ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,	*	**CASE NO. 08-2424**
Plaintiff-Appellant,	*	**On Appeal from the Montgomery County**
-vs-	*	**Court of Appeals, Second Appellate District**
THONEX WILLIAMS,	*	
Defendant-Appellee,	*	**Court of Appeals Case No. CA 22532**

****

APPELLEE'S MERIT BRIEF

****

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STATEMENT OF CASE

According to the Ohio Department of Mental Health; "the State of Ohio is unique in the nation in having a legal status known as incompetent to stand trial – un-restorable – criminal jurisdiction." (commonly referred to as "criminal jurisdiction") *The Ohio Department of Mental Health, Office of Forensic Services*, July 2007 newsletter page 10. Individuals involuntarily committed pursuant to criminal jurisdiction are committed, treated, reviewed and subject to release, in a manner which differs significantly from those involuntarily committed under Ohio's civil commitment procedures.

In December of 2005, Appellee, Thonex Williams, was indicted for five (5) felony counts in the Montgomery County Court of Common Pleas. Appellee was found incompetent to stand trial and committed to Twin Valley Behavioral Care facility in Columbus, Ohio

At the conclusion of the maximum allowed period of one year, for the purpose of making efforts to restore him to competency, Thonex was not restored to competency. The treatment facility concluded that there was no substantial likelihood of his restoration to competency in the foreseeable future. The Trial Court agreed. As of this date, Thonex remains incompetent to stand trial and in the custody of the Ohio Department of Mental Health.

After the Trial Court found Thonex unrestorable and without the possibility of restoration in the foreseeable future, the Montgomery County Prosecutor's Office filed a request with the Trial Court to retain criminal jurisdiction over Thonex pursuant to R.C. 2945.39.

Prior to a hearing on the matter to deterimine whether or not to retain criminal jurisdiction, the Trial Court denied Apellee's request to dismiss the criminal indictment. The requested dismissal was based on this Court's decision in *State v. Sullivan* (2001), 90 Ohio St.3d 502, 2001-Ohio-6245, 902 N.E.2d 1042 along with the body of case law holding that, upon an individual being found un-restorable, the criminal indictment must be dismissed and the individual must be treated the same as all other individuals involuntarily committed through civil commitment procedures. It was further argued that the functioning of Revised

Code Section 2945.39 is an unconstitutional end-around of the law as announced in *Jackson v. Indiana* (1972), 406 US 714, 92 S.Ct. 1845, *Burton v. Reshetylo* (1974), 38 Ohio St2nd 35 and *State v. Sullivan* (2001), 90 Ohio St.3d 502.

Ultimately, the Trial Court granted the Prosecutor's request to retain criminal jurisdiction and Thonex was remanded to the custody of the Ohio Department of Mental Health's facility in Columbus. Thereafter, the matter proceeded to the Second District Court of Appeals.

The Second District Court of Appeals found that R.C. 2945.39 violated Appellee's Equal Protection and Due Process rights, and failed to provide Appellee with the substantive rights afforded to all other criminal defendants who are subject to adjudication on the merits of whether or not they committed the crime charged. *State v. Williams*, 179 Ohio App.3d 584, 2008-Ohio-6245, 902 N.E.2d 1042.

On or about December 19, 2008, the Montgomery County Prosecutor's Office appealed the decision of the Second District.

On March 25, 2009, Twin Valley Behavioral Healthcare Center made recommendations that Thonex be transferred from the criminal forensic maximum security facility in Columbus to the Ohio Department of Mental Health civil services in Cincinnati. (Appendix, Ohio Department of Mental Health Report, March 25, 2009) Despite the March recommendation, the Trial Court did not authorize the order of transfer until June 12, 2009. (Appendix, ISTU-CJ Order for Transfer of Commitment from Maximum Security at Twin Valley BHC to Locked Civil Unit at Summit BHC, June 12, 2009) The three month delay in modification of treatment facility was a direct result of the Trial Court retaining criminal jurisdiction since under civil law the chief clinical officer is authorized to make that adjustment without seeking court approval.

The differing standards of treatment between Ohio's civil and criminal commitment procedures, along with the resulting depravation of Appellee's Equal Protection and Due Process rights is now before this Court for resolution.

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.

Reply:
Proposition of Law No. I: Involuntary Commitment pursuant to R.C. 2945.39, of a criminal defendant found incompetent to stand trial, deprives the defendant of the Constitutional rights of Equal Protection and Due Process:

R.C. 2945.38 provides that when a criminal defendant is found to be incompetent to stand trial the court may order restorative efforts for a period of up to one (1) year. If the defendant has not been restored within one year (one year for the most serious of offenses), no further treatment may be administered and any further efforts at restoration must cease. Any proceedings in the criminal case, thereafter, are governed by R.C. 2945.39.

R.C. 2945.39 allows a court to dismiss the criminal case and turn the defendant over to a probate court for a determination as to whether or not the defendant is subject to civil involuntary commitment. Alternatively, a court, upon request of the State, may hold a hearing to determine if, by clear and convincing evidence, the defendant committed the crime charged and if the defendant is subject to institutionalization. If those two criteria's are met, the defendant may be involuntarily detained for a period of time equal to that which may have been the maximum sentence imposed upon criminal conviction.

Under R.C. 2945.39(A)(2) the process by which a trial court determines whether a defendant committed the crime charged, as recognized by the Appellate Court below, provides for none of the fundamental constitutional protections generally afforded those

charged with a crime. *State v. Williams* (2008) 179 Ohio App.3d 584 at 594.

