Constitutions.

13-18

Proposition of Law No. III: The involuntary commitment of a defendant under R.C. 2945.39 does not violate the defendant’s right to Due Process under the United States and Ohio Constitutions.

18-23

CONCLUSION	23
CERTIFICATE OF SERVICE	24

APPENDIX	APPX. PAGE
Notice of Appeal, Supreme Court of Ohio, 08-2424, (December 19, 2008)	1-2
Opinion, Court of Appeals, CA 22532, (November 26, 2008)	3-34
Final Entry, Court of Appeals, CA 21710, (November 26, 2008)	35-36

State v. Bretz, (Dec. 30, 1999), Holmes App. No. 98-001 37-47

Decision and Entry Overruling Defendant's Motion to Dismiss (August 22, 2007) 48-51

CONSTITUTIONAL PROVISIONS; STATUTES

R.C. 2945.37 52-54

R.C. 2945.38 55-60

R.C. 2945.39 61-63

R.C. 2945.401 64-70

R.C. 2945.402 71-72

TABLE OF AUTHORITIES

<u>CASES:</u>	<u>PAGE</u>
<i>Addington v. Texas</i> (1978), 441 U.S. 418, 99 S.Ct. 1804	19, 20
<i>F.S. Royster Guano Co. v. Virginia</i> (1920), 253 U.S. 412, 40 S.Ct. 560, 64 L.Ed. 989	15
<i>Foucha v. Louisiana</i> (1992), 504 U.S. 71, 112 S.Ct. 1780	19, 20
<i>In re Burton</i> (1984), 11 Ohio St.3d 147, 464 N.E.2d 530	5
<i>Jackson v. Indiana</i> , (1972), 406 U.S. 715, 92 S.Ct. 1845	16, 18, 23
<i>Kansas v. Hendricks</i> (1997), 521 U.S. 346, 117 S.Ct. 2072, 138 L.Ed.2d 501	2, 3, 8, 10, 19, 20, 21
<i>Seling v. Young</i> (2001), 531 U.S. 250, 121 S.Ct. 727, 148 L.Ed.2d 734	8
<i>State ex rel. Dickman v. Defenbacher</i> (1955), 164 Ohio St.2d 142	7
<i>State v. Bretz</i> (Dec. 30, 1999), Holmes App. No. 98-001	14, 23
<i>State v. Cook</i> (1998), 83 Ohio St.3d 404, 700 N.E.2d 570, 1998-Ohio-291	7, 8, 10
<i>State v. Sullivan</i> (1996), 90 Ohio St. 502, 2001-Ohio-6, 739 N.E.2d 788	23, 24
<i>State Ward</i> (1999), 130 Ohio App.3d 551, 720 N.E.2d 603	15
<i>State v. Williams</i> , 179 Ohio App.3d 584, 2008-Ohio-6245, 902 N.E.2d 1042	2, 9
<i>United States v. Salerno</i> (1987), 481 U.S. 739, 107 S.Ct. 2095	3
<i>United States v. Ward</i> (1980), 448 U.S. 242, 100 S.Ct. 2636, 65 L.Ed.2d 742	8
<i>Xenia v. Schmidt</i> (1920), 101 Ohio St. 437, 130 N.E. 24	7

CONSTITUTIONAL PROVISIONS; STATUTES:

R.C. 2907.02(B)	1
R.C. 2945.37(A)(6)	6
R.C. 2945.38	<i>passim</i>
R.C. 2945.38(B)(2)	4
R.C. 2945.38(C)(1)	4
R.C. 2945.38(C)(1)(b)	1
R.C. 2945.39	<i>passim</i>
R.C. 2945.39(A)(2)	1, 2, 4, 17, 20, 23
R.C. 2945.39(C)	12
R.C. 2945.39(D)(1)	5, 11, 18, 21, 23
R.C. 2945.39(D)(2)	5
R.C. 2945.39(J)	18
R.C. 2945.401	<i>passim</i>
R.C. 2945.401(C)	6, 18
R.C. 2945.401(D)	6
R.C. 2945.401(J)(1)	6, 21, 23
2945.401(J)(2)(a)	18
R.C. 2945.402	2, 3, 6, 10, 11
R.C. 5122.01(B)	4, 5, 6, 13, 14, 21, 23, 24
R.C. 5122.05	18

R.C. 5122.15(C) ` 6, 12, 13, 14

R.C. 5122.15(H) 7, 14

R.C. 5211.15 10

OTHER:

R.C. Chapter 5122 9, 13, 14, 17, 18

Statement of the Case

On December 19, 2005, Thonex Williams was charged in the Common Pleas Court in Montgomery County with five felonies, including one count of rape, a felony of the first degree.¹ Shortly thereafter, the court found that Williams was incompetent to stand trial, but that there was a substantial likelihood he could be restored to competence with treatment, and committed him to Twin Valley Behavioral Care, under the authority of R.C. 2945.38.² At the mandatory status review, the court found that Williams remained incompetent and recommitted him for further treatment and evaluation.³ Six months after that, and a year after he was first committed, Williams was back in court and still incompetent. By then, Williams had been held for restorative treatment for a year, the maximum period allowed,⁴ so the State asked the trial court to retain jurisdiction and commit him involuntarily, using the procedure set out in R.C. 2945.39(A)(2). Williams, in turn, filed a motion to dismiss the indictment, alleging that the procedure for involuntary commitment on a pending indictment under R.C. 2945.38, 2945.39 and 2945.401 was punitive in nature, and that it violated Due Process and Equal Protection.⁵ The court denied the motion after oral argument.⁶ The trial court then held the hearing described in R.C. 2945.39(A)(2) and granted the State's motion to retain jurisdiction.⁷

¹ Docket Entry No. 1

² Docket Entry Nos. 8, 12, 15

³ Docket Entry No. 19

⁴ R.C. 2945.38(C)(1)(b)

⁵ Docket Entry No. 21

⁶ Docket Entry No. 45

⁷ Docket Entry No. 50

Williams appealed. The Second District Court of Appeals, one judge dissenting, found that R.C. 2945.39 violates the Equal Protection Clause, Due Process, and various rights guaranteed to a defendant in a criminal case, and is therefore unconstitutional. *State v. Williams*, 179 Ohio App.3d 584, 2008-Ohio-6245, 902 N.E.2d 1042. This Court accepted the State's appeal and stayed the decision of the Court of Appeals.

Argument

Proposition of Law No. I: A commitment under R.C. 2945.39 is civil in nature. The purpose and effect of R.C. 2945.39, which operates in conjunction with 2945.38, 2945.401 and 2945.402, is to protect the public by allowing the involuntary commitment of dangerously mentally-ill individuals whose unrelieved mental incompetence prevents trial on a pending indictment for a violent felony. It is civil in nature and the Constitution does not require the person committed under the statute be given the Constitutional rights afforded to a defendant in a criminal prosecution.

A. Introduction and Summary:

The majority of the court of appeals held that an involuntary commitment under R.C. 2945.39 is criminal, not civil, in nature: “[a]lthough R.C. 2945.39 attempts to accomplish some of the same goals as civil commitment, the commitment procedures of R.C. 2945.39 reflect an overriding intent to confine incompetent defendants who have been charged with serious felonies as if they had been convicted or until they can be tried.” *State v. Williams*, supra at ¶ 49. And so according to the majority, commitment under R.C. 2945.39 is unconstitutional because it is accomplished without affording the same procedural safeguards given a defendant in a criminal prosecution: the right to a jury trial, the right not to be committed except upon proof beyond a reasonable doubt, the

right to a speedy trial, and the right to suppress evidence obtained in violation of the person's constitutional rights. *Id.* at ¶ 37.

But the court of appeals is wrong - The confinement of “mentally unstable individuals who present a danger to the public” is a classic example of non-punitive detention. *Kansas v. Hendricks* (1997), 521 U.S. 346, 363, 117 S.Ct. 2072, 2082, citing *United States v. Salerno* (1987), 481 U.S. 739, 107 S.Ct. 2095. Like the act at issue in *Kansas v. Hendricks*, R.C. 2945.39 does not implicate either of the primary objectives of criminal punishment: retribution or deterrence. It is not retributive because it does not affix culpability for prior criminal conduct, instead using such conduct solely for evidentiary purposes. *Kansas v. Hendricks*, *supra* at 361, 2082. Commitment cannot be meant to serve as a deterrent, since those to whom it applies are unlikely to be deterred by the threat of commitment. *Id.* at 362, 2082. And the commitment ends when the person is no longer mentally ill and subject to involuntary hospitalization by court order.

B. Governing Law:

1. Involuntary Commitment under R.C. 2945.38, 2945.39, 2945.401 and 2945.402: The following discussion of the interplay of the statutes under which a trial court can order and involuntarily commit an individual under R.C. 2945.39 applies to the Due Process and Equal Protection arguments the State will address in the second and third Propositions of law.

R.C. 2945.38(C)(1) allows a court to commit an incompetent defendant charged with certain violent felonies to a course of restorative treatment for up to one year. If, at the end of that year, the defendant has not been restored to competence, the court's

options are these: dismiss the indictment and discharge the defendant, allowing time to begin civil commitment proceedings, or retain jurisdiction over the defendant, which allows the court to commit the defendant involuntarily. R.C. 2945.38(B)(2).

However, a court cannot retain jurisdiction and commit an incompetent defendant under R.C. 2945.39 unless it holds an evidentiary hearing and finds by clear and convincing evidence that the person committed the offense with which he is charged and that he is a mentally ill person subject to hospitalization by court order.⁸ R.C. 2945.39(A)(2).

“Mentally ill person subject to hospitalization” is defined in R.C. 5122.01(B).

A mentally ill person subject to hospitalization is a mentally ill person who, because of the illness:

- Represents a substantial risk of physical harm to himself as shown by evidence of threats of, or attempts at, suicide or serious self-inflicted bodily harm;

or

- Represents a substantial risk of physical harm to others as manifested by evidence of recent homicidal or other violent behavior, evidence of recent threats that place another in reasonable fear of violent behavior and serious physical harm, or other evidence of present dangerousness;

or

- Represents a substantial and immediate risk of serious physical impairment or injury to himself as shown by evidence that he cannot provide for and is not providing for his basic physical needs because of his mental illness and that appropriate provision for those needs cannot be made immediately available in the community;

⁸ The reports submitted to the court while he was committed for treatments do not suggest that Williams is mentally retarded, and Dr. Bergman estimated that his intelligence was in the low-normal to borderline range.

or

- Would benefit from treatment in a hospital for the person's mental illness and is in need of such treatment as shown by evidence of behavior that creates a grave and imminent risk to substantial rights of him or others.

A person subject to hospitalization under this statute must present a substantial risk of physical harm to himself or others at the time of the commitment hearing, and his mental state must be evaluated on the basis of current or recent behaviors as well as prior dangerous propensities. *In re Burton* (1984), 11 Ohio Sjt.3d 147, 464 N.E.2d 530. A totality of the circumstances test is to be used by a court to determine whether an alleged mentally ill person is subject to hospitalization under R.C. 5122.01(B). *Id.* paragraph one of the syllabus.

If the trial court finds by clear and convincing evidence that the defendant committed the crimes charged and is a mentally ill person subject to hospitalization by court order, it must commit him to an appropriate facility, whether that is a hospital operated by the department of mental health, or an appropriate medical or psychiatric facility. R.C. 2945.39(D)(2). In determining the place and nature of commitment, the court must order the least restrictive alternative consistent with public safety and the welfare of the defendant, though in weighing these factors, the court is to give preference to protecting public safety. R.C. 2945.39(D)(1).

During the period of commitment, the treatment facility must provide the court with an update of the defendant's mental status six months after the commitment begins and every two years after that, and the court, upon receiving the report, must hold a

hearing to determine whether the defendant is still a mentally ill person subject to hospitalization by court order under R.C. 5122.01(B) and whether he remains incompetent to stand trial. And the chief clinical officer may request a change in conditions or termination of the commitment at any time, as long as he or she has evaluated the defendant's welfare and the risks to public safety. R.C. 2945.401(C) and (D). The defendant also may ask the court to change the conditions of the commitment. The individual may be granted a conditional release, which is a commitment that allows the person to live in the community, and receive treatment. R.C. 2945.37(A)(6), R.C. 2945.402.

A commitment under R.C. 2945.39 is not open-ended - it terminates whenever one of three things happens: a) the person is no longer a mentally ill person subject to hospitalization by court order; b) the maximum prison term he could have received if convicted of the most serious crime charged has ended; or c) he becomes competent and the court terminates the commitment for trial on the indictment. R.C. 2945.401(J)(1).

There are differences between a commitment under R.C. 2945.39 and an ordinary civil commitment. For example, a commitment through probate court under R.C. 5122.15(C) requires only that it be proved by clear and convincing evidence that the person is mentally ill and subject to hospitalization under R.C. 5122.01(B). The initial commitment under R.C. 5122.15(C) lasts for no longer than 90 days, but can be extended upon application and after a full hearing. If the court continues the commitment, it must hold a full hearing at least every two years and, if requested, every six months. The court may hold a hearing before the expiration of the six-month period if it receives an

application that is supported by the affidavit of an expert attesting that the person is no longer mentally ill and subject to hospitalization. R.C. 5122.15(H).

2. Presumption of Constitutionality: A law enacted by the General Assembly is presumed to be constitutional and will be upheld absent proof beyond a reasonable doubt that the legislation and constitutional provisions are clearly incompatible. See *State v. Cook* (1998), 83 Ohio St.3d 404, 409, 700 N.E.2d 570, 1998-Ohio-291, quoting *State ex rel. Dickman v. Defenbacher* (1955), 164 Ohio St.2d 142, paragraph one of the syllabus. “A regularly enacted statute of Ohio is presumed to be constitutional and is therefore entitled to the benefit of every presumption in favor of its constitutionality.” *Id.* at 147. That presumption of validity cannot be overcome unless it appears that there is a clear conflict between the legislation in question and a particular provision or provisions of the Constitution. *Xenia v. Schmidt* (1920), 101 Ohio St. 437, 130 N.E. 24. Accordingly, when Williams challenged the constitutionality of R.C. 2945.39, his burden was to overcome the strong presumption in favor of the constitutionality of the statute.

3. The intent-effects test: Did the General Assembly intend to punish those committed under R.C. 2945.39? If not, is a commitment under R.C. 2945.39 actually punitive in effect? The Court of Appeals held that R.C. 2945.39 is criminal in nature. The question of whether a statute is civil or criminal for purposes of complying with the demands of the Federal Constitution is a question of federal law. *Seling v. Young* (2001), 531 U.S. 250, 275, 121 S.Ct. 727, 148 L.Ed.2d 734. (Stevens, J., dissenting) When called upon to determine whether statutes imposing additional

obligations on convicted sex offenders violate the Ex Post Facto clause of the United States Constitution, courts have used the “intent-effects” test to first decide whether the statutes at issue are civil or criminal in nature. *State v. Cook*, supra at 415. The United States Supreme Court used the “intent-effects” test in its analysis of a Kansas statute permitting the state to institutionalize sexual predators with mental abnormalities or personality disorders that made it likely the offender would reoffend, in *Kansas v. Hendricks* (1997), 521 U.S. 346, 353-369, 117 S.Ct. 2072, 2081-2085, 138 L.Ed.2d 501, 514-519.

In applying the “intent-effects” test, this court must first determine whether the General Assembly, “in establishing the penalizing mechanism, indicated either expressly or impliedly a preference for one label or the other” and second, where the General Assembly “has indicated an intention to establish a civil penalty, * * * whether the statutory scheme was so punitive either in purpose or effect as to negate that intention.” *State v. Cook*, supra, quoting *United States v. Ward* (1980), 448 U.S. 242, 248-249, 100 S.Ct. 2636, 2641, 65 L.Ed.2d 742, 749.

The Court of Appeals, using the “intent-effects” test, held that the General Assembly intended the statute to punish mentally ill offenders whose mental illness prevented trial on a pending indictment. *State v. Williams*, supra at ¶ 45, 46, 49. It did not address the effects of the statute. The State agrees that the test is appropriate, but disagrees with the court’s conclusion.

C. Argument:

1. **What the Court of Appeals relied on and why it erred:** The majority of the court of appeals held that the commitment procedures set out in R.C. 2945.39 “reflect an overriding intent to confine incompetent defendants who have been charged with serious felonies as if they had been convicted or until they can be tried” and that the law “[suggests] that protecting the public from dangerous mentally ill persons is secondary to punishing those dangerously mentally ill persons who cannot be tried.” ¶ 45, 48.

To support its conclusion that the legislature intended to substitute commitment for punishment, the court relied on the location of the commitment procedure in the criminal code, the absence of any plain statement from the legislature that a commitment under R.C. 2945.39 was civil, and the survival of the criminal indictment during the period of commitment. *State v. Williams*, supra, at ¶ 43-47. But the placement of the commitment procedure in Title 29 does not, by itself, make it punitive in nature⁹ and here the commitment arises directly out of a criminal prosecution, that cannot proceed placing the commitment procedure in Chapter 2945, which generally addresses trials on criminal cases, reflects the circumstances from which the commitment arose – a criminal prosecution – not the legislature’s intent to punish those who cannot be convicted. ¶ 87. The court also noted that the commitment procedure does not apply to those who are mentally ill but who have been convicted of committing a qualifying offense. ¶ 46. But a mentally ill person who has been convicted of a violent felony is subject to the authority of the court that imposes sentence and the department of rehabilitation and correction

who oversees its execution during the period of their sentence. The commitment procedures prescribed in for Chapter 2945 of the Revised Code do not apply to these individuals because the danger they pose to the public, including the prison population, is mitigated by other means. Finally, the court of appeals found that limiting the duration of the commitment to the maximum term the person could have served if convicted of the most serious offense, bears little, if any, relationship to the purposes of civil commitment, “i.e. to confine and treat mentally ill individuals until they are cured.” ¶ 47. But the purpose of the statute is not to *confine* mentally ill individuals until they are cured: first, because a commitment under R.C. 2945.39 does not necessarily result in confinement, and those committed generally have more freedom and rights than prison inmates; and, second, because confining and treating mentally ill persons “until they are cured” is not the purpose of a civil commitment under R.C. 5211.15 or 2945.39. Mental illness is a necessary predicate for commitment under each statute, but it is not sufficient. And, linking the commitment to criminal activity does not make it punitive. *Kansas v. Hendricks*, supra at 361.

2. Commitment under R.C. 2945.39 is not punitive in intent or effect: Did the General Assembly intend to punish mentally ill persons whose intractable mental incompetence prevented trial on a pending indictment for a violent felony? Clearly not. The two primary objectives of criminal punishment are deterrence and retribution,¹⁰ and commitment under R.C. 2945.39 serves neither purpose. Instead, R.C. 2945.39, R.C.

⁹ *State v. Cook*, (1998), 83 Ohio St.3d 404, 700 N.E.2d 570, 1998-Ohio-29

¹⁰ *Kansas v. Hendricks* (1997), 521 U.S. 346, 361, 117 S. Ct. 2072, 2082, 138 L. Ed. 501, 515.

2945.38 and 2945.401 and 2945.402, make plain the legislature's intent to protect the public from those mentally ill persons who are not only subject to hospitalization by court order but who have also committed a serious, violent felony. That statute protects the public welfare by incapacitating mentally ill individuals who are particularly dangerous, and it protects the less dangerous mentally ill who have been committed through the probate court under R.C. 5122.15(B). The clearest expression of this intent is shown in R.C. 2945.39(D)(1), which requires the court to order the least restrictive commitment alternative available that is consistent with public safety and the welfare of the defendant, giving preference to protecting public safety.¹¹

The fact that the commitment, and the court's jurisdiction over the person, ends when he or she is no longer mentally ill and subject to hospitalization by court order shows that the legislature did not intend for commitment under R.C. 2945.39 to be a means to punish those who cannot be convicted. Even if the defendant remains incompetent to stand trial, the commitment terminates when the person no longer qualifies for hospitalization under R.C. 5122.15(C). His commitment lasts only as long as he remains dangerous to himself and others. Thus, a person committed on an indictment charging aggravated murder – a crime for which the penalty is a life sentence and who can therefore be committed for a maximum of life, must be released from the commitment whenever he recovers to the extent that he is no longer mentally ill and

¹¹ Although the Court of Appeals referred several times to what it saw as the general assembly's manifest intent to punish those whose commitments derive from an indictment, the fact is that "commitment" and "confinement" are not synonymous, and the person committed is entitled to

subject to hospitalization by court order under R.C. 5122.15(C). It is true that the commitment must end after a period equal to the maximum term the person could have served in prison if convicted, but that does not make the statute punitive in intent or effect. Instead, it is a reasonable attempt to tie maximum duration of a commitment under R.C. 2945.39(C) to the seriousness of the underlying charge. It also provides a definite date upon which the commitment will end in most cases. Thus, a person who, ten years after being committed after an R.C. 2945.39 hearing on a charge of rape, remains incompetent and mentally ill and subject to hospitalization by court order, may be committed at that time under R.C. 5122.15(C).