Appellant concedes that the involuntary commitment procedures set forth in R.C. 2945.39 do not provide for the various substantive and procedural rights which are afforded to all others charged with a crime. Despite this, Appellant argues that the Court of Appeals erred in finding that R.C. 2945.39 is criminal rather than civil in nature and therefore, Appellee was not entitled to the rights which are afforded to a criminal defendant. Oddly, later, in proposition of law numbered two and three Appellant argues that, despite being "civil" in nature, R.C. 2945.39 does not need to afford the same substantive and procedural rights as those set forth in Ohio's civil commitment procedures based upon the fact that Appellee *committed a crime*. The material fallacy, or circularity, of this argument is self evident.

The following fundamental rights, which are weaved into our entire criminal justice system, were denied Appellee in the adjudication of whether he committed a crime:

Appellee was denied effective assistance of counsel. Having been found incompetent to stand trial Appellee was unable to assist in any meaningful way in his defense. "Competence to stand trial is rudimentary, for upon it depends the main part of those rights deemed essential to a trial, including the right to effective assistance of counsel, the right to summon, to confront, and to cross exam witnesses, and the right to testify on ones own behalf or to remain silent without penalty for doing so." *Cooper v. Oklahoma* (1996) 517 U.S. 348 at 354 quoting *Riggins v. Nevada* (1992) 504 U.S. 127 at 139-140

2945.39 lowers the constitutional standard required to adjudicate an individual responsible for the commission of a crime. 2945.39 allows a court to make a finding that a defendant committed a criminal act by "clear and convincing evidence" rather than the customary "beyond a reasonable doubt." This lessening of standard is particularly offensive when coupled with the fact that, by the very nature of Appellee's incompetency, he was and is unable to defend himself. Thus, 2945.39 effectively prevented Appellee from responding to the allegations, while at the same time lessened the government's burden of proof.

2945.39 does not provide for pretrial and trial protections afforded to others accused

of criminal acts. It is unclear whether or not the statutory section even requires the court to utilize the Ohio Rules of Criminal Procedure or even the Ohio Rules of Evidence. A fair reading of the section suggests the court may not have to impose such requirements in evidentiary presentation. It is, however, clear that numerous constitutional protections generally afforded to a criminal defendant in litigation were not afforded to Appellee. It is notable that the Trial Court below proceeded with the adjudication despite the fact that there was a pending and unresolved motion to suppress filed by Appellee. In the adjudication the government used Appellee's statements and the Court allowed their use, despite never resolving Appellee's motion to suppress. R.C. 2945.39(B) specifically allows the use of hearsay evidence, along with unindicted prior bad acts, as a basis to find the defendant committed the crime charged.

2945.39 does not provide for a defendant's right to confront witnesses against him. R.C. 2945.39(B) allows the use of "reports" in lieu of testimony.

2945.39 suspends Appellee's right to a trial by jury, despite the fact that the Trial Court adjudicated whether or not the Appellee committed a criminal act

2945.39 violates a defendant's right to a speedy trial. Due to the incompetency of the Appellee, the statute of limitations for prosecution of these criminal charges is tolled, along with his right to a speedy trial. (2945.72(B)) It is reasonable and foreseeable, therefore, that Appellee could serve what he would have served upon conviction (some ten (10) plus years) and then later be placed on trial for the commission of the same crime and sentenced to the same ten years. As such, 2945.39 violates the 8th Amendment's prohibition against cruel and unusual punishment. The pretrial incarceration of an individual who has not been afforded the opportunity to be brought to trial within a reasonable period of time violates the Federal Constitutions prohibition against cruel and unusual punishment; "there is a substantial injustice in keeping an un-convicted person in custody to await trial where it is plainly evident that his mental condition will not permit trial within a reasonable period of time." *Jackson v. Indiana* 408 US 715, 92 S.Ct. 1845, citing *Cook v. Ciccone*, 312 F.Sub at 284.

Appellant argues that none of these rights should have been afforded Appellee since 2945.39 is in essence a civil statute (In Appellant's subsequent arguments, addressed below, Appellant argues the civil commitment procedures should not apply either). Accordingly Appellant asserts that the Court of Appeals erred in finding 2945.39 to be criminal in nature. In this argument Appellant relies primarily on the United States Supreme Court's decision in *Kansas v. Hendrick* (1997) 512 U.S. 346, 117 S.Ct. 2072, 138 L.Ed.2d 501. The decision in *Hendrick* is, as the Court of Appeals found, distinguishable.

The *Hendrick* decision was confined to civil involuntary commitment procedures and the question of whether or not Kansas law provided substantive due process to those civilly confined. R.C. 2945.39 is apart of Ohio's criminal code and is applicable to only those charged with a crime:

> 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, (citation omitted), 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. *State v. Williams*, (2008) 179 Ohio App.3d 584 at 596

The procedures set forth in *Hendrick* mirrored the civil commitment procedures of Kansas. The decision did not compare and contrast civil commitment procedure and criminal commitment procedure as is the problem in the case at bar. Indeed, the United States Supreme Court specifically found the Kansas statute "afforded the same status to others who have been civilly committed" *Hendrick* at 368. 117 S.Ct. 2072. Thus the Equal Protection and Due Process problems presented by the United States Supreme Court's decision in *Jackson* were absent in *Hendrick*, unlike the current differing criminal vs. civil procedures of R.C. 2945.39. As noted by the Appellate Court:

> 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. *State v. Williams*, (2008) 179 Ohio App.3d 584