Commitment under R.C. 2945.39 is not intended to deter further criminal conduct because the population for whom commitment under the statute are unlikely to possess the ability to tailor their behavior to the requirements of the law simply because there exists a possibility of commitment. Nor does the statute advance the goal of specific deterrence - the conditions of an individual defendant's commitment do not deter him from committing additional violent acts as much as prevent him from doing so while protecting the public and treating his illness. It cannot be said that commitment under R.C. 2945.39 deters the person committed or others from committing violent felonies.

Nor is there any scienter requirement for commitment – the crime alleged in the indictment serves only as evidence of present dangerousness. *State v. Williams*, supra at

¶ 87

have the conditions of the commitment reviewed by the court and changed when his condition warrants it. R.C. 2945.401, 2945.402.

The majority was wrong in attributing to R.C. 2945.39 an overriding intent to punish. The statute, when read in conjunction with R.C. 2945.38, 2945.401, and 2945.402 proves an overriding purpose to protect the public from dangerously mentally ill individuals, while protecting the rights of the persons committed. The protections the majority of the court of appeals would require are rights afforded criminal defendants in a criminal prosecution, which have no application in the commitment procedure at issue here.

Proposition of Law No. II: The involuntary commitment of a defendant under R.C. 2945.39 does not violate the defendant's right to Equal Protection under the United States and Ohio Constitutions.

The Equal Protection Clause guarantees that persons who are similarly situated will be treated similarly. *State Ward* (1999), 130 Ohio App.3d 551, 720 N.E.2d 603. Of course, most laws differentiate in some fashion between classes of persons, and the Equal Protection Clause does not forbid classifications. It simply keeps governmental decision-makers from treating differently persons who are in all relevant respects alike. *State v. Ward*, supra, citing *F.S. Royster Guano Co. v. Virginia* (1920), 253 U.S. 412, 415, 40 S.Ct. 560, 561, 64 L.Ed. 989, 990-991.

A classification that does not involve fundamental rights or proceeds along suspect lines is accorded a strong presumption of validity and does not run afoul of the Equal Protection Clause if there is a rational relationship between the disparity of treatment and some legitimate government interest. involving neither a suspect class. "Generally, disparity in treatment between similarly situated persons is constitutional if it bears some fair relationship to a legitimate public purpose. However, when this difference in

treatment infringes on a fundamental right, the court must determine whether the difference is specifically tailored to serve a compelling governmental interest.” *State v. Bretz* (Dec. 30, 1999), Holmes App. No. 98-001, interior citations omitted.

Involuntary commitment under R.C. 2945.39 is available to confine only those whose propensity for violence has been demonstrated, who are subject to hospitalization by court order under R.C. Chapter 5122, and whose continuing incompetence prevents trial on a pending indictment. By contrast, under R.C. 5122.15(C) a person may be committed civilly if a judge determines, based on clear and convincing evidence, that he or she is a mentally ill person subject to hospitalization under R.C. 5122.01(B). In either case, the commitment ends if the person is no longer mentally ill and subject to hospitalization by court order. Under R.C. 2945.39, the commitment will definitely end no later than the expiration of the time the person could have been imprisoned if convicted; under Chapter 5122, the commitment has no set end-date. Both require that the placement take into account the persons’ treatment needs, although a commitment under R.C. 2945.39 requires the court to consider and give preference to public safety. In both cases, the person is entitled to periodic reviews to determine whether he or she is still mentally ill and subject to hospitalization by court order and, if so, whether the person’s mental status merits a change in conditions or a transfer to a different facility, although in the case of a commitment under R.C. 2945.39, the procedures are more restrictive and require the court to make some determinations that would be made by the chief clinical officer in a regular civil commitment.

To be sure, there are differences between a commitment under R.C. 2945.38 and one under R.C. Chapter 5122. Under R.C. 5122.15(C) a person may be committed civilly if a judge determines, based on clear and convincing evidence, that he or she is a mentally ill person subject to hospitalization under R.C. 5122.01(B). The initial commitment lasts for no longer than 90 days, but can be extended upon application and after a full hearing. If the court continues the commitment, it must hold a full hearing every two years and, if requested, every six months. The court may hold a hearing before the expiration of the six month period upon application supported by affidavits of a psychologist or psychiatrist attesting that the person is no longer mentally ill and subject to hospitalization. R.C. 5122.15(H). However, these differences are justified by the State's legitimate interest in confining those who are mentally ill and dangerous. What's more, the statute is narrowly drawn to accomplish that goal at the same time it protects the rights of the person committed. Allowing those committed through the probate court faster initial review hearings, the right to a placement that does not take public safety into account, fewer restrictions on transfers, and an easier procedure for termination of the commitment does not violate equal protection - it provides an additional layer of protection for the public by ensuring that those individuals who are shown to be particularly dangerous are truly no longer mentally ill persons subject to hospitalization by court order before they are released.

In *Jackson v. Indiana*, (1972), 406 U.S. 715, 92 S.Ct. 1845, the Supreme Court held the mere filing of criminal charges against a person cannot justify providing that person with fewer procedural and substantive protections against indefinite commitment

than the protections generally available to all others facing an involuntary commitment. *Id.*, at 724, 443. Jackson had argued that the mere filing of criminal charges against him was not a sufficient basis to treat him so differently from those citizens of Indiana who were subject to commitment under the State's general civil commitment statutes, which provided a stricter standard for commitment and a more lenient standard for release. Here is what the court said with respect to Jackson's Equal Protection claim:

Consequently, we hold that by subjecting Jackson to a more lenient commitment standard and to a more stringent standard of release than those generally applicable to all others not charged with offenses, and by thus condemning him in effect to permanent institutionalization without the showing required for commitment afforded by §22-1209 or §22-1907 [State statutes governing involuntary commitment of persons not charged with crimes] *Indiana* deprived petitioner of Equal Protection of the laws under the Fourteenth Amendment.

But R.C. 2945.39(A)(2) has a stricter standard, not a more lenient one, for commitment of one found incompetent to stand trial than the standard applied in civil commitment proceedings through the Probate Court. For the court to retain jurisdiction under R.C. 2945.39, not only must there be clear and convincing proof that the person is mentally ill and subject to hospitalization under Chapter 5122 of the Code, there must also be clear and convincing proof that he committed the crime charged. A finding that the defendant committed the crime is a predicate for retaining jurisdiction, but has no significance after that. If the defendant improves to the point that he no longer qualifies for hospitalization under the same standard applied to those committed through the Probate Court, the commitment ends. And even if Thonex Williams never improves, he

must be released after 10 years, a time limitation that is not available to those committed through Probate Court.

As noted, commitment under R.C. 2945.38, 2945.39 and 2945.401 is not indefinite – it ends if the person becomes competent and the case goes to trial, or if he improves to the extent that he is no longer subject to hospitalization by court order, or at the end of the longest period he could have been imprisoned if convicted of the most serious charge. R.C. 2945.39(J).

Persons committed solely under Chapter 5122, by contrast, have no certain termination date for confinement; confinement lasts until the person no longer meets the definition of a mentally ill person subject to hospitalization by court order. Chapter 5122. Ohio has a stricter standard for involuntary commitment of defendants charged with a serious offense who have attained competence after treatment than it applies to those committed civilly, and it promises them release from the commitment no later than a date certain. As a result, the holding in *Jackson v. Indiana*, supra, does not support the idea that Ohio's statute violates Williams' right to Equal Protection.

Williams also complained that his right to Equal Protection is violated because he is not entitled to the assessment of his commitment that R.C. 5122 requires in civil cases and because he cannot be discharged by the chief clinical officer of the hospital or facility to which he was committed but must be released, if at all, by order of the court. But those in Williams' position are protected in other ways: R.C. 2945.39(D)(1) requires the court to order the least restrictive commitment alternative that is consistent with public safety and the welfare of the defendant, giving preference to public safety. R.C.

2945.401(C) requires the institution to report periodically to the court on the defendant's competence, and 2945.401(J)(2)(a) allows a hearing on competence if requested by the chief clinical officer, defense counsel, or others. These differences are justified by the State's interest in restraining those who are not only mentally ill and subject to hospitalization, but who have also committed a serious crime. Cf. *Heller v. Doe* (1993), 509 U.S. 312, 321, 113 S. Ct. 2637, 125 L.Ed.2d 257

Proposition of Law No. III: The involuntary commitment of a defendant under R.C. 2945.39 does not violate the defendant's right to Due Process under the United States and Ohio Constitutions.

From the Court's decision in *Addington v. Texas* (1978), 441 U.S. 418, 99 S.Ct. 1804 and *Kansas v. Hendrick* (1997), 521 U.S. 346, 117 S.Ct. 2072, we know that civil commitment for any purpose constitutes a significant deprivation of liberty that requires due process protections. *Addington v. Texas*, supra, at 425, 1809. But we also know that the State has a legitimate interest in restraining the dangerously mentally ill. *Kansas v. Hendricks*, supra, at 355-356, 2084. The United States Supreme Court has consistently upheld involuntary commitment statutes that detain people who are unable to control their behavior and thereby pose a danger to the public health and safety, provided the confinement takes places pursuant to proper procedures and evidentiary standards. *Kansas v. Hendricks*, supra at 357, 2080, citing *Foucha v. Louisiana* (1992), 504 U.S. 71, 80, 112 S.Ct. 1780. And the Court has consistently sustained civil commitment statutes when they require proof of dangerousness and proof of mental illness or "mental abnormality." *Kansas v. Hendricks*, supra, at 358, 2080. With proper procedural safeguards in place, a State does not violate due process by enacting statutes providing

for the involuntarily confinement of those whose mental illness causes them to present a risk of harm to others.

The procedural safeguards contained in R.C. 2945.38, 2945.39 and 2945.401 ensure that the due process rights of those criminal defendants who are committed because they cannot be restored to competence are honored. R.C. 2945.39(A)(2) prohibits a trial court from retaining jurisdiction over a criminal defendant unless it finds by clear and convincing evidence that the person committed the crime charged and is mentally ill and subject to hospitalization. (Due process requires that the confinement under civil commitment statutes be justified by clear and convincing evidence. *Addington v. Texas*, supra at 432, 1812.) To designate a person as mentally ill and subject to hospitalization, the court must necessarily find that the person poses a danger or risk of harm to himself or others. R.C. 5122.01(B). The court must order the least restrictive commitment consistent with public safety and welfare of the defendant, giving preference to public safety. R.C. 2945.39(D)(1). A defendant committed under R.C. 2945.39 is entitled to treatment while confined, and to periodic reviews of his commitment. And a commitment under R.C. 2945.39 is not open-ended - it terminates whenever one of three things happens: a) the person is no longer a mentally ill person subject to hospitalization by court order; b) the maximum prison term he could have received if convicted of the most serious crime charged has ended; or c) he becomes competent and the court terminates the commitment for trial on the indictment. R.C. 2945.401(J)(1).

In *Kansas v. Hendricks*, supra the Supreme Court upheld a series of State laws that established a procedure for the involuntary and potentially indefinite commitment of “sexually violent predators,” after determining that the existing civil commitment statutes were inadequate to confront the risks posed by these persons. The new statutes applied to those who were scheduled for release from prison on a conviction for a sexually violent offense, those who were charged with such a crime and found incompetent to stand trial, and those who were found not guilty by reason of insanity or because of a mental disease of defect of such a crime. The statutes put the burden of proof on the State and the commitment proceedings included a number of procedural safeguards, for example they required that the conditions of confinement meet constitutional standards for care and treatment, that the person’s status be reviewed periodically, and that the person be released if his condition improved to the extent that the State could no longer satisfy its burden of proof. Hendricks argued, among other things, that the statutes violated due process by allowing him to be confined until he was no longer suffering from the mental abnormality that made him dangerous, but without offering him treatment that would allow him to improve. (No treatment existed for his condition.) The Court rejected his argument: first, the commitment was only potentially indefinite – if he recovered, he would be released; second, the court noted that it had never held that the Constitution prevents a State from civilly detaining those for whom no treatment is available, but who nevertheless pose a danger to others. *Id.*, at 365-366, 2084.

The procedural safeguards contained in R.C. 2945.38, 2945.39 and 2945.401 ensure that the due process rights of those criminal defendants who are committed

because they cannot be restored to competence are honored. R.C. 2945.39(A)(2) prohibits a trial court from retaining jurisdiction over a criminal defendant unless it finds by clear and convincing evidence that the person committed the crime charged and is mentally ill and subject to hospitalization. To designate a person as mentally ill and subject to hospitalization, the court must necessarily find that the person poses a danger or risk of harm to himself or others. R.C. 5122.01(B). The court must order the least restrictive commitment consistent with public safety and welfare of the defendant, giving preference to public safety. R.C. 2945.39(D)(1). A defendant committed under R.C. 2945.39 is entitled to treatment while confined, and to periodic reviews of his commitment. And a commitment under R.C. 2945.39 is not open-ended - it terminates whenever one of three things happens: a) the person is no longer a mentally ill person subject to hospitalization by court order; b) the maximum prison term he could have received if convicted of the most serious crime charged has ended; or c) he becomes competent and the court terminates the commitment for trial on the indictment. R.C. 2945.401(J)(1).

The State has a legitimate interest in restraining a person who, like Williams, is mentally ill, poses a risk or danger to himself or others, and has already committed a serious crime, and R.C. 2945.38, 2945.39 and 2945.401 provide a reasonable procedure for accomplishing that goal.

Neither *Jackson v. Indiana*, *supra* nor *State v. Sullivan*, *infra*, dictates the outcome in this case. In upholding Jackson's Due Process claim, the United States Supreme Court held as follows:

We hold, consequently, that a person charged by a State with a criminal offense who is committed **solely** on account of his incapacity to proceed to trial cannot be held more than the reasonable period of time necessary to determine whether there is a substantial probability that he will attain that capacity in the foreseeable future. If it is determined that this is not the case, then the State must either institute the customary civil commitment proceeding that would be required to commit indefinitely any other citizen or release the defendant. (emphasis added)

When the trial court retained jurisdiction over Thonex Williams and committed him under R.C. 2945.38, 2945.39, and 2945.401, Williams was not committed *solely* on account of his incapacity to proceed to trial; he was held because he was a mentally ill person subject to hospitalization by court order, as that term is defined in R.C. 5122.01(B). If he improved while confined and was no longer subject to commitment under the civil standard, the commitment ends and he will be released. Thus, this part of the holding in *Jackson v. Indiana* does not invalidate the Ohio statutes; Williams will be confined only as long as he is long as he is mentally ill and subject to hospitalization by court order.

In *State v. Sullivan* (1996), 90 Ohio St. 502, 2001-Ohio-6, 739 N.E.2d 788, this Court held that an earlier version of R.C. 2945.38 that required all defendants found incompetent to stand trial to undergo treatment for a set period of time violated due process. The court found that if there was no chance that the defendant would become competent within that time, then the mandatory treatment period bore no reasonable relationship to the purpose of the commitment. *Id.*, 506, 792. In contrast, there is a rational relationship between the purpose of R.C. 2945.39, which is to protect the public welfare by confining the dangerously mentally ill who have committed a violent felony

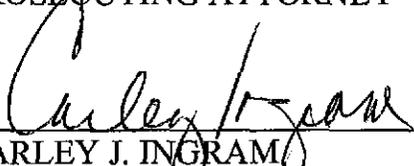
for which they cannot be tried and a requirement that those people be committed until such time as they are no longer a danger to themselves and others, as set out in R.C. 5122.01. There is no due process violation here. Cf. *State v. Bretz*, supra.

Conclusion

Under R.C. 2945.39, a common pleas court can commit to a hospital or other treatment facility a mentally ill person whose unrelieved mental incompetence prevents trial on a pending indictment for a violent felony, but *only if* the court has found by clear and convincing evidence that the person actually committed the crime charged *and* is mentally ill and subject to hospitalization by court order under R.C. Chapter 5122. Such a commitment is punitive in neither intent nor effect, and comports with the Due Process and Equal Protection Clauses of the Constitution. The judgment of the Court of Appeals should be reversed.

Respectfully submitted,

MATHIAS H. HECK, JR.
PROSECUTING ATTORNEY

BY: 

CARLEY J. INGRAM
REG. NO. 0020084

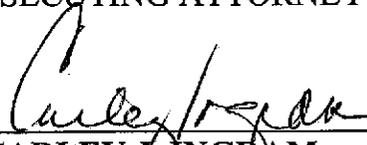
Assistant Prosecuting Attorney
Montgomery County Prosecutor's Office
APPELLATE DIVISION
P.O. Box 972
301 W. Third Street, 5th Floor
Dayton, OH 45422
(937) 225-4117

ATTORNEY FOR STATE OF OHIO,
PLAINTIFF-APPELLEE

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Appellant's Merit Brief was sent by first class on this 22nd day of June, 2009, to Opposing Counsel: Anthony Comunale, One First National Plaza, 130 W. Second Street, Suite 2050, Dayton, OH 45402-1504.

MATHIAS H. HECK, JR.
PROSECUTING ATTORNEY

By: 

CARLEY J. INGRAM

REG. NO. 0020084

Assistant Prosecuting Attorney
APPELLATE DIVISION

APPENDIX

IN THE SUPREME COURT OF OHIO

08-2424

STATE OF OHIO

CASE NO. 08-

Plaintiff-Appellant,

ON APPEAL FROM THE
MONTGOMERY COUNTY COURT
OF APPEALS, SECOND
APPELLATE DISTRICT

vs.

THONEX WILLIAMS

COURT OF APPEALS
CASE NO: 22532

Defendant-Appellee.

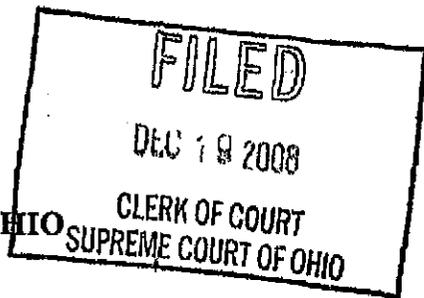
NOTICE OF APPEAL OF APPELLANT, THE STATE OF OHIO

MATHIAS H. HECK, JR.
PROSECUTING ATTORNEY
By **CARLEY J. INGRAM** (COUNSEL OF RECORD)
REG. NO. 0020084
Assistant Prosecuting Attorney
Montgomery County Prosecutor's Office
Appellate Division
P.O. Box 972
301 West Third Street - Suite 500
Dayton, Ohio 45422
(937) 225-4117

COUNSEL FOR APPELLANT, THE STATE OF OHIO

Anthony Comunale(COUNSEL OF RECORD)
One First National Plaza
130 W. Second Street, Suite 2050
Dayton, Ohio 45402-1504

COUNSEL FOR APPELLEE, THONEX WILLIAMS



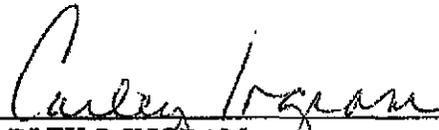
NOTICE OF APPEAL OF APPELLANT, THE STATE OF OHIO

Appellant, the State of Ohio, through the Office of the Prosecuting Attorney for Montgomery County, hereby gives notice of appeal to the Supreme Court of Ohio, from the judgment of the Montgomery County Court of Appeals, Second Appellate District, entered in *State of Ohio v. Thonex Williams*, Case No. 22532, on November 26, 2008.