It is also notable that the individual in *Hendrick* was subject to civil institutionalization after the conviction of a crime, not before:

> 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 shown 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. *State v. Williams* at 596, 597

The involuntary commitment of Appellee did not relate to treatment but rather the facilitation of the criminal case:

> 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. *Williams* at 597

Moreover, as this Court has recognized, involuntary commitment under 2945.39 and 2945.38 are commitments whose primary purpose is to facilitate the criminal case. "As we explained in the *State v. Sullivan* (2001) 90 Ohio St3d 502, 507, 739 N.E.2d 738 [the purpose of the treatment is to assist the defendant in obtaining competency to stand trial] the competency proceeding in this case clearly aids and is subordinate to the underlying main proceeding, which is the criminal case itself." *State v. Upshaw* (2006) 110 Ohio St.3d 189 at 193

Additionally, supporting a finding that R.C. 2945.39 is criminal in nature, is the fact that the legislature codified differing standards of treatment between civil and criminal commitments. If there is a conflict, the criminal commitment statutes control, R.C. 5122.01.1. Further, R.C. 2945.40.1, directs that discharge procedures are "not to be in accordance with the civil commitment procedures." These mandates demonstrate legislative intent to

segregate the procedural scheme of 2945.39 from the civil commitment standards and procedures.

It is painfully apparent that Appellant (and the legislature) wish to create a classification of people who may have their liberty restrained without being afforded the same rights as those restrained through probate civil proceedings, while, at the same time, not be afforded the same rights as those charged formally with crimes. The government simply wishes to hold, for as long as possible, those incompetent to stand trial, as if they had actually been convicted of a crime:

> 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. (emphasis added) *State v. Williams* at 597

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.

REPLY:
Procedures under R.C. 2945.39 for the involuntary commitment of an individual charged with, but not convicted of a crime, in so far as they differ from the procedures for the civil involuntary commitment of an individual,as set forth in R.C. 5122, violate the Equal Protection clauses of the United States and Ohio Constitutions.

An individual is denied Equal Protection of laws if they are involuntarily committed, after having been found incompetent to face criminal charges, unless they are afforded the same procedural rights as those civilly committed. *Jackson v. Indiana* 406 U.S. 715, 92S.Ct.

1845, *Burton v. Reshetylo* (1974) 38 Ohio St2d. The procedures set forth in R.C. 2945.39 do exactly the opposite. Indeed, R.C. 5122.01.1 mandates that those civilly committed shall not be treated the same as those committed under R.C. 2945.39.

Appellant argues, in their first proposition of law, that those involuntarily committed under R.C. 2945.39 are not entitled to the rights of all other criminal defendants because the commitment is civil in nature. Now, Appellant, in its second proposition of law, argues that those involuntarily committed under R.C. 2945.39 need not be provided the same rights as those committed under Ohio's civil commitment procedures *because they have committed a crime*. The Second District Court of Appeals properly found these arguments are not in accordance with well established principles of Equal Protection.

This Court has clearly held that, once it is determined an individual will not obtain mental competency to stand trial within the foreseeable future, they must either be released or civilly committed. *State v. Sullivan* (2001) 90 Ohio St.3d 502; *Burton v. Reshetylo* (1974) 38 Ohio St2d at 46 and *State v. Upshaw* (2006) 110 Ohio St.3d 189. In the event, as in the case of Appellee, there is no substantial probability of competency being obtained within one (1) year, the Court must dismiss the indictment against the defendant. *State v. Sullivan* (2001) 90 Ohio St.3d 502 at footnote 4.

The *Reshetylo* and *Sullivan* holdings were based upon the clear and unequivocal holdings contained in the United States Supreme Court's decision in *Jackson v. Indiana* 406 U.S. 715:

> If it is determined that [an individual will not obtain competency in the foreseeable future] then the state must either institute the customary civil commitment proceeding that it would be required to commit indefinitely any other citizen or release the defendant. *Jackson v. Indiana* 406 U.S. 715 at 738.

A violation of equal protection exists when a person who is found incompetent to stand trial is subjected to differing standards of commitment, treatment and release then those committed through a civil procedure for involuntary commitment:

> As noted above we cannot conclude that pending criminal charges provide a greater justification for different treatment than conviction and sentence. Consequently, we hold that by subjecting Jackson to a more lenient standard and to a more stringent standard of release then those generally applicable to all others not charged with offenses and by thus condemning him in affect to permanent institutionalization without the showing required for commitment or the opportunity for release afforded by {Indiana's Civil Commitment Laws}, deprives petitioner of equal protection of the laws under the Fourteen Amendment *Jackson*, at 738.

In so holding the United States Supreme Court relied in part on its previously announced holding 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." *Baxstrom v. Herold* (1966), 383 U.S. 107. Accordingly the Court in *Jackson* found varying standards for those merely accused of a crime were equally unacceptable.

Appellant concedes that substantial differences exist between commitment procedures set for in R.C. 2945.39 and Ohio's civil commitment statues, R.C. chapter 5122. As found by the Appellate Court below:

> 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. *State v. Williams*, 179 Ohio App.3d 584 at 601.

The above noted differences in procedures, pursuant to R.C. 2945.39, compared to Ohio's the civil commitment standards set forth under Title 51 warrant a more detailed breakdown, especially with respect to the modification procedures, as these differences have

already adversely affected Appellee.

Pursuant to R.C. 2945.39, a trial court must find that a defendant is a mentally ill person subject to court ordered commitment, along with making a finding that the defendant committed the crime by clear and convincing evidence. Nowhere can such a standard be found within the procedure for committing a mentally ill individual under Title 51, Ohio's civil commitment procedure. The Court of Appeals properly held this to be a more restrictive standard for commitment and, therefore, no Equal Protection violation occurred as in *Jackson.*

However, upon the initial commitment, pursuant to R.C.5122.05, a mandatory assessment of an individual to determine whether they are subject to such commitment is suspended as R.C. 5122.05 states that no such assessment is necessary if the commitment is made pursuant to R.C. 2945.39.

Under Civil Commitment Procedure, if a finding in favor of commitment has been made by a probate court, the probate court is given six options as to how to best provide treatment to the individual. These options include both in-patient, as well as, out-patient treatment and also allow for flexibility in the court's placement decision. 5122.15 (C)(1-6). The treatment needs of the individual is the primary basis upon which the probate court must make its decision. Further, 5122.15 (C)(6) allows the court to place the individual outside of the standard statutory options by allowing placement in "any other suitable facility or person consistent with the diagnosis, prognosis, and treatment needs of the respondent.' No such flexibility is provided under the criminal commitment procedure. Nor, is the treatment needs of the individual the primary basis guiding the criminal court in deciding the individual's placement.

Instead, under R.C. 2945.39 (D)(1), the court is mandated to commit the criminal defendant to a facility operated by the Department of Mental Health regardless of the defendant's treatment needs. The options for outpatient treatment, and the lesser liberty restriction entailed thereby, or any other less restrictive option consistent with the patient's needs, are removed. The provision for an appropriate treatment setting is replaced by the

requirement for inpatient institutionalization under the criminal statute.

In guiding the decision of where to commit an individual, Ohio's Civil Commitment Procedure mandates that the Court "shall" be guided by what is referred to as the "least restricted environment." 5122.15(E). Alternatively, in the criminal commitment proceedings under 2945.39(D)(1), in determining the nature of commitment the Court "shall" give preference to protecting the public safety. The guiding principle of public safety being wholly omitted in civil commitment proceedings, and, of course, having nothing to do with the treatment needs of the individual.

Once commitment is made, how a person's liberty is restrained during the actual commitment differs tremendously between the civil and criminal statutes as well. Under 5122.15 whether a person is confined to a facility, allowed to walk freely on the grounds of a facility, is placed in 24/7 supervision, etc., is all up to the reasoned determination of the Chief Clinical Officer. Under criminal procedure the Chief Clinical Officer must pass all modification requests through forensic services who is free to agree or disagree. Thereafter, the ultimate determination is left up to the trial court who must schedule a hearing, 2945.401(C).

The Court of Appeals below was concerned with the unnecessary delay that may attend these additional restrictions when it comes to the release of individuals criminally committed; "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.*" *State v. Williams*, 179 Ohio App.3d 584 at 602. The same reasoning applies to decisions regarding modification of confinement. The concern of the Court of Appeals has specifically surfaced in Appellee's case.

In March of 2009, those charged with Appellee's care at the forensic center in Columbus submitted a report to the Trial Court recommending that Appellee would be more appropriately placed in the less restrictive civil hospital facility in Cincinnati (Appendix, Ohio

Department of Mental Health, March 25, 2009). The Trial Court took approximately three months to act on the recommendation of the Chief Clinical Officer, finally, issuing an order approving the transfer of Appellee from one hospital to another in June of 2009 (Appendix, ISTU-CJ Order for Transfer of Commitment from Maximum Security at Twin Valley BHC to Locked Civil Unit at Summit BHC, June 12, 2009). Had Appellee been committed under Ohio's civil procedure he would have been transferred immediately upon the Chief Clinical Officer's rendering a decision. Instead, Appellee was left in a higher security facility which those who provided his care had already decided was an inappropriate facility.

In a civil commitment the ultimate discharge of an individual, who is confined under R.C. 5122.21, is left exclusively in the hands of the Chief Clinical Officer of the institution. The Chief Clinical Officer is empowered, from the initial ninety day period of institutionalization, through the entire commitment, to release an individual, should, the individual no longer meet the criteria for involuntary institutionalization. 5122.15(F)

Alternatively, under criminal jurisdiction, the proceedings for release detailed in 2945.401 require several substantive tiers of review and evaluation, ultimately culminating in the decision by a trial court rather than those actually engaged in the treatment of the individual.

Time frames for the review of an involuntarily committed individual differ between criminal and civil jurisdiction as well. 2945.401(D) provide for reports to the trial court holding jurisdiction over the criminal defendant after the initial six (6) month period and every two (2) years thereafter. If, in-between those periods, it becomes apparent that the individual is not subject to the continued commitment or commitment should be appropriately modified, the Chief Clinical Officer may recommend to the trial court termination of the individual's commitment. 2945.401(C). This is in opposition to the civil commitment review which under 5122.21(A) requires the Chief Clinical Officer of the facility to review the committed individuals progress every thirty (30) days and if the person is eligible for release

the Chief Clinical Officer is directed to immediately release them, *unless* they have been committed under Ohio Criminal Proceedings.

If a conflict between the commitment and treatment procedures arise between civil and criminal commitment statutes, the criminal commitment statutes control, R.C. 5122.01.1. Moreover, under R.C. 2945.40.1, the continued commitment and/or discharge hearing are directed "not to be in accordance with the civil commitment procedures." Thus, these two sections codify the unequal treatment between Ohio civil and criminal commitment procedure, favoring the criminal commitment procedure by statutory authorization. This also shows a clear legislative intent to have the revised R.C. 2945.39 function as a criminal statute.