This felony case raises a substantial constitutional question and is one of public or great general interest.

Respectfully submitted,

MATHIAS H. HECK, JR.
PROSECUTING ATTORNEY

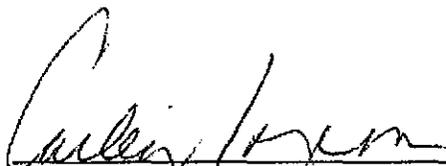
BY  _____

CARLEY J. INGRAM
REG NO. 0020084
Assistant Prosecuting Attorney
APPELLATE DIVISION

COUNSEL FOR APPELLANT,
STATE OF OHIO

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Notice of Appeal was sent by first class mail on this 18 day of December, 2008, to the following: Anthony Comunale, One First National Plaza, 130 W. Second Street, Suite 2050, Dayton, Ohio 45402-1504 and Timothy Young, Ohio Public Defender Commission, 8 East Long Street - 11th Floor, Columbus, Ohio 43215-2998.

 _____

CARLEY J. INGRAM
REG NO. 0020084
Assistant Prosecuting Attorney
APPELLATE DIVISION

FILED
COURT OF APPEALS

2008 NOV 26 AM 8:47

GREGORY A. BRUSH
CLERK OF COURTS
MONTGOMERY CO. OHIO
SS

IN THE COURT OF APPEALS FOR MONTGOMERY COUNTY, OHIO

STATE OF OHIO	:	
Plaintiff-Appellee	:	C.A. CASE NO. 22532
v.	:	T.C. NO. 2005 CR 5174
THONEX WILLIAMS	:	(Criminal appeal from Common Pleas Court)
Defendant-Appellant	:	

OPINION

Rendered on the 26th day of November, 2008.

.....
CARLEY J. INGRAM, Atty. Reg. No. 0020084, Assistant Prosecuting Attorney, 301 W. Third Street, 5th Floor, Dayton, Ohio 45422
Attorney for Plaintiff-Appellee

ANTHONY COMUNALE, Atty. Reg. No. 0062449, 130 W. Second Street, Suite 2050, Dayton, Ohio 45402
Attorney for Defendant-Appellant

.....
DONOVAN, J.

Thonex Williams appeals from a judgment of the Montgomery County Court of Common Pleas, which found that Williams was incompetent to stand trial and unrestorable

to competency within the statutory time limits, retained jurisdiction over him under R.C. 2945.39, and ordered that Williams be committed to the Timothy B. Moritz Forensic Unit of the Columbus Campus of Twin Valley Behavioral Healthcare ("Twin Valley"). Williams challenges the trial court's retention of jurisdiction, arguing that R.C. 2945.39 is unconstitutional. For the following reasons, the trial court's judgment will be REVERSED and the matter REMANDED for further proceedings.

I.

On December 19, 2005, Williams was indicted for one count of possession of crack cocaine, two counts of gross sexual imposition, one count of unlawful sexual conduct with a minor, and one count of rape. Williams' counsel promptly requested an evaluation of Williams' current mental condition and of his mental condition at the time of the offenses. On the same date, Williams entered a written plea of not guilty by reason of insanity.

Williams was examined by the Forensic Psychiatry Center for Western Ohio, and Williams subsequently stipulated to the contents of the psychiatric report. On March 1, 2006, the trial court found that Williams was incompetent to stand trial and that there was a substantial probability that he could be restored to competency within the one-year statutory time limit set forth in R.C. 2945.38. The court committed Williams to Twin Valley for restorative treatment, including appropriate medication. After a six month review, Williams remained incompetent to stand trial and was found to be a mentally ill person subject to hospitalization by court order. Because the maximum time for treatment had not expired, the court ordered that Williams receive continued treatment at Twin Valley.

On February 15, 2007, Twin Valley submitted an evaluation summary report indicating that Williams remained incompetent to stand trial and that, despite one year of

efforts at restoration, Williams "is not restorable within the statute of limitations." At a hearing on February 26, 2007, the State requested that the trial court retain jurisdiction over Williams under R.C. 2945.39. Williams orally requested and subsequently filed a motion to dismiss the indictment, arguing that R.C. 2945.39 violated his rights to equal protection and due process. The trial court overruled Williams' motion to dismiss.

In November 2007, the trial court held a hearing to determine whether to retain jurisdiction over Williams. The state focused on the charge of rape, a first degree felony. The court found by clear and convincing evidence that Williams committed the offense for which he was indicted (rape), that Williams was a mentally ill person subject to hospitalization by court order, that Williams was incompetent to stand trial, and that the statutory time limit for restoration treatment had expired. The court ordered Williams to remain hospitalized at Twin Valley.

Williams appeals, raising three assignments of error, each of which challenges the constitutionality of R.C. 2945.39.

II.

We begin by reviewing the commitment procedures at issue in this case.

A. Retention of jurisdiction by the criminal court

The pre-trial commitment of an incompetent criminal defendant is governed by R.C. 2945.38, R.C. 2945.39, R.C. 2945.401, and R.C. 2945.402. This case focuses on R.C. 2945.39, which addresses the retention of jurisdiction by the trial court to commit an incompetent defendant who is not restorable to competency within the statutory time limitations.

R.C. 2945.39 applies only to certain felony defendants. In order to fall within the

scope of R.C. 2945.39, the defendant's most serious charge must be either: (1) aggravated murder, murder, or an offense of violence for which a sentence of death or life imprisonment may be imposed; (2) an offense of violence that is a felony of the first or second degree;¹ or (3) a conspiracy to commit, an attempt to commit, or complicity in the commission of one of the above-named offenses. See R.C. 2945.38(C)(1).

Under R.C. 2945.38, a trial court may commit, for up to one year, a defendant charged with one of these serious felony offenses who has been found to be incompetent to stand trial, provided that there is a substantial probability that he will become competent to stand trial within one year with a course of treatment. If there is no substantial probability that the defendant will become competent to stand trial within one year, or if at the end of one year of restorative treatment the defendant has not been restored to competency, the trial court has two options. *Id.* First, the court or the prosecutor may seek civil commitment of the defendant through the probate court. Second, the court may retain jurisdiction over the defendant under R.C. 2945.39 if the court finds, by clear and convincing evidence, both that (1) the defendant is a mentally ill person subject to hospitalization by court order or is a mentally retarded person subject to institutionalization by court order and (2) he committed the offense with which he was charged. R.C.

¹An "offense of violence" is defined in R.C. 2901.01(A)(9). An offense of violence that is a first or second degree felony includes violations of R.C. 2903.01 (aggravated murder); R.C. 2903.02 (murder); R.C. 2903.03 (voluntary manslaughter); R.C. 2903.04(A) (involuntary manslaughter); R.C. 2903.11 (felonious assault), R.C. 2903.15 (permitting child abuse which results in a death); R.C. 2905.01 (kidnapping); R.C. 2907.02 (rape); R.C. 2909.02 (aggravated arson); R.C. 2909.24 (terrorism); R.C. 2911.01 (aggravated robbery); R.C. 29011.02(A)(1) and (2) (robbery); R.C. 2911.11 (aggravated burglary); R.C. 2911.12(A)(1) and (2); R.C. 2921.34 (escape); R.C. 2923.161 (improperly discharging a firearm at or into a habitation); and R.C. 2919.22(B)(1) (endangering children).

2945.39(A)(2).

The phrase “mentally ill person subject to hospitalization by court order” means “a mentally ill person who, because of the person's illness:

“(1) Represents a substantial risk of physical harm to self as manifested by evidence of threats of, or attempts at, suicide or serious self-inflicted bodily harm;

“(2) Represents a substantial risk of physical harm to others as manifested by evidence of recent homicidal or other violent behavior, evidence of recent threats that place another in reasonable fear of violent behavior and serious physical harm, or other evidence of present dangerousness;

“(3) Represents a substantial and immediate risk of serious physical impairment or injury to self as manifested by evidence that the person is unable to provide for and is not providing for the person's basic physical needs because of the person's mental illness and that appropriate provision for those needs cannot be made immediately available in the community; or

“(4) Would benefit from treatment in a hospital for the person's mental illness and is in need of such treatment as manifested by evidence of behavior that creates a grave and imminent risk to substantial rights of others or the person.” R.C. 5122.01(B).

Because Williams was alleged to be a mentally ill person, not mentally retarded person, we will address only the requirements for mentally ill persons. Likewise, our discussion of civil commitment through the probate court, *infra*, will address only R.C. Chapter 5122, which concerns the mentally ill.

If the trial court fails to make both of the required findings under R.C. 2945.39(A)(2) by clear and convincing evidence (or if the defendant has been charged with a

misdemeanor or a felony that does not fall under R.C. 2945.38(C)(1)), the trial court must dismiss the indictment, information or complaint against the defendant. R.C. 2945.39(C). At that juncture, the defendant would be discharged unless the prosecutor sought commitment through the probate court under R.C. Chapter 5122 or 5123.

If the trial court determines that it will retain jurisdiction over the defendant under R.C. 2945.39, the trial court must commit the defendant to "a hospital operated by the department of mental health, a facility operated by the department of mental retardation and developmental disabilities, or another medical or psychiatric facility, as appropriate."

R.C. 2945.39(D)(1). 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, giving preference to protecting public safety. R.C. 2945.39(D)(1).

All changes to commitment, including termination of commitment, must be made by court order. R.C. 2945.401(B).

The hospital must report periodically to the trial court whether the defendant remains a mentally ill person subject to hospitalization by court order and whether he remains incompetent to stand trial. R.C. 2945.401(C). The reports must be made after six months and every two years thereafter. *Id.* The court must hold a hearing on continued commitment within 30 days of the report. *Id.* If more than six months have passed since the last hearing, the defendant may request a hearing on a change in the conditions of confinement. *Id.* Hearings are open to the public. R.C. 2945.401(F), incorporating R.C. 2945.40(D).

The chief clinical officer may recommend less restrictive confinement or termination

of commitment. R.C. 2945.401(D). If less restrictive confinement is recommended, the prosecutor is given an opportunity to request a hearing on the recommendation. R.C. 2945.401(D)(1)(a). If termination is recommended, the trial court and a local forensic center must be notified. R.C. 2945.401(D)(1)(b). The local forensic center must also evaluate the defendant and provide a report. *Id.* If the local forensic center disagrees with the recommendation, the chief clinical officer, after consideration of the forensic center's decision, shall either withdraw, proceed with, or modify and proceed with the recommendation. R.C. 2945.401(D)(1)(b)(i). The prosecutor may also seek an independent expert evaluation of the defendant's mental condition. R.C. 2945.401(D)(1)(c). The trial court may either approve, disapprove or modify the chief clinical officer's recommendation. R.C. 2945.401(I).

The commitment of a defendant finally terminates (1) when the court determines he is no longer a mentally ill person subject to hospitalization by court order, (2) upon the expiration of "the maximum prison term or term of imprisonment that the defendant or person could have received if the defendant or person had been convicted of the most serious offense with which the defendant or person is charged," or (3) the court determines he is competent to stand trial and is no longer a mentally ill person subject to hospitalization by court order. R.C. 2945.401(J).

If the defendant's commitment is terminated because the maximum period of confinement based on his offense has expired, the prosecutor may then seek civil commitment through the probate court. R.C. 2945.401(A).

B. Civil commitment through the probate court

Civil commitment of a mentally ill person through the probate court is governed by

R.C. Chapter 5122.

Under R.C. Chapter 5122, a person may be involuntarily committed if, after a full hearing, the person is found by clear and convincing evidence to be a mentally ill person subject to hospitalization by court order, as defined by R.C. 5122.01(B). R.C. 5122.15. Full hearings under R.C. 5122.15 are closed to the public, unless requested by defendant's counsel.

Initially, the court may commit the individual for a period not to exceed ninety days. Commitment shall be at (1) a hospital operated by the department of mental health if the respondent is committed pursuant to section 5139.08 of the Revised Code (dealing with children in the custody of the Department of Youth Services); (2) a nonpublic hospital; (3) the veterans' administration or other agency of the United States government; (4) a board of alcohol, drug addiction, and mental health services or agency the board designates; (5) private psychiatric or psychological care and treatment; or (6) any other suitable facility or person consistent with the diagnosis, prognosis, and treatment needs of the respondent. R.C. 5122.15(C). Placement should be at the least restrictive alternative available and consistent with treatment goals. R.C. 5122.15(E).

Continued commitment may be sought after the initial ninety-day period. R.C. 5122.15(H). The probate court must hold a hearing on the petition for continued commitment and hold additional hearings at least every two years thereafter. If six months have passed since the last hearing, the individual held may request a hearing on continued commitment. *Id.*

Before an involuntary patient may be transferred to a more restrictive setting, the chief clinical officer must file a motion with the court requesting the court to amend its order

of placement. R.C. 5122.20.

The chief clinical officer must examine the patient at least every thirty days. R.C. 5122.21(A). If the conditions justifying involuntary commitment no longer apply, the chief clinical officer may discharge the patient; no court approval is required. R.C. 5122.21(B).

III.

Upon review of R.C. 2945.39, the trial court found that R.C. 2945.39 was constitutional. The trial court found that the statute sought "to accommodate the need of society to be protected from criminal defendants who are deemed to be a danger to themselves and/or society, provided that the person is subject to hospitalization by court order or *** institutionalization by court order." Although the court recognized that the finding that the defendant committed the offense "smacks of an adjudication on the merits of the criminal indictment," it held that the finding served two purposes: (1) to allow the defendant to attack the sufficiency of the indictment and argue defenses which exonerate him, and (2) to provide a second level of review, beyond the criminal indictment, that the defendant is in fact a danger to himself and/or society.

The trial court rejected Williams' argument that the "clear and convincing" standard of proof violated his constitutional rights. It concluded that the standard "is not so much a lessening of the criminal standard, as it is a consistency with the commonly accepted civil commitment procedure in criminal cases and in cases in which commitment is sought of those not criminally charged." The court also concluded that the maximum length of confinement "does not so much indicate the punitive nature of the commitment, but rather the extent to which the individual and society are endangered by him." The court further stated:

"[U]nder Revised Code §2945.401, should the court retain jurisdiction for this longer period of time, the statute permits changes of confinement and accounts for changes in conditions, including termination of defendant's commitment if he no longer meets the §2945.39(A)(2)(b) criterion. The Court finds that the scheme adopted in §2945.39 is less a denigration of the constitutional rights of the criminally accused as it is a transfer of authority for ordering civil commitment from the probate court to the criminal court for purposes of determining the danger of such Defendant to himself and to the public for purposes of civil commitment, in this case of persons charged with criminal offenses."

On appeal, Williams claims that the hearing by which the court retained jurisdiction under R.C. 2945.39 was conducted in an unconstitutional manner and that R.C. 2945.39 violates his rights to equal protection and due process. We will address these issues in an order that facilitates our analysis.

Before turning to the issues raised, we note that statutes enjoy a strong presumption of constitutionality. *State v. Cook*, 83 Ohio St.3d 404, 409, 1998-Ohio-291, 700 N.E.2d 570. "An enactment of the General Assembly is presumed to be constitutional, and before a court may declare it unconstitutional it must appear beyond a reasonable doubt that the legislation and constitutional provisions are clearly incompatible." *Id.*, quoting *State ex rel. Dickman v. Defenbacher* (1955), 164 Ohio St. 142, 57 O.O. 134, 128 N.E.2d 59, paragraph one of the syllabus.

IV.

We begin with Williams' third assignment of error, which states:

"PROCEEDINGS UNDER [R.C.] 2945.39 VIOLATE BOTH APPELLANT'S EQUAL PROTECTION AND DUE PROCESS RIGHTS."

In his third assignment of error, Williams claims that the trial court's proceedings under R.C. 2945.39 were unconstitutional because he was not afforded the constitutional protections that defendants are normally given in a criminal case. These protections include the rights to effective assistance of counsel, proof beyond a reasonable doubt, speedy trial, jury trial, suppression of evidence, and protection against cruel and unusual punishment. The State responds that R.C. 2945.39 imposes civil commitment, and the rights afforded to criminal defendants in a criminal prosecution do not apply.

Whether a statute is criminal or civil in nature is a matter of statutory interpretation. *State v. Cook*, 83 Ohio St.3d 404, 1998-Ohio-291, 700 N.E.2d 570. The Ohio Supreme Court has adopted an intent-effects test for delineating between criminal and civil statutes. *Id.* "In applying the intent-effects test, this court must first determine whether the General Assembly, 'in establishing the penalizing mechanism, indicated either expressly or impliedly a preference for one label or the other' and second, where the General Assembly 'has indicated an intention to establish a civil penalty, * * * whether the statutory scheme was so punitive either in purpose or effect as to negate that intention.'" *Id.* at 415, quoting *United States v. Ward* (1980), 448 U.S. 242, 248-249, 100 S.Ct. 2636, 65 L.Ed.2d 742.

As noted in *Cook*, the United States Supreme Court applied the intent-effects test in *Kansas v. Hendricks*, 521 U.S. 346, 117 S.Ct. 2072, 138 L.Ed.2d 501. In that case, the Court reviewed whether Kansas' Sexually Violent Predator Act constituted criminal proceedings and whether involuntary commitment under the Act was punitive. The Act established procedures for the civil commitment of persons who, due to a "mental abnormality" or a "personality disorder," were likely to engage in "predatory acts of sexual violence." *Id.* at 350, citing Kan. Stat. Ann. § 52-29a01 et seq. A sexually violent predator

was defined as “any person who has been convicted of or charged with a sexually violent offense and who suffers from a mental abnormality or personality disorder which makes the person likely to engage in the predatory acts of sexual violence.” Hendricks was incarcerated for a sexually violent offense and was slated for release shortly after the Act took effect. Hendricks argued, in part, that his commitment under the Act violated the Double Jeopardy Clause and the Constitution’s ban on ex post facto laws. He asserted that the Act established criminal proceedings and, consequently, confinement under the Act was punitive.

In rejecting Hendricks’ claim that the Kansas statute was criminal in nature, the Supreme Court first noted that the Kansas legislature intended to create civil proceedings as evidenced by the Act’s placement within the Kansas probate code, not the criminal code. Second, the Court found that the Act did not implicate either of the “primary objectives of criminal punishment: retribution or deterrence.” The Court concluded that the Act was not retributive because it did not “affix culpability for prior criminal conduct” and, instead, used such conduct only for evidentiary purposes – either to demonstrate that a “mental abnormality” existed or to support a finding of future dangerousness. The Court further noted that the Act did not make a criminal conviction a prerequisite for commitment in that persons who had been absolved of criminal responsibility may nonetheless be subject to confinement. Third, the Court stated that, unlike a criminal statute, no finding of scienter was required to commit an individual who was found to be a sexually violent predator. Nor did the Kansas legislature intend for the Act to act as a deterrent. The Supreme Court rejected the contention that the potential for indefinite commitment and lack of available treatment rendered the confinement punitive. The Court reasoned: “If

detention for the purpose of protecting the community from harm *necessarily* constituted punishment, then all involuntary civil commitments would have to be considered punishment. We have never so held.” *Id.* at 363 (emphasis sic.) The Court concluded:

“Where the State has ‘disavowed any punitive intent’; limited confinement to a small segment of particularly dangerous individuals; provided strict procedural safeguards; directed that confined persons be segregated from the general prison population and afforded the same status as others who have been civilly committed; recommended treatment if such is possible; and permitted immediate release upon a showing that the individual is no longer dangerous or mentally impaired, we cannot say that it acted with punitive intent. We therefore hold that the Act does not establish criminal proceedings and that involuntary confinement pursuant to the Act is not punitive.” *Id.* at 368-69.

We find *Hendricks* to be distinguishable.

The General Assembly did not articulate its intent in enacting R.C. 2945.39. Contrast R.C. 2950.02(A), Ohio’s sex offender registration statute, which makes findings and states the legislature’s intent. Rather, we must glean the legislative purpose from the nature of its provisions. Unlike the Kansas statute, R.C. 2945.39 is part of the penal code. Although the legislature’s placement of R.C. 2945.39’s commitment procedure in the criminal code rather than the probate code is not dispositive, see *Cook*, *supra* (finding that Ohio’s sexual offender registration statute, which is part of the criminal code, is civil in nature), the statute does not indicate that it has a civil purpose despite its placement in the criminal code, and its language reveals both criminal and civil purposes.