Whether it is the initial commitment, the time frame for commitment, nature of the commitment, proceedings for review, or the standards for release, those involuntarily committed under civil proceedings and those involuntarily committed under criminal proceedings are absolutely not treated the same. In observing such, the Court below stated:

> 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 multifaceted 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. State v. Williams*, 179 Ohio App.3d 584 at 60

Accordingly even if this Court were to find the functioning of R.C. 2945.39 is civil, rather than criminal in nature, the commitment procedures set forth therein still violate Appellee's right of Equal Protection as they differ from those applicable to all others involuntarily committed under Ohio's civil commitment procedures.

Appellant acknowledges that there are differences between the civil and criminal procedures, something prohibited by the *Jackson* decision. Appellant argues that those differences are based solely upon the fact that the individual has been charged (or found responsible for) the commission of a crime, something which is equally prohibited by the *Jackson* decision.

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.

Reply: Proposition of Law No. III: The involuntary commitment of a defendant under R.C. 2945.39 violates the defendant's right to Due Process under the United States and Ohio Constitutions

The involuntary commitment of an individual found incompetent to stand trial must bear a reasonable relationship to the purpose for which the individual is committed. When it is determined that an individual involuntarily committed as incompetent to stand trial is not restorable within the foreseeable future, Due Process requires that the criminal indictment be dismissed. The government then must either release the defendant, or institute civil procedures for involuntary commitment. These principles of Due Process are clearly and unequivocally set forth in *Jackson v. Indiana*:

> 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 obtain 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, *Jackson v. Indiana*, 406 US 715 at 738.

Justice Blackman further wrote in *Jackson*, "at the least due process requires that the nature and duration of commitment bear some reasonable relation to the purpose for which the individual is committed." Id.

This court applied the *Jackson* holding in *Burton v. Reshetylo* (1974), 38 Ohio St.2nd 35, 67 O.O.2d 53, holding:

> "Due process requires that the duration of [commitment due to incompetence to stand trial] must bear a reasonable relation to the purpose behind it. It is clear that the state's interest is in aiding petitioner through care and treatment to attain competency. When it is determined that there is little likelihood that he will ever attain that goal the state must either institute other proceedings or release him." Id. at 43, 67 O.O.2d at 57, 309 N.E.2d at 912.

This Court in *State v. Sullivan* specifically addressed the Due Process violation of continued involuntary commitment by a criminal trial court of an individual who (as is the case of Appellee) was without ability to be restored to competency. This court held:

> Moreover, requiring treatment of incompetent defendants for any mandatory period clearly violates our directive in Burton that "as soon as it is reliably determined that [the defendant will not, in the foreseeable future, attain the mental competence to stand trial], then other procedures must be instituted to either release the person or civilly commit him indefinitely." *Sullivan* at 507 citing *Burton*, 38 Ohio St.2d at 46, 67 O.O.2d at 59, 309 N.E.2d at 914.

This court in *Sullivan* specifically noted that Due Process required the termination of the criminal case in favor of civil commitment. "We acknowledge that if a trial court finds that there is not a substantial probability Appellee will attain competency to stand trial within

one year of treatment, then the Court must dismiss the indictment against Appellee." *State v. Sullivan* (2001) 90 Ohio St.3d 502 at footnote 4.

In *Sullivan* the defendant was only being subjected to a one year commitment while Appellee herein has been committed for a period of up to ten (10) years despite, as in *Sullivan,* uncontroverted evidence that there is no probability Appellee will ever be restored to competency.

Appellant argues that R.C. 2945.39 has numerous procedural safe guards and a definitive time frame for expiration (the number of years that the defendant could have been sentenced to upon conviction of the crime) and therefore, does not violate Due Process. Interestingly, these were the exact arguments used by Appellant in support of former R.C. 2945.38 in the *Sullivan* case and flatly rejected by this, " R.C. 2945.38, as amended, clearly falls short of those procedural safeguards necessary to protect a defendant's right to due process. Accordingly, we hold that R.C. 2945.38, as amended by S.B. 285, is unconstitutional." *Sullivan* at 508

The procedures set forth in R.C. 2945.39 are nothing more than an unconstitutional end-around the infirmities of the previous R.C. 2945.38 struck down by this Court. Appellant relies exclusively upon arguments which failed then and must fail now. The Court of Appeals below properly saw this procedure as merely a way for the state to hold an individual until they can be placed on trial for the matter for which they have been found incompetent to stand trial. If it were otherwise than the lesser restrictive standards available to those civilly committed would be available to those committed under 2945.39. Moreover, there would be no reason for biannual reports to be made to the court indicating whether or not the individual was restored to competency and may be put on trial.

The Appellee herein is not restorable within the foreseeable future. Appellee has been committed in a criminal proceeding, which differs substantially from a civil proceeding in its nature and scope merely because he was charged with a crime. If subjecting a person to an arbitrary time frame of up to one (1) year is unreasonable, as in *Sullivan*, then subjecting a

person to an arbitrary time frame of ten (10) years must be tenfold unreasonable. There can be no fair reading of the holdings of this Court and the United States Supreme Court that allows for the retention of criminal charges against a defendant found to be incompetent and non-restorable while at the same time providing differing levels of treatment and release than those civilly committed.

CONCLUSION

For the foregoing reasons Appellee respectfully request this Court deny this appeal and affirm the decision of the Appellate Court.