Through R.C. 2945.39, the General Assembly chose to provide a separate commitment procedure as part of the underlying criminal action. The determination

whether the court should retain jurisdiction, the placement of the defendant in a treatment facility, changes to the defendant's placement, review hearings on the defendant's mental status, and the termination of the defendant's commitment are all made by the trial court as part of the ongoing criminal case.

To be sure, one purpose of confinement under R.C. 2945.39 is to protect the public from individuals who may be particularly dangerous as evidenced by the offenses with which they were charged, a legitimate civil goal. However, the commitment procedures in R.C. 2945.39 apply only to defendants who likely committed the offenses for which they are charged yet are incompetent to stand trial and cannot be punished through the criminal justice system. Unlike the statutes in *Hendricks* and *Cook*, R.C. 2945.39 does not cover mentally ill individuals who have been convicted of the same offenses, thus suggesting that protecting the public from dangerous mentally ill persons is secondary to punishing those dangerous mentally ill persons who cannot be tried.

Consistent with that approach, the criminal indictments against the incompetent defendants confined under R.C. 2945.39 remain pending, unlike the indictments against incompetent criminal defendants who are referred to the probate court for civil commitment. For incompetent defendants held under R.C. 2945.39, periodic reviews must include an opinion as to whether the defendant remains incompetent to stand trial, R.C. 2945.401(C), and if after a hearing the defendant is found to be competent to stand trial, the defendant may be tried for the offenses. Thus, an incompetent defendant's commitment under R.C. 2945.39 is not solely to restrain and provide treatment for dangerous mentally ill defendants, but also to confine the defendant as part of the pending underlying criminal action in the event that the defendant regains competency to be tried.

Finally, the criminal nature of an incompetent defendant's confinement under R.C. 2945.39 is demonstrated by linking the maximum length of detention under R.C. 2945.39 to the maximum criminal sentence that the defendant could have received if convicted of the most serious offense with which he was charged. Although a defendant may be released prior to that date if the trial court determines that he is no longer a mentally ill person subject to hospitalization by court order, the defendant's commitment must be terminated upon reaching the length of the maximum sentence regardless of whether the defendant remains a dangerous mentally ill person subject to hospitalization by court order. Thus, the maximum length of confinement under R.C. 2945.39 bears little, if any, relationship to the purposes of civil commitment, i.e., to confine and treat mentally ill individuals until they are cured. Moreover, by creating a maximum length of confinement based on the criminal penalty, a defendant's charged offense is not used solely as evidence of the defendant's dangerousness or mental illness for purposes of determining whether commitment is appropriate.

Tellingly, if an incompetent defendant is released due to the expiration of the maximum commitment period under R.C. 2945.39, the prosecutor may then seek civil commitment through the probate court. Thus, the statutory scheme strongly suggests that the commitment procedures under R.C. Chapter 5122 are adequate to address society's interest in confining dangerous mentally ill persons and that the prior commitment under R.C. 2945.39 was largely punitive.

Accordingly, although R.C. 2945.39 attempts to accomplish some of the same goals as civil commitment, the commitment procedures of R.C. 2945.39 reflect an overriding intent to confine incompetent defendants who have been charged with serious felonies as

if they had been convicted or until they can be tried. Accordingly, we conclude that R.C. 2945.39 is criminal, not civil, in nature. Because of the criminal nature of R.C. 2945.39, Williams was entitled to the same protections afforded a criminal defendant during his hearing under R.C. 2945.39.

The third assignment of error is sustained.

V.

Williams' first assignment of error states:

"THE TRIAL COURT'S DECISION AND OHIO REVISED CODE SECTION 2945.39 VIOLATED APPELLANT'S EQUAL PROTECTION RIGHTS AS AFFORDED BY THE UNITED STATES AND THE OHIO CONSTITUTIONS."

In his first assignment of error, Williams claims that R.C. 2945.39 denies him the equal protection of the laws, because the commitment procedures under R.C. 2945.39 differ significantly from the civil commitment procedures set forth in R.C. Chapter 5122.

The constitutional guarantee of equal protection requires that laws operate equally upon persons who are alike in all relevant respects. See *McCrone v. Bank One Corp.*, 107 Ohio St.3d 272, 2005-Ohio-6505, 839 N.E.2d 1, ¶20. When suspect classes are not involved, the equal protection clause permits class distinctions in legislation if the distinctions bear some rational relationship to a legitimate government objective. *State ex rel. Vana v. Maple Hts. City Council* (1990), 54 Ohio St.3d 91, 92, 561 N.E.2d 909, 911, citing *Clements v. Fashing* (1982), 457 U.S. 957, 963, 102 S.Ct. 2836, 2843-2844, 73 L.Ed.2d 508. "Under rational basis scrutiny, legislative distinctions are invalid only if they bear no relation to the state's goals, and no ground can be conceived to justify them." *State v. Harding*, Montgomery App. No. 20801, 2006-Ohio-481, 2006 WL 267323, ¶71,

citing *Fabrey v. McDonald Village Police Department* (1994), 70 Ohio St.3d 351, 353, 639 N.E.2d 31.

In this case, Williams claims that the procedures and standards under R.C. 2945.39 differ significantly from those found in the civil commitment statutes. First, he notes that R.C. 2945.39 requires an additional threshold determination, by clear and convincing evidence, that the incompetent person committed the offense for which he had been accused. Second, Williams states that the procedures for discharge under R.C. 2945.39 are more onerous. Williams asserts that the presence of an indictment against a mentally ill person is inadequate to justify these different commitment procedures.

In response, the State argues that R.C. 2945.39(A)(2) has a stricter standard, not a more lenient one, for commitment of a person found incompetent to stand trial than the standard civil commitment statute. The State points out that commitment under R.C. 2945.39 ends when the individual no longer qualifies for hospitalization under the same standard applied in the standard civil commitment statute and that, unlike the civil commitment statute, which has no maximum period of confinement, commitment under R.C. 2945.39 is limited to the maximum prison term that the defendant could have received if the defendant had been convicted of the most serious offense with which he was charged. Although the State acknowledges Williams' argument that he cannot be discharged by the chief clinical officer, the State asserts that he is protected in other ways, such as by the requirements that he be placed in the least restrictive commitment alternative consistent with public safety, that the institution report periodically to the court, and by allowing hearings on the defendant's competency upon request.

In support of his assertion that R.C. 2945.39 violates his right to equal protection,

Williams relies primarily upon *Jackson v. Indiana* (1972), 406 U.S. 715, 92 S.Ct. 1845, 32 L.Ed.2d 435. In that case, Jackson was a mentally-defective deaf mute with the mental level of a pre-school child and limited communication skills. The trial court had instituted competency proceedings and determined that Jackson "lack[ed] comprehension sufficient to make his defense." Jackson was committed to the Department of Mental Health until he "was sane." On appeal before the United States Supreme Court, Jackson argued, inter alia, that his commitment under Indiana's statute deprived him of equal protection and violated his right to due process. The United States Supreme Court agreed with both contentions.

Addressing Jackson's equal protection argument, the Court began by noting that it had previously ruled that a criminal conviction and imposition of sentence "are insufficient to justify less procedural and substantive protection against indefinite commitment than that generally available to all others." *Id.* at 724, citing *Baxstrom v. Herold* (1966), 383 U.S. 107, 86 S.Ct. 760, 15 L.Ed.2d 620. Turning to Indiana's various commitment statutes, the Court noted that the procedures were substantially similar – they all provided notice; examination by two doctors; a full judicial hearing with the same rights to counsel, to introduce evidence, and to cross-examine witnesses; a determination by the court alone; and appellate review. The Supreme Court found significant, however, that the State had a different, more lenient standard to commit Jackson and that the circumstances justifying his release were substantially different. The Court stated that it could not "conclude that pending criminal charges provide a greater justification for different treatment than conviction and sentence." It thus held that "by subjecting Jackson to a more lenient commitment standard and to a more stringent standard of release than those generally

applicable to all others not charged with offenses, and by thus condemning him in effect to permanent institutionalization without the showing required for commitment or the opportunity for release afforded by § 22-209 or 22-1907, Indiana deprived [Jackson] of equal protection of the laws under the Fourteenth Amendment.”

In *Baxstrom*, cited in *Jackson*, the Supreme Court had addressed whether an individual was denied equal protection when he continued to be held at the state hospital for male criminals who were declared insane while serving their sentences, even though he had completed his criminal sentence. The Court held that Baxstrom was denied equal protection by New York's statutory procedure under which a person may be civilly committed at the expiration of his penal sentence without the jury review available to all other persons civilly committed in New York. The Court reasoned: "Classification of mentally ill persons as either insane or dangerously insane of course may be a reasonable distinction for purposes of determining the type of custodial or medical care to be given, but it has no relevance whatever in the context of the opportunity to show whether a person is mentally ill at all. For purposes of granting judicial review before a jury of the question whether a person is mentally ill and in need of institutionalization, there is no conceivable basis for distinguishing the commitment of a person who is nearing the end of a penal term from all other civil commitments." *Id.* at 111-12.

The Supreme Court further held that Baxstrom was denied equal protection when he was not afforded the same procedures for determining the hospital to which he was committed. Under New York law, individuals generally could be civilly committed to hospitals maintained by the Department of Correction only after judicial proceedings had been held in which it was determined that the person was so dangerously mentally ill that

his presence in a civil hospital was dangerous to the safety of other patients or employees or to the community. Those, like Baxstrom, who were committed upon the expiration of their criminal sentence, could be committed at such a hospital if the judge determined that the person "may require care and treatment in an institution for the mentally ill." The Court noted that commitment to a hospital run by the Department of Corrections was more restrictive than commitment to hospital run by the Department of Mental Hygiene.

In concluding that Baxstrom's equal protection rights had been violated by the different standard for placing Baxstrom at a state hospital, the Supreme Court rejected the argument that it was reasonable to classify persons in Baxstrom's class together with those found to be "dangerously insane" since such persons were not only insane but had proven criminal tendencies as shown by their past criminal records. The Court stated: "The capriciousness of the classification employed by the State is thrown sharply into focus by the fact that the full benefit of a judicial hearing to determine dangerous tendencies is withheld only in the case of civil commitment of one awaiting expiration of penal sentence. A person with a past criminal record is presently entitled to a hearing on the question whether he is dangerously mentally ill so long as he is not in prison at the time civil commitment proceedings are instituted. Given this distinction, all semblance of rationality of the classification, purportedly based upon criminal propensities, disappears."

We read *Jackson* and *Baxstrom* to hold that individuals who are civilly committed must be afforded the same procedural and substantive protections, regardless of whether they are incompetent to stand trial, presently incarcerated, or have no criminal history. However, committees may be subjected to different types of custodial or medical care based upon medical need or dangerousness.

Turning to the statutes before us, both R.C. 2945.39 and R.C. Chapter 5122 concern the commitment of individuals who are mentally ill persons subject to hospitalization by court order. Compare R.C. 2945.39 with R.C. 5122.15. In that respect, both commitment schemes concern individuals who have been found to be dangerous to themselves or to others. Moreover, R.C. 2945.39 and R.C. Chapter 5122 use the same standard for determining whether a person is a mentally ill person subject to hospitalization by court order. R.C. 2945.39, however, requires the court to make an additional determination that the defendant committed the offense with which he was charged. Because R.C. 2945.39 imposes an additional finding in order to commit an individual under that statute, we agree with the State that R.C. 2945.39(A)(2) has a stricter, not a more lenient, standard for the court to determine whether an incompetent defendant should be committed. Accordingly, the portion of R.C. 2945.39 that sets forth the standard for determining whether the incompetent defendant is subject to commitment does not violate an incompetent defendant's equal protection rights.

As argued by Williams, there are substantial differences between R.C. 2945.39 and R.C. Chapter 5122 in the nature of the commitment and the release of individuals. As detailed above, commitment through the probate court involves a shorter period of commitment prior to the first review hearing, the placement is based on the least restrictive alternative without any emphasis on public safety, and the termination of commitment is determined solely by the chief clinical officer. Commitment under R.C. 2945.39 is substantially more restrictive, there are significantly more procedures for transferring the defendant to a less restrictive commitment, and termination of commitment involves a review by the local forensic center and court approval.

Although substantial differences exist, the differences result in a violation of Williams' equal protection rights only if there is no rational relationship to a legitimate government objective. The State asserts that "[t]hese differences are justified by the State's interest in restraining those who are not only mentally ill and subject to hospitalization, but who have also committed a serious crime."

We agree with the State that the State has an interest in confining individuals who are mentally ill and dangerous. The State may differentiate between mentally ill persons based on a showing that certain individuals pose a greater danger. To that end, a determination that an individual has already committed a serious offense of violence may be probative as to that individual's dangerousness. However, R.C. 2945.39 – as with the statute in *Baxstrom* – applies only to individuals who have been accused of a serious offense of violence. It does not apply to individuals who have been convicted of the same offense or have a history of committing that offense but are not under indictment. In that respect, R.C. 2945.39 cannot reasonably effectuate the goal of providing more restrictive commitment to those who have committed dangerous crimes.

Finally, we see no rational basis for the substantially different procedures concerning termination of commitment. Under the civil commitment scheme, the chief clinical officer may discharge a patient upon finding that the individual is no longer a mentally ill person subject to hospitalization by court order. (If the patient is under indictment, a sentence of imprisonment, a community control sanction, a post-release control sanction, or on parole, the chief clinical officer may discharge the patient only after giving ten days written notice of his intent to discharge to the court having criminal jurisdiction over the patient.) Unlike the multi-faceted procedures of R.C. 2945.401, no

court authorization is required for discharge under R.C. Chapter 5122. In our view, once a person has been determined no longer to be a mentally ill person subject to hospitalization by court order, the State has no interest in continuing the person's commitment. Because both R.C. 2945.39 and R.C. Chapter 5122 concern persons who were deemed dangerous to themselves or to others, we see no reasonable basis for providing more onerous procedures, with the attendant delay, for terminating the confinement of individuals under indictment for serious felony offenses, and these procedures are contrary to *Jackson*.

The first assignment of error is sustained.

VI.

Williams' second assignment of error states:

"THE TRIAL COURT'S DECISION AND OHIO REVISED CODE SECTION 2945.39 VIOLATED APPELLANT'S DUE PROCESS RIGHTS AS AFFORDED BY THE UNITED STATES AND THE OHIO CONSTITUTIONS."

In Williams' second assignment of error, he claims that his commitment by the criminal court under R.C. 2945.39 violates his right to due process because the retention of the criminal indictment and the length of the involuntary commitment are not reasonably related to the purpose for which he was committed.

In *Jackson*, the United States Supreme Court held that the indefinite commitment of a defendant solely on account of his incompetency to stand trial violated the Due Process Clause. 406 U.S. at 731. In so holding, the Court stated that, without a finding of dangerousness, an individual cannot be indefinitely committed. "At the least, due process requires that the nature and duration of commitment bear some reasonable

relationship to the purpose for which the individual is committed.” *Id.* at 738. The Court thus held:

“[A] person charged by a State with a criminal offense who is committed solely on account of his incapacity to proceed to trial cannot be held more than the reasonable period of time necessary to determine whether there is a substantial probability that he will attain that capacity in the foreseeable future. If it is determined that this is not the case, then the State must either institute the customary civil commitment proceeding that would be required to commit indefinitely any other citizen, or release the defendant. Furthermore, even if it is determined that the defendant probably soon will be able to stand trial, his continued commitment must be justified by progress toward that goal.” *Id.* at 738.

In accord with *Jackson*, the Supreme Court of Ohio, in the context of a petition for a writ a habeas corpus, held that an individual who had been held for eleven years solely because he was incompetent to stand trial was denied due process and equal protection. *Burton v. Reshetylo* (1974), 38 Ohio St.2d 35, 309 N.E.2d 907. The Court recognized that “[d]ue process requires that the duration of [Burton’s] commitment must bear a reasonable relationship to the purpose behind it.” *Id.* at 43. Because Burton was being held indefinitely solely because of his incapacity to proceed to trial, the Court concluded that Burton’s due process rights had been violated. The Court also noted that Ohio had procedures for the continued commitment of convicted persons under then-existing R.C. 5125.08 and R.C. 5125.09. Under those statutes, a convicted person was entitled to the full panoply of rights accorded to persons under civil commitment. (In addition, the supreme court held, citing *Baxstrom*, that Burton’s equal protection rights were violated when there was no corresponding procedure that applied to him and he was therefore

denied the same procedural protections. *Id.* at 45-46.)

More recently, the Supreme Court of Ohio held that the former version of R.C. 2945.38, which set a mandatory minimum length of time during which a defendant must be treated for restoration to competency, violated a defendant's right to due process because the defendant was to be treated for a mandatory period regardless of whether the defendant would attain competency to stand trial in the foreseeable future. *State v. Sullivan*, 90 Ohio St.3d 502, 2001-Ohio-6, 739 N.E.2d 788. The Court commented in a footnote that, "if the trial court finds that there is not a substantial probability that appellee will attain competency within one year of treatment, then the court must dismiss the indictment against appellee." *Id.* at 509, n.4. The Court recognized that an affidavit may be filed with the probate court for civil commitment. *Id.*

In several cases, the United States Supreme Court has found that a convicted person could not be committed for longer than the maximum criminal sentence without being granted the same procedural safeguards as those individuals committed under the civil commitment statutes. See *Baxstrom, supra*; *McNeil v. Director, Patuxent Institution* (1972), 407 U.S. 245, 92 S.Ct. 2083, 32 L.Ed. 2d 719; *Humphrey v. Cady* (1972), 405 U.S. 504, 92 S.Ct. 1048, 31 L.Ed.2d 394. But see *Jones v. United States* (1983), 463 U.S. 354, 103 S.Ct. 3043, 77 L.Ed.2d 694 (holding that a person acquitted as not guilty by reason of insanity may be committed until such time as he has regained his sanity or is no longer a danger to himself or society and that his confinement is not constitutionally limited by the maximum sentence). We emphasize that these cases involved persons who had been convicted of the offenses, and the cases arose in the context of post-conviction confinement in which the State sought to hold the defendant beyond the length of his

sentence.

Where pre-trial confinement is involved, courts have limited "the reasonable period of time necessary to determine whether there is a substantial probability that he will attain that capacity in the foreseeable future" by the maximum length of the criminal sentence that could be imposed if convicted. See *State ex rel. Deisinger v. Treffert* (1978), 85 Wis.2d 257, 270 N.W.2d 402 (stating that "[t]he most basic notions of due process fairness require that one found incompetent to stand trial is entitled to release when observatory confinement reaches the length of the potential maximum sentence for the underlying criminal offense.").

Reading the above authority together, the principles of due process require that a defendant who is believed to be incompetent to stand trial should be evaluated to determine the defendant's competency and the likelihood that the defendant may be restored to competency in the foreseeable future. If the defendant is incompetent to stand trial and there is a reasonable likelihood that he may be restored to competency in the near future, the defendant may be committed until the earlier of (1) a reasonable period of time to restore him to competency (up to one year for serious felony offenses), or (2) the length of the maximum criminal sentence he may have received. Continued commitment must be justified by progress toward restoration to competency. If the incompetent defendant is found not to be restorable after the maximum time for restorative treatment, the treatment must end and the indictment must be dismissed. If a convicted defendant serves his sentence in a mental health facility, the defendant's commitment terminates upon the completion of the sentence absent subsequent civil commitment.

Williams' commitment under R.C. 2945.39 fails to comport with due process. By its

terms, R.C. 2945.39 applies only when an incompetent defendant is not restorable to competency within a reasonable period of time. Although Williams' commitment is ostensibly tied to the determination that he is a dangerous mentally ill person subject to hospitalization by court order, his commitment included attempts to restore him to competency and the required hospital reports to the trial court must indicate whether Williams has been restored to competency. Upon the determination that Williams was not restorable to competency, due process required that all efforts to restore him to competency cease. Because commitment under R.C. 2945.39 involves attempts at restoration to competency beyond a reasonable period of time to restore him to competency, commitment under R.C. 2945.39 amounts to an impermissible end-run around *Jackson*.

To the extent that Williams is detained for the purpose of protecting citizens from dangerous mentally ill persons, the maximum length of confinement also bears little relationship to that purpose. As stated above, an incompetent defendant committed under R.C. 2945.39 must be released, at the latest, upon the expiration of the maximum prison term or term of imprisonment that he could have received if he had been convicted of the most serious offense with which he was charged, regardless of whether there has been any improvement in his mental condition. Although the defendant may be released earlier, the maximum period of time for commitment has no relationship with the defendant's mental condition or his dangerousness to society. In this case, Williams may be committed for up to ten years under R.C. 2945.39 and then released from commitment while still a dangerous mentally ill person subject to hospitalization by court order.

In addition, we agree with Williams that due process requires that the indictment

against him be dismissed upon a finding that he is not restorable to competency. Although the Supreme Court in *Jackson* did not decide whether the State may keep charges pending indefinitely due to Jackson's competency commitment, the Supreme Court of Ohio in *Sullivan* indicated that an indictment must be dismissed if the defendant is not restorable to competency. *Sullivan*, 90 Ohio St.3d at 509, n.4. Furthermore, we find it is fundamentally unfair for an incompetent defendant to have charges pending indefinitely when there is little hope that he may be brought to trial and be exonerated. (We note that R.C. 2945.38(H)(3) and R.C. 2945.39(C) require the dismissal of the indictment against defendants over whom the trial court does not retain jurisdiction under R.C. 2945.39.)

Finally, although we stated above that an incompetent defendant must be afforded the constitutional protections due to a criminal defendant, we emphasize here that the use of the clear and convincing standard for determining whether an incompetent defendant committed the offense with which he was charged violates due process. While the clear and convincing evidence standard may be used to find that an individual is a mentally ill person subject to hospitalization by court order, *Addington v. Texas* (1979), 441 U.S. 418, 99 S.Ct. 1804, 60 L.Ed.2d 303, R.C. 2945.39, the additional finding that a person has committed a criminal offense must be made beyond a reasonable doubt. Furthermore, in light of the more substantial restrictions on a person's liberty while committed under R.C. 2945.39, the procedural safeguards afforded to a criminal defendant must be provided so that an incompetent defendant may defend himself against the indictment and to minimize the chance that he may be subjected to R.C. 2945.39 commitment erroneously. See *Commonwealth v. Burgess*, 450 Mass. 366, 375, 878 N.E.2d 921.

Williams' second assignment of error is sustained.

VII.

The judgment of the trial court retaining jurisdiction under R.C. 2945.39 will be reversed, and the matter will be remanded to the trial court for further proceedings.

.....

BROGAN, J., concurs.

WOLFF, P.J., dissenting:

I respectfully dissent.

As described in the majority opinion, R.C. 2945.39 allows the commitment of an individual found incompetent to stand trial and unrestorable to competency within a reasonable period of time. Unlike in *Jackson*, however, commitment under R.C. 2945.39 is not based solely on the defendant's incompetence. Rather, consistent with the goals of civil commitment, R.C. 2945.39 provides for the commitment of incompetent defendants who are mentally ill persons subject to hospitalization by court order.

First, I agree with the trial court's conclusion that commitment under R.C. 2945.39 is civil in nature. Although R.C. 2945.39 requires a finding that the incompetent defendant committed the offense with which he was charged, that finding is used primarily as evidence of the defendant's present dangerousness to society and of the risk that he may pose to patients committed through the probate court. See *Hendricks*, 521 U.S. at 362. R.C. 2945.39 contains no scienter requirement, and it has no deterrent intent. *Id.* The placement of these commitment procedures within the penal code is little indication of the purpose of the statute, considering that it addresses the commitment of those who have been found incompetent to stand trial. I find most significant the fact that individuals committed under R.C. 2945.39 must be released when they have been found to be no

longer a mentally ill person subject to hospitalization by court order. In my view, the release provision emphasizes that the primary purpose of R.C. 2945.39 is to provide stricter confinement for mentally ill persons who are particularly dangerous. As noted by the United States Supreme Court in *Hendricks*, the confinement of the dangerously mentally ill "is a legitimate nonpunitive governmental objective and has been historically so regarded." 521 U.S. at 363. In short, I agree with the trial court that R.C. 2945.39 is merely a transfer of commitment authority to the criminal court from the probate court for mentally ill persons subject to hospitalization by court order, whose present dangerousness is demonstrated by the commission of a serious felony.

Second, although I agree with the majority that R.C. 2945.39 sets forth separate and distinct procedures for commitment, I find these distinctions to be rationally related to the government's interest in confining dangerous mentally ill persons, and I find no violation of Williams' equal protection rights. I am not persuaded that R.C. 2945.39 violates equal protection because it concerns only individuals who are under indictment and not individuals with a history of committing serious felony offenses. The legislature could rationally conclude that an individual's present involvement in the criminal justice system indicates a greater degree of dangerousness. Moreover, because those committed under R.C. 2945.39 are particularly prone to commit serious felonies, the legislature could rationally distinguish these committees from persons committed through the probate court for purpose of release procedures. Suffice it to say, society has a substantial interest in ensuring that those individuals who have been deemed particularly dangerous truly are no longer mentally ill persons subject to hospitalization by court order prior to their release from commitment. R.C. 2945.39 provides this additional level of protection to the public.

Finally, I find no due process violations based on the failure to dismiss the indictment, any continued efforts at restoring to competency, or the maximum length of commitment. Williams has been charged with rape, a first degree felony. Because of the seriousness of this offense, the State has a substantial interest in keeping Williams under indictment and trying him should he become competent to stand trial in the future. See *Bauer*, supra (finding that dismissal of the indictment is contrary to the policies of state). Although the indictment against Williams may be pending for a significant period of time due to his incompetency, the State's interest in pursuing a first degree felony offense justifies continued jurisdiction by the trial court. I note that the State's right to keep Williams under indictment might be limited by Williams' constitutional right to a speedy trial.

Although R.C. 2945.39 provides that a defendant may be committed until the expiration of the maximum term of imprisonment that he could have received for the charged offense, due process is satisfied by the fact that he may be released sooner if he is no longer subject to hospitalization by court order.

Finally, while Williams is being committed for treatment of his mental illness, I see no reason why he cannot be reevaluated for competency. If Williams' competency is restored while still mentally ill, Williams could be tried on the offense while remaining committed for his mental illness. R.C. 2945.401(J)(2). The State's interest in trying Williams for the charged offense could be satisfied while Williams continues to be treated for his mental illness.

Accordingly, I conclude that R.C. 2945.39 provides an alternative method of civil commitment and that it does not violate equal protection or due process. I would overrule the assignments of error and affirm the judgment.

.....
Copies mailed to:

Carley J. Ingram
Anthony Comunale
Hon. Gregory F. Singer

FILED
COURT OF APPEALS

2008 NOV 26 AM 8:47

GREGORY A. BRUSH
CLERK OF COURTS
MONTGOMERY CO. OHIO
39

IN THE COURT OF APPEALS FOR MONTGOMERY COUNTY, OHIO

STATE OF OHIO	:	
Plaintiff-Appellee	:	C.A. CASE NO. 22532
v.	:	T.C. NO. 2005 CR 5174
THONEX WILLIAMS	:	<u>FINAL ENTRY</u>
Defendant-Appellant	:	

.....

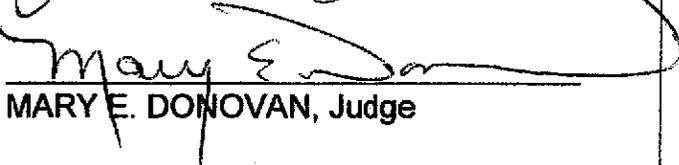
Pursuant to the opinion of this court rendered on the 26th day of November, 2008, the judgment of the trial court is reversed and the matter is remanded for further proceedings.

Costs to be paid as stated in App.R. 24.

WILLIAM H. WOLFF, JR., Presiding Judge



JAMES A. BROGAN, Judge



MARY E. DONOVAN, Judge

Copies mailed to:

Carley J. Ingram
Assistant Prosecuting Attorney
301 W. Third Street, 5th Floor
Dayton, Ohio 45422

Anthony Comunale
130 W. Second Street
Suite 2050
Dayton, Ohio 45402

Hon. Gregory F. Singer
Common Pleas Court
41 N. Perry Street
Dayton, Ohio 45422

Not Reported in N.E.2d
 Not Reported in N.E.2d, 2000 WL 93739 (Ohio App. 5 Dist.)
 (Cite as: 2000 WL 93739 (Ohio App. 5 Dist.))

Page 1

Only the Westlaw citation is currently available.

CHECK OHIO SUPREME COURT RULES FOR
 REPORTING OF OPINIONS AND WEIGHT OF
 LEGAL AUTHORITY.

Court of Appeals of Ohio, Fifth District, Holmes
 County.

STATE of Ohio, Plaintiff-Appellee,

v.

John Ray BRETZ, Defendant-Appellant.

No. CA-98-001.

Dec. 30, 1999.

Criminal Appeal from the Holmes County Court of
 Common Pleas, Case No. 96-CR-048.

Thomas C. Douglas, Millersburg, OH, for Plaintiff-
 Appellee.

Stephen D. Knowling, Millersburg, OH, for De-
 fendant-Appellant.

GWIN, P.J., FARMER and EDWARDS, JJ.

OPINION

EDWARDS.

*1 Defendant-appellant John Ray Bretz appeals from the September 18, 1997, Journal Entry of the Holmes County Court of Common Pleas finding appellant incompetent to stand trial and not restorable to competency, the trial Court's November 18, 1997, Journal Entry denying appellant's Motion to Dismiss proceedings under R.C. 2945.39(A)(2) et. seq., and the trial Court's November 19, 1997, Judgment Entry. Defendant-appellant also appeals the trial court's December 12, 1997, Judgment Entry committing defendant-appellant to Massillon Psychiatric Center and retaining jurisdiction over

the commitment for the remainder of defendant-appellant's life. Plaintiff-appellee is the State of Ohio.

STATEMENT OF THE FACTS AND CASE

On July 15, 1996, the Holmes County Grand Jury secretly indicted appellant on one count of attempted rape in violation of R.C. 2923.02(A), an aggravated felony of the second degree, three counts of felonious sexual penetration in violation of either R.C. 2907.12(A)(1)(b) or 2907.12(B), aggravated felonies of the first degree, and two counts of gross sexual imposition in violation R.C. 2907.05(A)(4), felonies of the third degree. The three victims were all under the age of thirteen. On July 22, 1996, the day of appellant's arraignment, appellant's counsel filed a "Motion Raising Issue of Competency to Stand Trial" pursuant to R.C. 2945.37 et. seq.^{FN1} and appellant filed written pleas of not guilty and not guilty by reason of insanity pursuant to Criminal Rule 11, which were accepted by the court.

FN1.R.C. 2945.37(B) provides, in relevant part, that "[i]n a criminal action in a court of common pleas ..., the court, prosecutor 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 shall hold a hearing on the issue as provided in this section."

Pursuant to a Journal Entry filed on July 25, 1996, appellant was then referred to the District V Forensic Diagnostic Center for a competency and sanity evaluation and report. A copy of appellant's psychological evaluation was received by the trial court on August 26, 1996.

Thereafter, a competency hearing was held before the trial court on September 3, 1996. At the hearing, the parties stipulated to the admissibility of appellant's psychological evaluation. Pursuant to a Judgment Entry filed on September 5, 1996, the trial court determined that, pursuant to appellant's

psychological report, appellant was not competent to stand trial but that there was a substantial probability that appellant would become competent within one year. For such reason, appellant, pursuant to R.C. 2945.38(D), was committed to the Massillon State Hospital for the maximum period then in effect, which was fifteen months, for restoration to competency.

After receiving a report in July of 1997 from the Massillon Psychiatric Center opining that appellant was not competent to stand trial and was not restorable to competency, the trial court scheduled a hearing for August 8, 1997, pursuant to R.C. 2945.38 to determine how to proceed. The trial court, in its July 16, 1997, entry setting the hearing, asked counsel to "brief the Court's alternatives." Appellee, on August 7, 1997, filed a memorandum on the Court's alternatives under R.C. 2945.38. The next day, a memorandum was filed by appellant. After reviewing the positions of counsel at the hearing on August 8, 1997, the trial court scheduled a hearing for September 10, 1997, to determine whether appellant was competent to stand trial.

*2 After the trial court found that appellant was incompetent to stand trial, appellee filed a "Motion to Return Jurisdiction" on September 11, 1997, requesting that the trial court conduct a hearing pursuant to R.C. 2945. 39(A)(2) ^{FN2} to determine whether the Court should retain jurisdiction over appellant. Pursuant to a Journal Entry filed on September 18, 1997, the trial court found that, based upon the evidence presented at the September 10, 1997, hearing, appellant was not competent to stand trial and was not restorable to competency, and that appellant represented a danger to himself and others. A hearing on appellee's Motion to Retain Jurisdiction was scheduled for September 22, 1997, to determine whether appellant committed the offenses for which he was charged and if appellant was mentally ill and subject to hospitalization by court order. A Motion to Dismiss the Proceedings under R.C. 2945. 39(A)(2) et seq. was filed by appellant on September 22, 1997. Appellant, in his

motion, argued that: (1) R.C. 2945. 39(A)(2) only applied to offenses committed after July 1, 1996, the effective date of S.B. 2 and (2) R.C. 2945. 39(A)(2) is unconstitutional under the Ohio and United States Constitutions as violative of due process and equal protection of law.

FN2.R.C. 2945. 39(A)(2) provides that, after the maximum time under R.C. 2945.38(C) for treatment of an incompetent defendant expires, "[o]n 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 for which the defendant is charged, b) the defendant is a mentally ill person subject to hospitalization by court order ...".

Prior to the hearing on September 22, 1997, the trial court had granted appellee fourteen days to respond to appellant's Motion to Dismiss. The following evidence was adduced at the hearing pursuant to R.C. 2945. 39(A)(2) that commenced on September 22, 1997, and was continued until September 24, 1997. At the September 22, 1997, hearing, counsel stipulated to the admission of the evidence produced at the September 10, 1997, competency hearing.

Counts I (Attempted Rape) and II (Felonious Sexual Penetration) and III (Gross Sexual Imposition) of the indictment all involve the same victim, J. S., who was born on October 21, 1985. When J.S. was in third grade, he lived in a house in Holmes County with his mother. Since Larry Bretz, appellant's brother, owned the house in which J.S. resided, both appellant and Larry Bretz also lived in the house. J.S. testified that in the late fall of his third grade year when he was eight years old, appellant "said if I would jack him off he would pay him money." Transcript of Proceedings at 73. At the time, J.S.'s parents were at the grocery store. J.S. further testified that while he was in appellant's

bedroom, he massaged appellant's penis with his hand for five to fifteen minutes until appellant ejaculated. Appellant did not pay J.S. any money at the time.

About the same time of year, J.S. was in appellant's bedroom. After taking J.S.'s clothes off, appellant, who was on top of J.S., "tried to put his penis in my butt." Transcript Proceedings at 74-75. J.S. was laying on his stomach on a bed at the time. While appellant did not penetrate J.S.'s anus, appellant's penis did touch and rub against appellant's buttocks. After approximately five to fifteen minutes, appellant ejaculated on J.S.'s buttocks.

*3 J.S. also testified about a third sexual incident involving appellant, relevant to Count II of the indictment (Felonious Sexual Penetration), that occurred during the fall of J.S.'s third grade year. According to J.S., appellant pulled down J.S.'s pants and inserted his finger into J.S.'s anus. When asked why he did not tell anyone of this third incident, J.S. testified that appellant threatened to kill him if he did. Appellant, however, did not threaten appellant after the first two incidents. J.S. further testified that he was afraid of appellant. Approximately two months later, J.S. told his aunt of the incidents involving appellant. J.S. also talked to a man at Children's Services and to nurses of Akron Children's Hospital, where he was examined. When asked whether appellant "ever talk[ed] to you about doing these things with other children," J.S. testified that appellant "had talked a couple of times about the neighbor girl." Transcript of Proceedings at 79. J.S. further testified that appellant "said he had had sex" with A. R., the neighbor girl. *Id.*

A.R. is the victim with respect to counts V (Felonious Sexual Penetration) and VI (Felonious Sexual Penetration) of the indictment in this matter. Both counts alleged that appellant had compelled the victim to submit by force or threat of force. At the hearing that commenced on September 22, 1997, A. R., who was born on July 20, 1985, testified that the summer before she started first grade, when she was six years old, she was at appellant's

house with her grandmother. Appellant was A.R.'s neighbor. A.R. testified that while she was sleeping, appellant had taken off her pants and underwear and while sitting on her back to hold her down, "had his fingers in my privates when I woke up." Transcript of Proceedings at 53. When A.R. woke up, she "told him [appellant] that I didn't like this and he told me that it was a game." Transcript of Proceedings at 54. Appellant, A.R. testified, threatened to hurt her and torture her if she told anyone of the incident and if he didn't let him do what he was doing.

A.R. also testified regarding a second incident that occurred the summer before she started first grade when she was upstairs at appellant's house. Appellant, A.R. testified, took her pants and underwear off and put his finger inside her anus, and then threatened to kill her or torture her if she told anyone. A.R., who said he was afraid of appellant, testified that appellant held her hands down while molesting her. After A.R. told a teacher of the incidents involving appellant, A.R. was examined at Akron Children's Hospital and also spoke to a man at Children's Services.

Both J.S.'s and A.R.'s testimony was corroborated by Donna Abbott, a pediatric nurse practitioner at Children's Hospital, who was involved in the examination of A.R. in January, 1993, and J.S. in February of 1995.

Appellant's final victim, R.C., Jr., testified concerning the events surrounding the gross sexual imposition alleged in count IV of the indictment. R.C., Jr., who was born on May 22, 1983, testified that in late October or November of 1994 when he was in sixth grade for the first time ^{FN3}, he went over to the house in which appellant was living at approximately 7:00 P.M. Appellant was living with Larry Bretz, R.C.'s uncle. ^{FN4} Appellant, R.C., Jr. testified, offered to pay R.C., Jr. \$4.00 if he played with appellant's "dick". Transcript of Proceedings at 38. R.C., Jr. testified that "played with his [appellant's] penis" and then whenever it went through my head "this is sick, that's when I went outside." Transcript

of Proceedings at 39. The whole incident lasted three to four minutes. R.C., Jr. later told his parents and two sisters of the incident. R.C., Jr. also talked to a man from Children's Services.

FN3. R.C., Jr. repeated the sixth grade.

FN4. Larry Bretz, appellant's brother, is related to R.C., Jr. by marriage.

*4 All three victims identified appellant as their molester. Appellant, who weighs approximately 180 pounds, is 6'2" in height.

At the conclusion of the trial, the court took the matter under advisement. Both parties then filed post trial briefs. On October 14, 1997, appellee filed a Memorandum in opposition to appellant's Motion to Dismiss. Pursuant to a Journal Entry filed November 18, 1997, the trial court denied appellant's Motion to Dismiss. The next day, pursuant to a Judgment Entry filed on November 19, 1997, the trial court found, by clear and convincing evidence that appellant had committed one count of attempted rape, two counts of gross sexual imposition and three counts of felonious sexual penetration. With respect to one count of felonious sexual penetration involving [A.R.], the court further found that appellant "did purposely compel [A.R.] to submit by use of actual force and by threat of force. If convicted of this offense Defendant would be imprisoned for life. R.C. 2907.12(B)." The court, in its November 19, 1997 Judgment Entry, further held as follows:

"Pursuant to the evidence produced at the September 10, 1997, hearing defendant is mentally ill and subject to hospitalization by court order.R.C. 5122.01(B). Defendant suffers from mental illness as defined in R.C. 5122.01(A): schizophrenia with prior history of alcohol and cannabis abuse. Specifically, the Court finds that Defendant represents substantial risk of physical harm to others as manifested by evidence of present dangerousness. Defendant is a repeated sexual abuser of children and uses threats of violence to avoid detection. R.C.