Respectfully Submitted,

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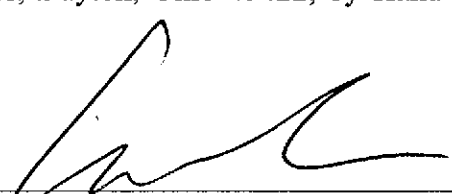
CERTIFICATE OF SERVICE

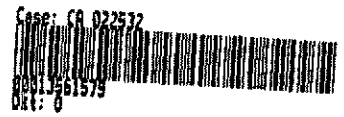
I hereby certify that a copy of the foregoing was served upon Carley J. Ingram, Assistant Prosecutor, 301 West Third Street, Fifth Floor, Dayton, Ohio 45422, by Hand Delivery on date same was filed.



ANTHONY COMUNALE
Attorney for Appellee

APPENDIX

APPENDIX



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MONTGOMERY CO. OHIO

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.

. . . . . .

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. . . . . .

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.

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[1]An "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 in 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

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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:

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"[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."

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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 abnormaility" 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

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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 commited; 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

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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.

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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

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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,

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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

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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.

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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

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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

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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

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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

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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

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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 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.

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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.

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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

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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 is 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

APPENDIX

Ohio Department of Mental Health

Twin Valley Behavioral Healthcare

Columbus Campus
200 West Broad Street
Columbus, Ohio 43223
Phone: (614) 752-0333
TDD: (614) 274-7137
Fax: (614) 752-0385

Dayton Campus
2611 Wayne Avenue
Dayton, Ohio 45420
Phone: (937) 258-0440
TDD: (937) 258-6257
Fax: (937) 258-6288

March 25, 2009 **Hospital Requested Report**

The Honorable Gregory F. Singer
Montgomery County Common Pleas Court
41 N. Perry St., Dayton, OH 45422

RE: Thonex Williams
Hospital Number: 741987
Date of ISTU-CJ Finding: 11/30/2007

ORC Section: 2945.39(A)
Case #: 2005 CR 5174
"39A" Expires: 11/30/17

Dear Judge Singer:

Please find enclosed a report on Thonex Williams pursuant to ORC Section 2945.401(C). This report is being submitted to the Court per the hospital's request to evaluate the least-restrictive environment for Mr. Williams. It is the Psychologist's opinion that Mr. Williams still remains incompetent to stand trial but **is no longer in need of a maximum security environment**. Rather, Mr. Williams should continue his IST-U-CJ Commitment in a civil setting such as the civil unit at the Summit Behavioral Healthcare.

If testimony will be required, we request that a subpoena be sent to John L. Tilley, Ph.D., Psychologist, who will represent the official position of the hospital. We ask that a hearing be scheduled within ten (10) days of your receipt of this letter and a Warrant to Convey be issued so that the Sheriff can transport Mr. Williams to this hearing. Please notify the Legal Assurance Office at (614) 752-0333, extension 5216, of the date and time of the hearing.

Respectfully submitted,

Karen E. Woods-Nyce, LISW, CCFC
Director of Patient Services, Campus Administrator

cc: Prosecuting Attorney: (enclosed with courts copy)
Defense Counsel: (enclosed with courts copy)
FCM: Kara Marciani
file

HOSPITAL REQUESTED REPORT REGARDING RETENTION & MOVEMENT ON IST-U-CJ COMMITMENT PURSUANT TO ORC – 2945.39(A)

Date: March 18, 2009

Identifying Data/Reason for Evaluation:
Thonex Williams, hereinafter referred to as the defendant, is a 32-year-old African American man. On November 30, 2007, the Montgomery County Common Pleas Court adjudicated the defendant Incompetent to Stand Trial - Unrestorable - Court Jurisdiction (IST-U-CJ) on one count of Rape, a felony of the first degree; two counts of Gross Sexual Imposition, a felony of the fourth degree; one count of Unlawful Sexual Conduct With a Minor, a felony of the third degree; and one count of Possession of Cocaine, a felony of the fourth degree in accordance with the provisions of the Ohio Revised Code (ORC) Section 2945.39(A). His charges stem from events purported to have occurred on or about December 10, 2005. On December 11, 2007, the defendant was re-admitted to the Timothy B. Moritz Forensic Unit of Twin Valley Behavioral Healthcare (TVBH), a maximum security psychiatric hospital, pursuant to him being adjudicated IST-U-CJ. On February 12, 2009, the defendant's treatment team opined that, in light of the defendant's overall treatment progress and other factors, he appeared appropriate for transfer to civil psychiatric hospital. On or about March 4, 2009, the Forensic Review Team of TVBH evaluated the defendant and concurred with the treatment team's opinion. Subsequently, a request for an evaluation was made by TVBH.

This evaluation has been conducted in association with that request for the purpose of formally informing the Court as to whether or not the defendant remains a mentally ill person subject to hospitalization by Court order and, if so, of the least restrictive treatment alternative for the defendant, balancing the defendant's treatment needs with the safety of the public.

Notification of Purpose and Limits of Confidentiality:
Prior to the initiation of the evaluation, I explained to the defendant my title, the purpose of the evaluation, my role in completing the evaluation, the methods that I would employ in the evaluation, and the limits of confidentiality, including the fact that the evaluation was being completed for the Court upon the request of TVBH, that none of the information provided should be expected to be held in confidence, and that a report would be prepared and shared with the Court.

Additionally, the defendant was informed that, should I testify in the matter, information gleaned through the evaluation may be revealed during my testimony. The defendant indicated that he understood the limits of confidentiality and agreed to proceed with the evaluation.