5122.01(B)(2). The Court further finds, based upon the same evidence that Defendant would benefit from treatment in a hospital for his mental illness and is in need of such treatment as manifested by evidence of behavior that creates a grave and imminent risk to substantial rights of others. R.C. 5122.01(B)(4)."

The Court thus retained jurisdiction over appellant. Thereafter, a dispositional hearing was held on December 11, 1997. Prior to the hearing, both parties had filed briefs regarding disposition. Pursuant to a Judgment Entry filed the day after the hearing, the trial court ordered that appellant be committed to the Massillon Psychiatric Center "until further order of this court" and that the court's jurisdiction over appellant's commitment under R.C. 2945.401(J)(1)"shall continue until the end of the defendant's life ^{FN5} " since the maximum prison term appellant could have received for felonious sexual penetration by force or threat of force in violation of R.C. 2907.12(A)(1)(b) was life in prison.

FN5. The trial court sets forth the language from R.C. 2945.401(J)(1) in its Judgment Entry. That code section sets forth that the defendant continues to be under the jurisdiction of the trial court until final termination of commitment. Final termination, pursuant to R.C. 2945.401(J)(1), occurs upon the *earlier* of one of the following: a) the defendant is no longer a mentally-ill person subject to hospitalization by court order; as determined by the trial court; b) the expiration of the maximum prison term that the defendant could have received if the defendant had been convicted of the most serious offense with which he is charged; c) the trial court enters an order terminating the commitment under circumstances described in division (J)(2)(a)(ii) of 2945.401. (2945.401(J)(2) provides for the procedures when and if defendant is restored to competency). (Statutory language is paraphrased)

The trial court also states that the maximum extent of the trial court's jurisdiction is life under the circumstances of this case. (The prison term for defendant's most serious charge.)

We find from a reading of the trial court's Judgment Entry in its entirety that the trial court issued orders consistent with R.C. 2945.401(J)(1). We, therefore, conclude that the trial court's Judgment Entry indicates that the trial court's jurisdiction over the commitment terminates upon the occurrence of the earliest of the events set forth in R.C. 2945.401(J)(1).

It is from the trial court's November 18, 1997, November 19, 1997, and December 12, 1997, Judgment Entries that appellant prosecutes his appeal, raising the following assignments of error:

ASSIGNMENT OF ERROR NO. I

THE TRIAL COURT ERRED IN ITS JOURNAL ENTRY OF NOVEMBER 18, 1997, IN DENYING APPELLANT'S MOTION OF SEPTEMBER 22, 1997, TO DISMISS THE PROCEEDINGS UNDER ORC 2945 BASED UPON THE EFFECTIVE DATE OF THE STATUTE.

ASSIGNMENT OF ERROR NO. II

*5 THE TRIAL COURT ERRED IN ITS JOURNAL ENTRY OF NOVEMBER 18, 1997, IN FINDING THAT ORC 2945 ET SEQ. IS CONSTITUTIONAL.

ASSIGNMENT OF ERROR NO. III

THE TRIAL COURT ERRED IN ITS JUDGMENT ENTRY OF NOVEMBER 19, 1997, WHEN IT FOUND BY CLEAR AND CONVINCING EVIDENCE THAT APPELLANT COMMITTED CERTAIN CRIMINAL ACTS AND SPECIFICATIONS

THEREIN; THAT THE APPELLANT WAS MENTALLY ILL AND SUBJECT TO HOSPITALIZATION.

ASSIGNMENT OF ERROR NO. IV

THE TRIAL COURT ERRED IN ITS JUDGMENT ENTRY OF SENTENCING OF DECEMBER 12, 1997, WHEN IT COMMITTED APPELLANT TO THE MASSILLON PSYCHIATRIC CENTER AND RETAINED JURISDICTION OVER APPELLANT'S COMMITMENT FOR THE REMAINDER OF APPELLANT'S LIFE.

ASSIGNMENT OF ERROR NO. V

THE TRIAL COURT ERRED IN SENTENCING APPELLANT SUCH AS TO DENY HIM THE BENEFITS OF S.B.2.

I

Appellant, in his first assignment of error, maintains that the trial court erred in overruling appellant's September 22, 1997, Motion to Dismiss the proceedings under R.C. 2945. Appellant specifically contends that R.C. 2945. 39(A)(2)^{FN6}, which was enacted as part of S.B. 285, applies only if the criminal offense which brought the defendant to the attention of the trial court was committed after S.B. 285's July 1, 1997, effective date. Therefore, appellant argues, S B. 285 should not have been applied to him as his offenses were committed prior to July 1, 1997.

FN6.R.C. 2945. 39(A)(2) outlines the procedure for a court to retain jurisdiction over a mentally ill defendant. See footnote 2.

Pursuant to R.C. 1.48, statutes are presumed to apply only prospectively unless they are specifically made retroactive. "The issue of whether a statute may constitutionally be applied retrospectively does not arise unless there has been a prior determination

that the General Assembly specified that the statute so apply." *Van Fossen v. Babcock & Wilcox Co.* (1988), 36 Ohio St.3d 100, 522 N.E.2d 489, paragraph one of the syllabus. Only after such a prior determination is the issue of whether a statute is unconstitutionally retroactive in violation of section 28, Article II of the Ohio Constitution addressed. *Id.* An "[a]nalysis of whether a statute is unconstitutionally retroactive in violation of Section 28, Article II... requires an initial determination of whether the statute is substantive or merely remedial." *Id.* at paragraph three of the syllabus. S.B. 285 contains no provisions for retroactive application. In other words, the General Assembly did not specify that the provisions of S.B. 285 were to be applied retroactively. Therefore, we never get to the second part of the analysis, which is whether the statute is unconstitutionally retroactive, because the statute is not retroactive at all.

We find, however, that the provisions of S.B. 285 that are relevant to the case sub judice were not applied retroactively by the trial court to the appellant's criminal offense, but were applied prospectively to commitment proceedings taking place after July 1, 1997. Prior to S.B. 285, the only commitment procedure available regarding a criminal defendant found incompetent to stand trial (and remaining incompetent after the relatively short statutory time allotted for treatment to try to obtain the defendant's return to competency) was a civil commitment through the probate court. Under S.B. 285, the prosecuting attorney can now choose under certain circumstances, to file an affidavit in probate court for civil commitment of the defendant or to file a motion for the criminal court to retain jurisdiction if the criminal court finds by clear and convincing evidence that the defendant committed the offense(s) charged and that the defendant is a mentally ill person subject to court order. R.C. 2945.39(A)

*6 In the case sub judice, commitment proceedings were not begun until after the July 1, 1997, effective date of S.B. 285. The trial court did not receive

a report from Massillon Psychiatric Center until July of 1997 indicating appellant was not competent to stand trial and was not restorable to competency. Thereafter, commitment proceedings began.

Our colleagues in Ohio's Ninth District Court of Appeals found that another portion of S.B. 285 was applicable to a request for the continued commitment of a defendant who had been found not guilty by reason of insanity in February, 1977, and was committed originally under former R.C. 2945.39 "until ... restored to reason." *State v. Hawkins* (Sept. 23, 1998), Summit App. No. 18765, unreported, affirmed(1999), 87 Ohio St.3d 311, 720 N.E.2d 521. S.B. 285, now provides that a defendant cannot be committed, under the jurisdiction of the criminal court, past the expiration of the maximum prison term that the defendant could have received if convicted. R.C. 2945.40.1 The *Hawkins* court found that S.B. 285 is prospective in its application when it applies to post-adjudication commitment hearings after its effective date of July 1, 1997, even though the defendant was found not guilty by reason of insanity prior to July 1, 1997.

The court in *Hawkins, supra*, cited *State v. Jackson* (1981), 2 Ohio App.3d 11, 440 N.E.2d 1199, in holding that provisions of S.B. 285 are prospective in nature. In *Jackson, supra*, the defendant was found not guilty by reason of insanity prior to April 30, 1980, the effective date of Am. Sub. S.B. No. 297. Under Am. Sub. S.B. No. 297, a number of changes were made with respect to involuntary commitment proceedings regarding persons found not guilty by reason of insanity, including changing jurisdiction from the probate court for the county in which the defendant was committed to the trial court and giving the prosecutor standing at commitment hearings. The *Jackson* court, found the provisions of Am. Sub. S.B. No. 297 to be prospective in nature, holding that the provisions were "intended to govern treatment and discharge procedures after the laws effective date" and did not take away any vested rights or attach any new obligations. *Jackson, supra*, at 14, 440 N.E.2d 1199 (Emphasis ad-

ded). We concur with the appellate court's holding in *Hawkins, supra*, that:

"S.B. 285, similarly, merely provides the procedural and jurisdictional bases upon which determinations of continued commitment are to be conducted after July 1, 1997. Its provisions do not change any determinations about guilt, innocence, or commitment made prior to July 1, 1997. Nor do they take away any vested rights, create any new obligations, impose any new duties, or attach any new disabilities with respect to the 1976 offense with which defendant was charged."

*7 *Hawkins, supra* at 3.

Since S.B. 285 is to be applied prospectively (because there is no legislative intent expressed otherwise) and since S.B. 285 was applied prospectively in the case sub judice to the commitment proceedings of the defendant, we find that the trial court did not error when it denied appellant's motion to dismiss the commitment proceedings brought under S.B. 285. Appellant's first assignment of error is overruled.

II

Appellant, in his second assignment of error, challenges the trial court's holding in its November 18, 1997, Journal Entry that R.C. 2945 et seq. is constitutional. Appellant specifically submits that R.C. 2945. 39(A)(2), the retention of jurisdiction provision of S.B. 285, is unconstitutional under the Ohio and United States Constitutions as violative of due process and equal protection. According to appellant, R.C. 2945. 39(A)(2) violates the requirements of *Jackson v. Indiana* (1972), 406 U.S. 715, 92 S.Ct. 1845, 32 L.Ed.2d 435 and is, therefore, unconstitutional.

In *Jackson, supra*, the United States Supreme Court held that the indefinite commitment of a criminal defendant "solely" on account of his incompetency to stand trial was violative of the due process clause. According to the court, "[w]ithout a finding

of dangerousness, one committed ... can be held only for a 'reasonable period of time' necessary to determine whether there is a substantial chance of his attaining the capacity to stand trial in the foreseeable future." *Jackson* at 733 (Emphasis added). In so holding, the United States Supreme Court stated that "due process requires that the nature and duration of commitment bear some reasonable relation to the purpose for which the individual is committed." *Jackson*, 406 U.S. at 738.

However, in the case sub judice, appellant was not committed solely because he is incompetent to stand trial. Rather, appellant was committed following a hearing before the trial court during which the State presented evidence of appellant's guilt. After the hearing, the trial court, pursuant to a Judgment Entry filed on November 19, 1997, found by clear and convincing evidence that appellant had committed specified offenses, that appellant was mentally ill and subject to hospitalization by court order, and that appellant posed a substantial threat of physical harm to others. In contrast, in *Jackson, supra*, there was no "affirmative proof" that the accused had committed criminal acts or was otherwise dangerous. See Footnote 12 of *Jones v. United States* (1983), 463 U.S. 354, 365, 103 S.Ct. 3043, 77 L.Ed.2d 694.

The right to due process provided for in the Ohio Constitution is the equivalent of the right to due process provided by the Fourteenth Amendment to the United States Constitution. *Envirosafe Serv. of Ohio, Inc. v. Oregon* (1992), 80 Ohio App.3d 516, 609 N.E.2d 1290.

*8 In evaluating due process claims, courts consider the private interest at stake, the government interest at issue, and the risk that the private interest will suffer an erroneous deprivation. *Mathews v. Eldridge* (1976), 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18. There is no doubt that the private interest at stake in this matter, namely, appellant's liberty, is substantial. However, we find that the State has an even greater interest in detaining individuals who have committed criminal acts and

whom, as appellant, pose a substantial risk of physical harm to others and are in need of psychological treatment. Given appellant's psychological evaluations as well as the trial court's finding, by clear and convincing evidence, that appellant had committed the charges alleged in the indictment and the trial court's finding that appellant represents a substantial risk of physical harm to others, we find that the possibility of an erroneous deprivation of appellant's liberty is slight. As the trial court noted in its November 18, 1997, Journal Entry:

"The Ohio legislature has been faced with the problem of releasing a defendant until he is competent to stand trial, thus affording him the opportunity to commit other crimes, or allow the criminal court to retain jurisdiction and place the defendant in a secure mental facility until he is either competent to stand trial or the maximum time for which he could have been imprisoned has elapsed.

S.B. 285 strikes a constitutionally acceptable balance. A defendant is not convicted of a crime. However, the court is allowed to continue a defendant's treatment which does not constitutionally amount to punishment. The duration of the defendant's compelled hospitalization is limited by the maximum term of imprisonment for the crime for which he was charged. In addition, the statute required a finding that defendant poses a risk of harm to himself and others. This was a substantial defect in the Indiana statute under examination in the *Jackson* case."

Thus, we do not find that appellant's due process rights have been violated since the nature and duration of appellant's commitment bear a reasonable relation to the purpose for which he has been committed.

Appellant further asserts that the trial court erred in finding R.C. 2945. 39(A)(2) constitutional since such section violates his right to equal protection.

The Equal Protection Clause of the Fourteenth Amendment directs that "all persons similarly situ-

ated shall be treated alike." *Assn. for Retarded Citizens of North Dakota v. Olson* (D.N.D.1982), 561 F.Supp. 473, 489. Generally, disparity in treatment between similarly situated persons is constitutional if it bears some fair relationship to a legitimate public purpose. *Olson*. However, when this difference in treatment infringes on a fundamental right, the court must determine whether the difference is specifically tailored to serve a compelling governmental interest. *Id.*

*9 We find, however, that R.C. 2945. 39(A)(2) does not violate equal protection. As the trial court stated in its November 18, 1997, Journal Entry, "Defendant argues that since he may be involuntarily hospitalized for life in this case a commitment under S.B. 285 is tantamount to an indefinite commitment under the Jackson doctrine. Defendant's argument fails, as he may well be subject to hospitalization for life under civil commitment. Thus, Ohio is not denying appellant equal protection of the law by his hospitalization being retained under the jurisdiction of the criminal trial court." Moreover, we agree with the trial court that there is no "substantive" difference in civil proceedings for hospitalization of mentally ill persons by court order under R.C. 5122 and 5123 and appellant's criminal proceedings under R.C. 2945. 39 et seq.

We also find, that to the extent there are some differences between the civil and "criminal" commitment proceedings, they are justified. For the criminal court to maintain jurisdiction, that court must find there is clear and convincing evidence the defendant committed the offenses charged. Therefore, not only must the criminal court find that the defendant is a danger to himself and others, the criminal court must have pretty strong proof that the defendant has already committed a harmful act.

Since the trial court did not err in finding R.C. 2945. 39(A)(2) et. seq. constitutional, appellant's second assignment of error is denied.

III

In his third assignment of error, appellant contends that the trial court erred in finding by clear and convincing evidence that appellant committed the criminal offenses for which he was indicted and that appellant was mentally ill and subject to hospitalization. Appellant specifically points to alleged inconsistencies in each victim's individual testimony.

We are not fact finders; we neither weigh the evidence nor judge the credibility of witnesses. Our role is to determine whether there was relevant, competent and credible evidence upon which the fact finder could base its judgment. *Cross Truck v. Jeffries* (Feb. 10, 1982), Stark App. No. CA-5758, unreported. Accordingly, judgments supported by some competent, credible evidence going to all the essential elements of the case will not be reversed as being against the manifest weight of the evidence. *C.E. Morris Co. V. Foley Construction* (1978), 54 Ohio St.2d 279, 376 N.E.2d 578.

As appellee correctly notes, it is the trial court's finding that appellant committed the offense contained in count VI of the indictment (Felonious Sexual Penetration With Force) that provides the grounds for appellant's lifetime commitment to the Massillon Psychiatric Hospital under the S.B. 285 proceedings. For such reason, this court need not review the evidence as to the other counts contained in the indictment.

Count VI of the indictment alleged that appellant, in the summer of 1991, "did, without privilege to do so, insert any part of the body or any instrument, apparatus, or other object into the vaginal or anal cavity of another who is not the spouse of the offender, when the other person is less than thirteen years of age to-wit Jane Doe, D.O.B. July 20, 1985, and the offender did purposely compel the victim to submit by force or threat of force, ...". A. R., the "Jane Doe" mentioned in count VI, testified at the September 22, 1997, hearing that in the summer of 1991 prior to the start of first grade, appellant removed her pants and underwear and digitally penetrated her anus. Appellant, A.R. testified, "told

me that if I would tell that he would again hurt me or kill me and torture me in any way." Transcript of Proceedings at 56. While penetrating A.R.'s anus, appellant held her hands down while she was on her stomach. Donna Abbott, a pediatric nurse-practitioner who had interviewed and examined A.R. in January of 1993, testified that her physical findings were consistent with A.R.'s account of the incident. At the time of the incident, appellant was 6'2" tall, weighed 180 pounds and was thirty nine years old.

*10 Appellant contends that A.R.'s testimony should be disregarded as unreliable since: (1) she testified at the bench trial regarding incidents that occurred six or seven years ago when A.R. was five or six; (2) A.R., at one point during a January 11, 1993, examination at Akron's Children's Hospital, told Donna Abbott that appellant had molested her seven times in one day and (3) A.R., during such examination, never told Donna Abbott that appellant had threatened her. Appellant also points to alleged inconsistencies in A.R.'s testimony and questions whether force was involved.

However, the trial court had the opportunity to hear A.R.'s testimony as a witness and to assess her credibility. The trial court clearly found A.R. a credible witness. That force was involved is evidenced by A.R.'s testimony that appellant held her hands down while digitally penetrating her as she lay on her stomach. Moreover, the element of force also can be established provided it can be shown that the victim's will was overcome by fear or duress. *State v. Eskridge* (1988), 38 Ohio St.3d 56, 58-59, 526 N.E.2d 304. During the proceedings in this case, A.R. testified that during a prior incident during the same summer, appellant "told me that if I tell he would do something to hurt me and he would torture me in a lot of ways, that he would kill me, and if I didn't let him do what he was doing that he would kill me and torture me." Transcript of Proceedings at 54. Based on appellant's prior threats, the trial court could have found by clear and convincing evidence that appellant committed

felonious sexual penetration with force with respect to Count VI of the indictment since appellant threatened A.R. with harm or death prior to the incident alleged in Count VI. Moreover, A.R.'s testimony was not only corroborated by Donna Abbott, the pediatric nurse practitioner, but also by J.S.'s testimony that appellant told him [J.S.] that he had engaged in sexual conduct with A.R.

Based on the foregoing, we find that there was competent, credible evidence supporting the trial court's finding pursuant to R.C. 2945.34(A)(2) that there was clear and convincing evidence appellant committed the offense of felonious sexual penetration with force as alleged in count VI of the indictment.

Appellant's third assignment of error is overruled.

IV

Appellant, in his fourth assignment of error, contends that the trial court erred in committing appellant to the Massillon Psychiatric Center and retaining jurisdiction over appellant's commitment for the remainder of appellant's life. We disagree.

Pursuant to an order filed on November 19, 1997, the trial court retained jurisdiction over appellant after a hearing pursuant to R.C. 2945.39(A)(2). Following the hearing, the court found, by clear and convincing evidence, that appellant had committed the offenses with which he was indicted and, in addition, that appellant was a mentally ill person subject to hospitalization by court order. Thereafter, a dispositional hearing was held on December 11, 1997. Pursuant to a Judgment Entry filed the next day, the trial court held as follows in ordering that appellant be committed to the Massillon Psychiatric Center "until further order of this court" and that the court's jurisdiction over appellant's commitment would continue until the end of appellant's life:

*11 "Once such commitment is made R.C. 2945.401(A) states that defendant "... shall remain subject to the jurisdiction of the trial court pursuant

to that commitment, under the provision of this section, until the final termination of the commitment as described in division (J)(1) of this section."

R.C. 2945.401(J)(1) restates that the defendant "... continues to be under the jurisdiction of the trial court until final termination of the commitment."

"Final termination" is defined in R.C. 2945.401(J)(1) as occurring upon the earlier of one of the following:

(a) the defendant or person no longer is a mentally-ill person subject to hospitalization by court order or a mentally-retarded person subject to institution-alization by court order; as determined by the trial court;

(b) the expiration of the maximum prison term or term of imprisonment that the defendant or person could have received if the defendant or person had been convicted of the most serious offense with which the defendant or person is charged or in relation to which the defendant or person was found not guilty by reason of insanity.

(c) the trial court enters an order terminating the commitment under circumstances described in division (J)(2)(a)(ii) of this section.

R.C. 2945.401(J)(1)(b) states that the trial court's jurisdiction and the potential term of defendant's commitment does not expire until the expiration of the maximum prison term that he could have received if he would have been convicted of the most serious offense with which he was charged. In this case the defendant was charged and found to have committed in Count VI of the indictment: Felonious Sexual Penetration by force or threat of force in violation of R.C. 2907.12(A)(1)(b), an aggravated felony of the first degree, which carries a sentence of life imprisonment pursuant to R.C. 2907.12(B). This offense occurred on or between October and November, 1994, which makes it a pre-S.B. 2 case.

Therefore, the court concludes that the maximum extent of this Court's jurisdiction and the maximum

extent of the defendant's commitment is life.

We agree with the trial court that R.C. 2945.401 makes no reference to any other sections of the Revised Code to determine the maximum form of commitment." Since appellant was committed in accordance with R.C. 2945.401, appellant's fourth assignment of error is overruled.

V

Appellant, in his fifth and final assignment of error, argues that the trial court erred in sentencing appellant "such as to deny him the benefits of S.B. 2". As is stated above, the trial court found that the offense of felonious sexual penetration as set forth in count VI of the indictment was a pre-S.B. 2 offense since it occurred prior to July 1, 1996, the effective date of S.B. 2. However, the indictment in this matter was not filed until July 15, 1996, after S.B. 2's effective date. Appellant specifically maintains that he should have been given the benefit of S.B. 2's amended sentencing provisions since S.B. 2 was in effect when the indictment in this matter was filed. We, however, do not agree.

*12 The Ohio Supreme Court, in *State v. Rush*, specifically held that the amended sentencing provisions of S.B. 2 are inapplicable with regard to those defendants who committed crimes prior to, but were convicted after, its July 1, 1996, effective date. *State v. Rush* (1998), 83 Ohio St.3d 53, 697 N.E.2d 634. The sentencing provisions of S.B. 2 apply only to those crimes committed on or after July 1, 1996. *Id.* Appellant, therefore, was not entitled to the benefits of S.B. 2's amended sentencing provisions since his crimes were committed prior to July 1, 1996. Therefore, under pre-S.B. 2 sentencing laws, the defendant would be subject to imprisonment for life if he were ever to be convicted of the charge of felonious sexual penetration and the offense involved force or threat of force and the victim was under thirteen years of age.

As stated previously in this opinion, a commitment

by the criminal court under S.B. 285 continues until final termination of the commitment. Final termination occurs upon the earlier of one of the following: 1) the court determines defendant is no longer a mentally ill person subject to hospitalization; 2) the expiration of the maximum prison term that defendant could have received if convicted of the most serious charge; 3) proceedings begin because the defendant has been restored to competency. In the case sub judice, the maximum prison term that defendant could receive if convicted is life in prison. Therefore, the trial court was correct in determining that, unless the defendant is found competent or no longer subject to psychiatric hospitalization, the trial court can maintain jurisdiction over defendant's commitment for life.

Appellant's fifth assignment of error is overruled.

The Judgment of the Holmes County Court of Common Pleas is affirmed.

GWIN, P.J. and FARMER, J. concur.

JUDGMENT ENTRY

For the reasons stated in the Memorandum-Opinion on file, the Judgment of the Holmes County Court of Common Pleas is affirmed. Costs to appellant.

Ohio App. 5 Dist., 1999.

State v. Bretz

Not Reported in N.E.2d, 2000 WL 93739 (Ohio App. 5 Dist.)

END OF DOCUMENT



Z-FILED
COURT OF COMMON PLEAS

2007 AUG 22 AM 11:10

GREGORY A. BAUSH
CLERK OF COURTS
MONTGOMERY CO. OHIO
3

IN THE COMMON PLEAS COURT OF MONTGOMERY COUNTY, OHIO

STATE OF OHIO,

CASE NO. 05 CR 5174

Plaintiff,

JUDGE GREGORY F. SINGER

v.

DECISION AND ENTRY
OVERRULING DEFENDANT'S
MOTION TO DISMISS

THONEX WILLIAMS,

Defendant.

This matter is before the Court for consideration of Defendant's Motion to Dismiss filed March 7, 2007. The matter was formally argued August 15, 2007, and the matter is now ready for decision. This Court having previously found that the Defendant was both incompetent to stand trial and that there is not a substantial probability that the Defendant will become competent to stand trial, even though the Defendant has been provided with a course of treatment, the State has moved orally in open court that the Court retain jurisdiction pursuant to Revised Code §2945.39(A)(2). The State proposes to put on evidence pursuant to that section to enable the Court to retain jurisdiction and the Defendant has moved to dismiss, claiming that that section is unconstitutional, as violative of the due process and equal protection clauses of the United States Constitution.

The Defendant relies heavily upon the United States Supreme Court decision, Jackson v. Indiana (1972), 406 U.S. 715 in which the court held at paragraph 2 of its syllabus as follows:

"Indiana's indefinite commitment of a criminal defendant solely on account of his lack of capacity to stand trial violates due process. Such

a defendant cannot be held more than the reasonable period of time necessary to determine whether there is a substantial probability that he will attain competency in the foreseeable future. If it is determined that he will not the state must either institute civil proceedings applicable to indefinite commitment of those not charged with a crime or release the defendant.”

Defendant claims that pursuant to this holding and because the Court has determined that Defendant will not attain competency or cannot with substantial probability be predicted to do so, the State must either “institute civil proceedings...or [the court must] release the defendant.”

This Court finds that a scheme to deprive a person of his freedom, by institutionalization in a mental facility is, by common acceptance of society and by practical application of traditional notions of due process and equal protection in the American jurisprudential system, not, on its face, offensive constitutionally. See, Greenwood v. United States, 350 U.S. 366 (distinguished by the Jackson v. Indiana court on the basis that it applied to initial proceedings only, albeit of indefinite duration). See also, any number of civil commitment statutes, including, Chapters 5122 and 5123 of the Ohio Revised Code. These statutes have passed constitutional muster by being bounded as to time (one year in Ohio’s case) and purpose (protecting the person committed and society), so long as the duration of commitment bears a reasonable relation to the purpose for which the person was committed. These so-called civil commitment statutes also provide for continued monitoring of the subject’s condition and allowing the subject to be released upon a determination that he is no longer a danger to himself or society.

By enacting Revised Code §2945.39, Ohio has sought to provide these protections to accommodate the need of society to be protected from criminal defendants who are deemed to be dangerous to themselves and/or society, provided that the person is subject to hospitalization by court order or a hospitalization or institutionalization by court order. For the Court to retain jurisdiction of a defendant, beyond the period in which restoration to competency is permitted, §2945.39 requires two (2) findings by the Court: first, that the Defendant committed the offense with which the Defendant is charged, and second, 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. While the first finding smacks of an adjudication on the merits of the criminal indictment, it serves, rather two other purposes: first, it provides a procedure allowing the Defendant to attack the sufficiency of the indictment and argue defenses which exonerate him, a proceeding tacitly approved by Jackson v. Indiana, *id.* at pages 740-741. Second, this hearing provides a second level of review, beyond the criminal indictment, that Defendant is in fact a danger to himself and/or society, and provides a vehicle by which the Court can make an independent determination of it.

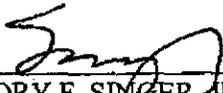
Defendant argues that the standard of proof is violative of his constitutional rights in and of itself, in that it fails to require proof beyond a reasonable doubt. However, "clear and convincing evidence" is not so much a lessening of the criminal standard, as it is a consistency with the commonly accepted civil commitment procedure in criminal cases and in cases in which commitment is sought of those not charged criminally. See, Hendricks v. Kansas, 521 U.S. 346 (1997), Revised Code §5122.15(B),(C).

The Court further finds that the time by which confinement is limited under §2945.39, being the length of time that the Defendant might be committed punitively upon conviction, does not so much indicate the punitive nature of the commitment, but rather the extent to which the individual and society are endangered by him.

Further, under Revised Code §2945.401, should the court retain jurisdiction for this longer period of time, the statute permits changes of confinement and accounts for changes in conditions, including termination of defendant's commitment if he no longer meets the §2945.39(A)(2)(b) criterion. The Court finds that the scheme adopted in §2945.39 is less a denigration of the constitutional rights of the criminally accused as it is a transfer of authority for ordering civil commitment from the probate court to the criminal court for purposes of determining the danger of such Defendant to himself and to the public for purposes of civil commitment, in the case of persons charged with criminal offenses.

Accordingly, Defendant's Motion to Dismiss is **overruled**, and this matter shall proceed to a scheduling conference for hearing under Revised Code §2945.39(C), on August 28, 2007 at 9:00 a.m. in Courtroom 2.

SO ORDERED:



GREGORY F. SINGER, JUDGE

Copies of the above have been delivered this date of filing to counsel:

Linda Howland & Carley Ingram, Attorney(s) for Plaintiff, 301 West Third Street, 5th Floor, Dayton, OH 45402

Anthony Comunale, Attorney for Defendant, 130 W. Second Street, Suite 2050, Dayton, OH 45402

Baldwin's Ohio Revised Code Annotated Currentness

Title XXIX. Crimes--Procedure (Refs & Annos)

Chapter 2945. Trial (Refs & Annos)

Insanity

→ 2945.37 Competence to stand trial; raising of issue; procedures; municipal courts

(A) As used in sections 2945.37 to 2945.402 of the Revised Code:

(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 of the following:

(a) A psychiatrist or a licensed clinical psychologist who satisfies the criteria of division (I)(1) of section 5122.01 of the Revised Code or is employed by a certified forensic center designated by the department of mental health to conduct examinations or evaluations.

(b) For purposes of a separate mental retardation evaluation that is ordered by a court pursuant to division (H) of section 2945.371 of the Revised Code, a psychologist designated by the director of mental retardation and developmental disabilities pursuant to that section to conduct that separate mental retardation evaluation.

(3) "Nonsecured status" means any unsupervised, off-grounds movement or trial visit from a hospital or institution, or any conditional release, that is granted to a person who is found incompetent to stand trial and is committed pursuant to section 2945.39 of the Revised Code or to a person who is found not guilty by reason of insanity and is committed pursuant to section 2945.40 of the Revised Code.

(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 division (A) of section 2945.402 of the Revised Code and pursuant to which a person who is found incompetent to

stand trial or a person who is found 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 incompetent to stand trial 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 section 5122.01 of the Revised Code.

(8) “Mentally retarded person subject to institutionalization by court order” has the same meaning as in section 5123.01 of the Revised Code.

(B) In a criminal action in a court of common pleas, a county court, or a municipal court, the court, prosecutor, 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 shall hold a hearing on the issue as provided in this section. If the issue is raised after the trial has commenced, the court shall hold a hearing on the issue only for good cause shown or on the court’s own motion.

(C) The court shall conduct the hearing required or authorized under division (B) of this section within thirty days after the issue is raised, unless the defendant has been referred for evaluation in which case the court shall 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 pursuant to division (H) of section 2945.371 of the Revised Code 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 under that division. A hearing may be continued for good cause.

(D) The defendant shall be represented by counsel at the hearing conducted under division (C) of this section. If the defendant is unable to obtain counsel, the court shall appoint counsel under Chapter 120. of the Revised Code or under the authority recognized in division (C) of section 120.06, division (E) of section 120.16, division (E) of section 120.26, or section 2941.51 of the Revised Code before proceeding with the hearing.

(E) 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 sections 2317.36 to 2317.38 of the Revised Code or any other applicable statute or rule.

(F) The court shall not 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 Chapter 5122. or a voluntary or involuntary mentally retarded resident under Chapter 5123. of the Revised Code 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.

(G) 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 shall find the defendant incompetent to stand trial and shall enter an order authorized by section 2945.38 of the Revised Code.

(H) Municipal courts shall follow the procedures set forth in sections 2945.37 to 2945.402 of the Revised Code. Except as provided in section 2945.371 of the Revised Code, a municipal court shall not order an evaluation of the defendant's competence to stand trial or the defendant's mental condition at the time of the commission of the offense to be conducted at any hospital operated by the department of mental health. Those evaluations shall be performed through community resources including, but not limited to, certified forensic centers, court probation departments, and community mental health agencies. All expenses of the evaluations shall be borne by the legislative authority of the municipal court, as defined in section 1901.03 of the Revised Code, and shall be taxed as costs in the case. If a defendant is found incompetent to stand trial or not guilty by reason of insanity, a municipal court may commit the defendant as provided in sections 2945.38 to 2945.402 of the Revised Code[FN1]

CREDIT(S)

(1996 S 285, eff. 7-1-97; 1988 S 156, eff. 7-1-89; 1981 H 694; 1980 S 297; 1978 H 565)

[FN1] So in original.

Current through 2009 File 2 of the 128th GA (2009-2010), apv. by 6/16/09 and filed with the Secretary of State by 6/16/09.

Copr. (c) 2009 Thomson Reuters

END OF DOCUMENT

Baldwin's Ohio Revised Code Annotated Currentness

Title XXIX. Crimes--Procedure (Refs & Annos)

Chapter 2945. Trial (Refs & Annos)

Insanity

→ 2945.38 Effect of findings; treatment or continuing evaluation and treatment of incompetent; medication; disposition of defendant; report; additional hearings; discharge

(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)(1)(a) If, after taking into consideration all relevant reports, information, and other evidence, the court finds that the defendant is incompetent to stand trial and that 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, the court shall 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 incompetent to stand trial, but the court is unable at that time to determine 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, the court shall 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 the defendant is provided with a course of treatment.

(b) The court order for the defendant to undergo treatment or continuing evaluation and treatment under division (B)(1)(a) of this section shall specify that the treatment or continuing evaluation and treatment shall occur at a facility operated by the department of mental health or the department of mental retardation and developmental disabilities, 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 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.

(c) 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 for treatment or continuing evaluation and treatment under division (B)(1)(b) of this section 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 for treatment or continuing evaluation and treatment may petition the court for authorization for the involuntary administration of medication. The court shall hold a hearing on the petition within five days of the filing of the petition if the petition was filed in a municipal court or a county court regarding an incompetent defendant charged with a misdemeanor or within ten days of the filing of the petition if the petition was filed in a court of common pleas regarding an incompetent defendant charged with a felony offense. Following the hearing, the court may authorize the involuntary administration of medication or may dismiss the petition.

(2) If the court finds that the defendant is incompetent to stand trial 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 shall order the discharge of the defendant, unless upon motion of the prosecutor or on its own motion, the court either seeks to retain jurisdiction over the defendant pursuant to section 2945.39 of the Revised Code or files an affidavit in the probate court for the civil commitment of the defendant pursuant to Chapter 5122. or 5123. of the Revised Code 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. If an affidavit is filed in the probate court, the trial court shall send to the probate court copies of all written reports of the defendant's mental condition that were prepared pursuant to section 2945.371 of the Revised Code.

The trial court may issue the temporary order of detention that a probate court may issue under section 5122.11 or 5123.71 of the Revised Code, to remain in effect until the probable cause or initial hearing in the probate court. Further proceedings in the probate court are civil proceedings governed by Chapter 5122. or 5123. of the Revised Code.

(C) No defendant shall be required to undergo treatment, including any continuing evaluation and treatment, under division (B)(1) of 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 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.

(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) Except as otherwise provided in this division, a defendant who is charged with an offense and is 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. 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 or the continuing evaluation and treatment of the defendant ordered under division (B)(1)(a) of this section 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 of the hospital or the managing officer of the institution shall notify the court within twenty-four hours of the defendant's movement to the medical facility for an emergency medical situation under this division.

(F) The person who supervises the treatment or continuing evaluation and treatment of a defendant ordered to undergo treatment or continuing evaluation and treatment under division (B)(1)(a) 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 fourteen days before the expiration of the maximum time for continuing evaluation and treatment as specified in division (B)(1)(a) 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;

(4) Whenever the person who supervises the treatment or continuing evaluation and treatment of a defendant ordered under division (B)(1)(a) of this section believes 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 the defendant's defense even if the defendant is provided with a course 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 and of assisting in the defendant's defense and there is a substantial probability that the defendant will become capable of understanding the nature and objective of the proceedings against the defendant and of assisting in the defendant's defense if the defendant is 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 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) If a defendant is committed pursuant to division (B)(1) of this section, 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 the defendant's defense even if the defendant is provided with a course of treatment, within ten days after the expiration of the maximum time for treatment as specified in division (C) of this section, within ten days after the expiration of the maximum time for continuing evaluation and treatment as specified in division (B)(1)(a) 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 or examiner that the defendant is competent to stand trial, whichever is the earliest, 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, but that there is a substantial probability that the defendant will become competent to stand trial if the defendant is provided with a course of treatment,

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, 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 court finds that there is not a substantial probability that the defendant will become competent to stand trial even if the defendant is provided with a course of treatment, or if the maximum time for treatment relative to that offense as specified in division (C) of this section 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 court finds that there is not a substantial probability that the defendant will become competent to stand trial even if the defendant is provided with a course of treatment, or 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 pro-

secute 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.

CREDIT(S)

(2001 S 122, eff. 2-20-02; 1996 S 285, eff. 7-1-97; 1996 S 269, eff. 7-1-96; 1988 S 156, eff. 7-1-89; 1980 H 965, H 900, S 297; 1978 H 565; 1975 S 185; 1953 H 1; GC 13441-2)

Current through 2009 File 2 of the 128th GA (2009-2010), apv. by 6/16/09 and filed with the Secretary of State by 6/16/09.

Copr. (c) 2009 Thomson Reuters

END OF DOCUMENT

Baldwin's Ohio Revised Code Annotated Currentness

Title XXIX. Crimes--Procedure (Refs & Annos)

☐ Chapter 2945. Trial (Refs & Annos)

☐ Insanity

→ 2945.39 Civil commitment; expiration of time for treatment; jurisdiction; hearing; reports

(A) If a defendant who is charged with an offense described in division (C)(1) of section 2945.38 of the Revised Code is found incompetent to stand trial, after the expiration of the maximum time for treatment as specified in division (C) of that section or after the court finds that there is not a substantial probability that the defendant will become competent to stand trial even if the defendant is provided with a course of treatment, one of the following applies:

(1) The court or the prosecutor may file an affidavit in probate court for civil commitment of the defendant in the manner provided in Chapter 5122, or 5123, of the Revised Code. If the court or prosecutor files an affidavit for civil commitment, 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 an affidavit for civil commitment, 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 send to the prosecutor the notices described in divisions (H)(4)(a)(i) to (iii) of section 2945.38 of the Revised Code within the periods of time and under the circumstances specified in those divisions.

(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 with which the defendant is charged.

(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.

(B) In making its determination under division (A)(2) of this section as to whether to retain jurisdiction over the defendant, 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 that is relevant to the defendant's ability to conform to the law.

(C) If the court conducts a hearing as described in division (A)(2) of this section and if the court does not make both findings described in divisions (A)(2)(a) and (b) of this section by clear and convincing evidence, the court shall dismiss the indictment, information, or complaint against the defendant. Upon the dismissal, the court shall discharge the defendant unless the court or prosecutor files an affidavit in probate court for civil commitment of

the defendant pursuant to Chapter 5122. or 5123. of the Revised Code. If the court or prosecutor files an affidavit for civil commitment, 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 an affidavit for civil commitment, 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 send to the prosecutor the notices described in divisions (H)(4)(a)(i) to (iii) of section 2945.38 of the Revised Code within the periods of time and under the circumstances specified in those divisions. A dismissal of charges under this division is not a bar to further criminal proceedings based on the same conduct.