HOSPITAL REQUESTED REPORT REGARDING RETENTION & MOVEMENT ON IST-U-CJ COMMITMENT PURSUANT TO ORC – 2945.39(A)

Evaluation Procedures and Sources of Information:
The defendant was evaluated on March 17, 2009 in a private meeting area on Unit D of the Timothy B. Moritz Forensic Unit of TVBH. The evaluation consisted of a clinical interview and a mental status examination (which spanned approximately 30 minutes) as well as a review of the available records, including the following:

1. A Risk Assessment Update report, prepared by the defendant's treatment team, dated February 12, 2009;
2. An Annual Comprehensive Psychiatric Examination report, prepared by Fritz Thenor, M.D., dated December 17, 2008;
3. A Status Evaluation report, prepared by the undersigned, John L. Tilley, Psy.D., dated April 11, 2008;
4. A Competency to Stand Trial Evaluation report, prepared by the undersigned, John L. Tilley, Psy.D., dated February 1, 2007;
5. A Competency to Stand Trial Evaluation report, prepared by the undersigned, John L. Tilley, Psy.D., dated August 3, 2006;
6. A Competency to Stand Trial Evaluation report, prepared by Barbra A. Bergman, Ph.D., which was not dated, but accompanied by a cover letter to the Court that is dated February 8, 2006;
7. Copies of the indictment as well as various Court orders and journal entries for the current case; and
8. Various other reports and documentation contained within the defendant's TVBH hospital chart, including:
    a. the admission sheet and report;
    b. multidisciplinary assessment reports (e.g., psychiatry);
    c. the defendant's treatment plan and treatment team summaries;
    d. the attending physician's orders; and
    e. the interdisciplinary progress notes.

History of the Defendant:
Family. Records indicate that the defendant was born in Little Rock, Arkansas and relocated to Dayton, Ohio in 1995. He was raised by his mother, who is noted to have a history of alcoholism and mental illness. She died from cancer about nine years ago. He has not had any contact with his father for approximately two decades. He has eight siblings; he is the middle sibling. He is single and has never been married. He does not have any children.

Education, Employment, and Military. Records indicate that the defendant was expelled from high school during his freshman year in association with conduct problems (e.g., fighting, unruly behavior). He was purportedly enrolled in special education classes for his behavioral difficulties. With respect to employment, he is noted to have worked

sporadically through temporary employment agencies. It is also noted that he has received social security benefits, presumably in association with psychiatric disabilities. He does not present with a history of military enlistment.

Medical. Records document that the defendant has endorsed a history of experiencing chronic pain in his ankle secondary to a self-inflicted gunshot wound that was sustained there several years ago. Additionally, records note that he has a history of thyroid dysfunction, asthma, diabetes mellitus (type II), and gastroesophageal reflux disease.

Substance Use / Abuse. The defendant is noted to have a history of using a variety of substances in a problematic fashion, including alcohol, cannabis, and cocaine.

Legal. Records indicate that the defendant was arrested for some offenses that pertained to the possession of illicit substances and a firearm. Subsequently, he was ordered by the Court to complete some residential substance abuse treatment. Other details concerning that legal history were not available.

Psychiatric. Records note that the defendant has been psychiatrically hospitalized on multiple occasions at several different facilities (e.g., Good Samaritan Hospital, St. Elizabeth's Medical Center). He is noted to have a history of evidencing psychotic symptomatology (e.g., auditory hallucinations, delusions of paranoia), mood instability, aggressiveness, and violent behavior. Records also note that he has received outpatient treatment through the community mental health system (e.g., the Day-Month West Mental Health Center) and has been treated with a variety of psychotropic medications.

Course of Hospitalization:
The defendant was re-admitted to TVBH on December 11, 2007. He was hospitalized at TVBH continuously from March 14, 2006 to February 26, 2007 for competency restoration on his instant offenses. He was returned to the Montgomery County Jail on February 26, 2007 for a competency hearing. He remained there for several months in association with his initial judge passing away and a new judge being assigned his case. While in the Montgomery County Jail, he was treated with several psychotropic medications, though records indicate that some of those medications differed from those he had been receiving during his hospitalization at TVBH. He was re-admitted to TVBH after being adjudicated IST-U-CJ. Upon his re-admission, he was noted to complain of auditory hallucinations, paranoia, and depression. He received an admitting diagnosis of Psychotic Disorder Not Otherwise Specified (which was later changed to Schizoaffective Disorder on March 25, 2008).

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HOSPITAL REQUESTED REPORT REGARDING RETENTION & MOVEMENT ON IST-U-CJ COMMITMENT PURSUANT TO ORC – 2945.39(A)

The defendant has been treated with a variety of psychotropic medications since his re-admission in December 2007, and various adjustments to his pharmacotherapy were made in the earlier months of his re-admission (e.g., certain medications were discontinued and replaced by others). For the past several months, however, he has been consistently treated with the following medications: Seroquel (an antipsychotic medication), Zyprexa (an antipsychotic medication), Haldol (an antipsychotic medication), Depakote (a medication with mood-stabilizing properties), Paxil (an antidepressant), trazodone (an antidepressant with sedative qualities), and Cogentin (a medication utilized to reduce the side effects of other medications). Progress notes indicate that he has remained compliant with his pharmacotherapy throughout the duration of his current hospitalization.