(D)(1) If the court conducts a hearing as described in division (A)(2) of this section and if the court makes the findings described in divisions (A)(2)(a) and (b) of this section by clear and convincing evidence, the court shall commit the defendant to a hospital operated by the department of mental health, a facility operated by the department of mental retardation and developmental disabilities, or another medical or psychiatric facility, as appropriate. In determining the place and nature of the commitment, the court shall 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 shall give preference to protecting public safety.

(2) If a court makes a commitment of a defendant under division (D)(1) of this section, the prosecutor shall send to the place of commitment all reports of the defendant's current mental condition and, except as otherwise provided in this division, any other relevant information, including, but not limited to, a transcript of the hearing held pursuant to division (A)(2) of this section, 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 shall 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 would create a substantial risk of harm to any person, the prosecutor also shall send the other relevant information. Upon admission of a defendant committed under division (D)(1) of this section, the place of commitment shall send to the board of alcohol, drug addiction, and mental health services 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 provided by the prosecutor under this division, including, if provided, a transcript of the hearing held pursuant to division (A)(2) of this section, the relevant police reports, and the prior arrest and conviction records that pertain to the defendant and that the prosecutor possesses.

(3) If a court makes a commitment under division (D)(1) of this section, all further proceedings shall be in accordance with sections 2945.401 and 2945.402 of the Revised Code.

CREDIT(S)

(2001 S 122, eff. 2-20-02; 1996 S 285, eff. 7-1-97)

Current through 2009 File 2 of the 128th GA (2009-2010), apv. by 6/16/09 and filed with the Secretary of State by 6/16/09.

Copr. (c) 2009 Thomson Reuters

END OF DOCUMENT

Baldwin's Ohio Revised Code Annotated Currentness

Title XXIX. Crimes--Procedure (Refs & Annos)

Chapter 2945. Trial (Refs & Annos)

Insanity

→ 2945.401 Nonsecured status or termination of commitment; reports on competence; jurisdiction; hearing

(A) A defendant found incompetent to stand trial and committed pursuant to section 2945.39 of the Revised Code or a person found not guilty by reason of insanity and committed pursuant to section 2945.40 of the Revised Code shall remain subject to the jurisdiction of the trial court pursuant to that commitment, and to the provisions of this section, until the final termination of the commitment as described in division (J)(1) of this section. If the jurisdiction is terminated under this division because of the final termination of the commitment resulting from the expiration of the maximum prison term or term of imprisonment described in division (J)(1)(b) of this section, the court or prosecutor may file an affidavit for the civil commitment of the defendant or person pursuant to Chapter 5122. or 5123. of the Revised Code.

(B) A hearing conducted under any provision of sections 2945.37 to 2945.402 of the Revised Code shall not be conducted in accordance with Chapters 5122. and 5123. of the Revised Code. Any person who is committed pursuant to section 2945.39 or 2945.40 of the Revised Code shall not voluntarily admit the person 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. All other provisions of Chapters 5122. and 5123. of the Revised Code regarding hospitalization or institutionalization shall apply to the extent they are not in conflict with this chapter. A commitment under section 2945.39 or 2945.40 of the Revised Code shall not be terminated and the conditions of the commitment shall not be changed except as otherwise provided in division (D)(2) of this section with respect to a mentally retarded person subject to institutionalization by court order or except by order of the trial court.

(C) The hospital, facility, or program to which a defendant or person has been committed under section 2945.39 or 2945.40 of the Revised Code shall report in writing to the trial court, at the times specified in this division, as to whether the defendant or person remains a mentally ill person subject to hospitalization by court order or a mentally retarded person subject to institutionalization by court order and, in the case of a defendant committed under section 2945.39 of the Revised Code, as to whether the defendant remains incompetent to stand trial. The hospital, facility, or program shall make the reports after the initial six months of treatment and every two years after the initial report is made. The trial court shall provide copies of the reports to the prosecutor and to the counsel for the defendant or person. Within thirty days after its receipt pursuant to this division of a report from a hospital, facility, or program, the trial court shall hold a hearing on the continued commitment of the defendant or person or on any changes in the conditions of the commitment of the defendant or person. The defendant or person may request a change in the conditions of confinement, and the trial court shall conduct a hearing on that request if six months or more have elapsed since the most recent hearing was conducted under this section.

(D)(1) Except as otherwise provided in division (D)(2) of this section, when a defendant or person has been committed under section 2945.39 or 2945.40 of the Revised Code, at any time after evaluating the risks to public safety and the welfare of the defendant or person, the chief clinical officer of the hospital, facility, or program to which the defendant or person is committed may recommend a termination of the defendant's or person's commitment or a change in the conditions of the defendant's or person's commitment.

Except as otherwise provided in division (D)(2) of this section, if the chief clinical officer recommends on-grounds unsupervised movement, off-grounds supervised movement, or nonsecured status for the defendant or person or termination of the defendant's or person's commitment, the following provisions apply:

(a) If the chief clinical officer recommends on-grounds unsupervised movement or off-grounds supervised movement, the chief clinical officer shall file with the trial court an application for approval of the movement and shall send a copy of the application to the prosecutor. Within fifteen days after receiving the application, the prosecutor may request a hearing on the application and, if a hearing is requested, shall so inform the chief clinical officer. If the prosecutor does not request a hearing within the fifteen-day period, the trial court shall approve the application by entering its order approving the requested movement or, within five days after the expiration of the fifteen-day period, shall set a date for a hearing on the application. If the prosecutor requests a hearing on the application within the fifteen-day period, the trial court shall hold a hearing on the application within thirty days after the hearing is requested. If the trial court, within five days after the expiration of the fifteen-day period, sets a date for a hearing on the application, the trial court shall hold the hearing within thirty days after setting the hearing date. At least fifteen days before any hearing is held under this division, the trial court shall give the prosecutor written notice of the date, time, and place of the hearing. At the conclusion of each hearing conducted under this division, the trial court either shall approve or disapprove the application and shall enter its order accordingly.

(b) If the chief clinical officer recommends termination of the defendant's or person's commitment at any time or if the chief clinical officer recommends the first of any nonsecured status for the defendant or person, the chief clinical officer shall send written notice of this recommendation to the trial court and to the local forensic center. The local forensic center shall evaluate the committed defendant or person and, within thirty days after its receipt of the written notice, shall submit to the trial court and the chief clinical officer a written report of the evaluation. The trial court shall provide a copy of the chief clinical officer's written notice and of the local forensic center's written report to the prosecutor and to the counsel for the defendant or person. Upon the local forensic center's submission of the report to the trial court and the chief clinical officer, all of the following apply:

(i) If the forensic center disagrees with the recommendation of the chief clinical officer, it shall inform the chief clinical officer and the trial court of its decision and the reasons for the decision. The chief clinical officer, after consideration of the forensic center's decision, shall either withdraw, proceed with, or modify and proceed with the recommendation. If the chief clinical officer proceeds with, or modifies and proceeds with, the recommendation, the chief clinical officer shall proceed in accordance with division (D)(1)(b)(iii) of this section.

(ii) If the forensic center agrees with the recommendation of the chief clinical officer, it shall inform the chief clinical officer and the trial court of its decision and the reasons for the decision, and the chief clinical officer

shall proceed in accordance with division (D)(1)(b)(iii) of this section.

(iii) If the forensic center disagrees with the recommendation of the chief clinical officer and the chief clinical officer proceeds with, or modifies and proceeds with, the recommendation or if the forensic center agrees with the recommendation of the chief clinical officer, the chief clinical officer shall work with the board of alcohol, drug addiction, and mental health services or community mental health board serving the area, as appropriate, to develop a plan to implement the recommendation. If the defendant or person is on medication, the plan shall include, but shall not be limited to, a system to monitor the defendant's or person's compliance with the prescribed medication treatment plan. The system shall include a schedule that clearly states when the defendant or person shall report for a medication compliance check. The medication compliance checks shall be based upon the effective duration of the prescribed medication, taking into account the route by which it is taken, and shall be scheduled at intervals sufficiently close together to detect a potential increase in mental illness symptoms that the medication is intended to prevent.

The chief clinical officer, after consultation with the board of alcohol, drug addiction, and mental health services or the community mental health board serving the area, shall send the recommendation and plan developed under division (D)(1)(b)(iii) of this section, in writing, to the trial court, the prosecutor and the counsel for the committed defendant or person. The trial court shall conduct a hearing on the recommendation and plan developed under division (D)(1)(b)(iii) of this section. Divisions (D)(1)(c) and (d) and (E) to (J) of this section apply regarding the hearing.

(c) If the chief clinical officer's recommendation is for nonsecured status or termination of commitment, the prosecutor may obtain an independent expert evaluation of the defendant's or person's mental condition, and the trial court may continue the hearing on the recommendation for a period of not more than thirty days to permit time for the evaluation.

The prosecutor may introduce the evaluation report or present other evidence at the hearing in accordance with the Rules of Evidence.

(d) The trial court shall schedule the hearing on a chief clinical officer's recommendation for nonsecured status or termination of commitment and shall give reasonable notice to the prosecutor and the counsel for the defendant or person. Unless continued for independent evaluation at the prosecutor's request or for other good cause, the hearing shall be held within thirty days after the trial court's receipt of the recommendation and plan.

(2)(a) Division (D)(1) of this section does not apply to on-grounds unsupervised movement of a defendant or person who has been committed under section 2945.39 or 2945.40 of the Revised Code, who is a mentally retarded person subject to institutionalization by court order, and who is being provided residential habilitation, care, and treatment in a facility operated by the department of mental retardation and developmental disabilities.

(b) If, pursuant to section 2945.39 of the Revised Code, the trial court commits a defendant who is found incompetent to stand trial and who is a mentally retarded person subject to institutionalization by court order, if the de-

defendant is being provided residential habilitation, care, and treatment in a facility operated by the department of mental retardation and developmental disabilities, if an individual who is conducting a survey for the department of health to determine the facility's compliance with the certification requirements of the medicaid program under Chapter 5111. of the Revised Code and Title XIX of the "Social Security Act," 49 Stat. 620 (1935), 42 U.S.C.A. 301, as amended, cites the defendant's receipt of the residential habilitation, care, and treatment in the facility as being inappropriate under the certification requirements, if the defendant's receipt of the residential habilitation, care, and treatment in the facility potentially jeopardizes the facility's continued receipt of federal medicaid moneys, and if as a result of the citation the chief clinical officer of the facility determines that the conditions of the defendant's commitment should be changed, the department of mental retardation and developmental disabilities may cause the defendant to be removed from the particular facility and, after evaluating the risks to public safety and the welfare of the defendant and after determining whether another type of placement is consistent with the certification requirements, may place the defendant in another facility that the department selects as an appropriate facility for the defendant's continued receipt of residential habilitation, care, and treatment and that is a no less secure setting than the facility in which the defendant had been placed at the time of the citation. Within three days after the defendant's removal and alternative placement under the circumstances described in division (D)(2)(b) of this section, the department of mental retardation and developmental disabilities shall notify the trial court and the prosecutor in writing of the removal and alternative placement.

The trial court shall set a date for a hearing on the removal and alternative placement, and the hearing shall be held within twenty-one days after the trial court's receipt of the notice from the department of mental retardation and developmental disabilities. At least ten-days before the hearing is held, the trial court shall give the prosecutor, the department of mental retardation and developmental disabilities, and the counsel for the defendant written notice of the date, time, and place of the hearing. At the hearing, the trial court shall consider the citation issued by the individual who conducted the survey for the department of health to be prima-facie evidence of the fact that the defendant's commitment to the particular facility was inappropriate under the certification requirements of the medicaid program under chapter 5111. of the Revised Code and Title XIX of the "Social Security Act," 49 Stat. 620 (1935), 42 U.S.C.A. 301, as amended, and potentially jeopardizes the particular facility's continued receipt of federal medicaid moneys. At the conclusion of the hearing, the trial court may approve or disapprove the defendant's removal and alternative placement. If the trial court approves the defendant's removal and alternative placement, the department of mental retardation and developmental disabilities may continue the defendant's alternative placement. If the trial court disapproves the defendant's removal and alternative placement, it shall enter an order modifying the defendant's removal and alternative placement, but that order shall not require the department of mental retardation and developmental disabilities to replace the defendant for purposes of continued residential habilitation, care, and treatment in the facility associated with the citation issued by the individual who conducted the survey for the department of health.

(E) In making a determination under this section regarding nonsecured status or termination of commitment, the trial court shall consider all relevant factors, including, but not limited to, all of the following:

- (1) Whether, in the trial court's view, the defendant or person currently represents a substantial risk of physical harm to the defendant or person or others;
- (2) Psychiatric and medical testimony as to the current mental and physical condition of the defendant or person;

- (3) Whether the defendant or person has insight into the defendant's or person's condition so that the defendant or person will continue treatment as prescribed or seek professional assistance as needed;
- (4) The grounds upon which the state relies for the proposed commitment;
- (5) Any past history that is relevant to establish the defendant's or person's degree of conformity to the laws, rules, regulations, and values of society;
- (6) If there is evidence that the defendant's or person's mental illness is in a state of remission, the medically suggested cause and degree of the remission and the probability that the defendant or person will continue treatment to maintain the remissive state of the defendant's or person's illness should the defendant's or person's commitment conditions be altered.
- (F) At any hearing held pursuant to division (C) or (D)(1) or (2) of this section, the defendant or the person shall have all the rights of a defendant or person at a commitment hearing as described in section 2945.40 of the Revised Code.
- (G) In a hearing held pursuant to division (C) or (D)(1) of this section, the prosecutor has the burden of proof as follows:
- (1) For a recommendation of termination of commitment, to show by clear and convincing evidence that the defendant or person remains a mentally ill person subject to hospitalization by court order or a mentally retarded person subject to institutionalization by court order;
- (2) For a recommendation for a change in the conditions of the commitment to a less restrictive status, to show by clear and convincing evidence that the proposed change represents a threat to public safety or a threat to the safety of any person.
- (H) In a hearing held pursuant to division (C) or (D)(1) or (2) of this section, the prosecutor shall represent the state or the public interest.
- (I) At the conclusion of a hearing conducted under division (D)(1) of this section regarding a recommendation from the chief clinical officer of a hospital, program, or facility, the trial court may approve, disapprove, or modify the recommendation and shall enter an order accordingly.
- (J)(1) A defendant or person who has been committed pursuant to section 2945.39 or 2945.40 of the Revised Code continues to be under the jurisdiction of the trial court until the final termination of the commitment. For purposes of division (J) of this section, the final termination of a commitment occurs upon the earlier of one of the following:

(a) The defendant or person no longer is a mentally ill person subject to hospitalization by court order or a mentally retarded person subject to institutionalization by court order, as determined by the trial court;

(b) The expiration of the maximum prison term or term of imprisonment that the defendant or person could have received if the defendant or person had been convicted of the most serious offense with which the defendant or person is charged or in relation to which the defendant or person was found not guilty by reason of insanity;

(c) The trial court enters an order terminating the commitment under the circumstances described in division (J)(2)(a)(ii) of this section.

(2)(a) If a defendant is found incompetent to stand trial and committed pursuant to section 2945.39 of the Revised Code, if neither of the circumstances described in divisions (J)(1)(a) and (b) of this section applies to that defendant, and if a report filed with the trial court pursuant to division (C) of this section indicates that the defendant presently is competent to stand trial or if, at any other time during the period of the defendant's commitment, the prosecutor, the counsel for the defendant, or the chief clinical officer of the hospital, facility, or program to which the defendant is committed files an application with the trial court alleging that the defendant presently is competent to stand trial and requesting a hearing on the competency issue or the trial court otherwise has reasonable cause to believe that the defendant presently is competent to stand trial and determines on its own motion to hold a hearing on the competency issue, the trial court shall schedule a hearing on the competency of the defendant to stand trial, shall give the prosecutor, the counsel for the defendant, and the chief clinical officer notice of the date, time, and place of the hearing at least fifteen days before the hearing, and shall conduct the hearing within thirty days of the filing of the application or of its own motion. If, at the conclusion of the hearing, the trial court determines that the defendant presently is capable of understanding the nature and objective of the proceedings against the defendant and of assisting in the defendant's defense, the trial court shall order that the defendant is competent to stand trial and shall be proceeded against as provided by law with respect to the applicable offenses described in division (C)(1) of section 2945.38 of the Revised Code and shall enter whichever of the following additional orders is appropriate:

(i) If the trial court determines that the defendant remains a mentally ill person subject to hospitalization by court order or a mentally retarded person subject to institutionalization by court order, the trial court shall order that the defendant's commitment to the hospital, facility, or program be continued during the pendency of the trial on the applicable offenses described in division (C)(1) of section 2945.38 of the Revised Code.

(ii) If the trial court determines that the defendant no longer is a mentally ill person subject to hospitalization by court order or a mentally retarded person subject to institutionalization by court order, the trial court shall order that the defendant's commitment to the hospital, facility, or program shall not be continued during the pendency of the trial on the applicable offenses described in division (C)(1) of section 2945.38 of the Revised Code. This order shall be a final termination of the commitment for purposes of division (J)(1)(c) of this section.

(b) If, at the conclusion of the hearing described in division (J)(2)(a) of this section, the trial court determines that the defendant remains incapable of understanding the nature and objective of the proceedings against the defendant or of assisting in the defendant's defense, the trial court shall order that the defendant continues to be

incompetent to stand trial, that the defendant's commitment to the hospital, facility, or program shall be continued, and that the defendant remains subject to the jurisdiction of the trial court pursuant to that commitment, and to the provisions of this section, until the final termination of the commitment as described in division (J)(1) of this section.

CREDIT(S)

(1996 S 285, eff. 7-1-97)

Current through 2009 File 2 of the 128th GA (2009-2010), apv. by 6/16/09 and filed with the Secretary of State by 6/16/09.

Copr. (c) 2009 Thomson Reuters

END OF DOCUMENT

Baldwin's Ohio Revised Code Annotated Currentness
Title XXIX. Crimes--Procedure (Refs & Annos)
 ▣ Chapter 2945. Trial (Refs & Annos)
 ▣ Insanity
 → 2945.402 Conditional release

(A) In approving a conditional release, the trial court may set any conditions on the release with respect to the treatment, evaluation, counseling, or control of the defendant or person that the court considers necessary to protect the public safety and the welfare of the defendant or person. The trial court may revoke a defendant's or person's conditional release and order rehospitalization or reinstitutionalization at any time the conditions of the release have not been satisfied, provided that the revocation shall be in accordance with this section.

(B) A conditional release is a commitment. The hearings on continued commitment as described in section 2945.401 of the Revised Code apply to a defendant or person on conditional release.

(C) A person, agency, or facility that is assigned to monitor a defendant or person on conditional release immediately shall notify the trial court on learning that the defendant or person being monitored has violated the terms of the conditional release. Upon learning of any violation of the terms of the conditional release, the trial court may issue a temporary order of detention or, if necessary, an arrest warrant for the defendant or person. Within ten court days after the defendant's or person's detention or arrest, the trial court shall conduct a hearing to determine whether the conditional release should be modified or terminated. At the hearing, the defendant or person shall have the same rights as are described in division (C) of section 2945.40 of the Revised Code. The trial court may order a continuance of the ten-court-day period for no longer than ten days for good cause shown or for any period on motion of the defendant or person. If the trial court fails to conduct the hearing within the ten-court-day period and does not order a continuance in accordance with this division, the defendant or person shall be restored to the prior conditional release status.

(D) The trial court shall give all parties reasonable notice of a hearing conducted under this section. At the hearing, the prosecutor shall present the case demonstrating that the defendant or person violated the terms of the conditional release. If the court finds by a preponderance of the evidence that the defendant or person violated the terms of the conditional release, the court may continue, modify, or terminate the conditional release and shall enter its order accordingly.

CREDIT(S)

(1996 S 285, eff. 7-1-97)

Current through 2009 File 2 of the 128th GA (2009-2010), apv. by 6/16/09 and filed with the Secretary of State

by 6/16/09.

Copr. (c) 2009 Thomson Reuters

END OF DOCUMENT