The defendant has evidenced substantial psychiatric improvement since mid-2008, which is likely attributable to the fact that his pharmacological regimen has remained consistent. He has not been violent or assaultive in the past two years, and his last instance of aggressive or threatening behavior occurred in August 2008 (when he threatened to "slap" a psychiatric attendant over a disagreement). He is noted to attend all of his scheduled groups (e.g., SAMI, Straight Talk, Empathy and Insight) and participates meaningfully within them. With respect to symptomatology, he reportedly continues to experience some paranoia and occasional auditory hallucinations, though his symptoms are noted to occur much less frequently and with less intensity relative to previous months. His progress in treatment led his treatment team to opine in February 2009 that he appeared suitable for transfer to a civil psychiatric hospital, and that opinion was supported by TVBH's Forensic Review Team upon their evaluation of him in early March 2009.

Current Mental Status Examination:
Appearance & Behavior. The defendant appeared his documented age of 32 years. He is noted to stand at a height of 5'8" and to weigh approximately 225 pounds. He has black hair and brown eyes. With respect to facial hair, he presented with a goatee, which was relatively neat in its appearance. He was dressed appropriately in casual attire. His grooming and personal hygiene were what I would consider satisfactory. Interpersonally, he was responsive, though somewhat hesitant, which seemed related to some underlying paranoia. He remained generally cooperative, however, and he did not manifest any grossly abnormal or bizarre behavior.

Speech & Language. No overt abnormalities were noted with respect to the volume, rate, rhythm, and amount of the defendant's speech. His expressive language functioning did not reveal any obvious difficulties with word finding, grammar, syntax, usage, logic, or coherence. His receptive language functioning appeared unimpaired, insofar as he did not require repetition, clarification, or simplification of instructions.

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HOSPITAL REQUESTED REPORT REGARDING RETENTION & MOVEMENT ON IST-U-CJ COMMITMENT PURSUANT TO ORC – 2945.39(A)

Mood & Affect. The defendant denied any mood complaints. His affect was flattened; he evidenced a lack of emotional responsiveness during the examination.

Orientation, Thought Processing, & Perception. The defendant was oriented to person, place, time, and situation. His thought processes were mostly clear and coherent. His thought content revealed the presence of some underlying paranoia, though he did not evidence any indications of floridly delusional beliefs. With respect to perceptual disturbances, he endorsed a history of experiencing auditory command hallucinations. He described his hallucinations as unfamiliar, male voices that order him to "hurt people." He related that he last experienced a hallucination "about five days ago." He indicated that, on average, he experiences hallucinations about once per week. He revealed that he perceives the hallucinations as symptomatic of psychiatric illness and indicated that he is able to largely ignore them. He characterized his hallucinations as much being much less severe now relative to months prior.

Judgment, Insight, Reasoning & Cognitive Abilities. The defendant's judgment did not seem markedly impaired. However, he evidenced a lack of insight into several aspects of his history and functioning. For instance, he tended to minimize his history of psychiatric illness in general, his need for pharmacotherapy, and his history of problematic substance use. However, he was able to name several of his current psychiatric medications (e.g., "I am on Depakote, Haldol, and Seroquel"). His attention and concentration did not appear impaired. His memory functions seemed intact.

Specific Competency Areas:
The defendant was unable to identify his charges by name. He demonstrated little appreciation for the severity of his charges as well as the possible penalties associated with his charges (e.g., he maintained that, at maximum, he could be sentenced to five years in prison if convicted on all counts). He was unable to describe or discuss the pleas available to him. He presented as distrustful of counsel, commensurate with his underlying paranoia. His current mental status is such that he would likely be incapable of tolerating the stress of a trial.

Diagnosis:

Axis I:	Schizoaffective Disorder
Axis II:	No Diagnosis
Axis III:	Deferred (to attending physician)

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Risk Assessment and Clinical Discussion:
The defendant's risk factors can be delineated as either static (i.e., historical and unchangeable) or dynamic (i.e., current, but changeable). The defendant's static risk factors include the following:

- a history of severe psychiatric illness, which has included floridly psychotic symptomatology;
- a history of violent and criminal behavior related to psychiatric illness; and
- being found IST-U-CJ.

The defendant's dynamic risk factors include the following:

- the presence of some lingering psychiatric symptomatology (i.e., paranoia, occasional command auditory hallucinations); and
- a lack of insight into his psychiatric condition, his need for continued pharmacotherapy, and his history of problematic substance use.

While the defendant's static risk factors are historical and, thus, by definition, unchanging, his dynamic risk factors are not, and it is possible to further neutralize them. Continued pharmacotherapy has the potential for further neutralizing his psychiatric symptomatology and bringing about a remission in his Schizoaffective Disorder. Enlisting his continued attendance at and participation in treatment groups, coupled with an involvement in individual psychotherapy, can be utilized as a means of enhancing his insight into his condition and his need for psychiatric treatment. Ideally, his pharmacotherapy and psychotherapies would function in a reciprocal fashion, as his improvement through one is likely to bolster improvements in the other, and vice versa.

Opinion:
It is my opinion, offered with reasonable psychological certainty, that the defendant has a severe mental illness, namely a Schizoaffective Disorder, which is characterized by substantial deficits in thought, mood, perception, and behavior. As a result of this mental illness, and based on the findings reported herein, it is also my opinion, again offered with reasonable psychological certainty, that the defendant is presently incapable of assisting in his defense.

It is also my opinion, again rendered with a reasonable degree of psychological certainty, that the defendant remains a mentally ill person subject to hospitalization by Court order. His mental illness continues to place him at risk for manifesting symptomatology that would constitute dangerousness and thereby represent a substantial risk of physical harm to others. It is further my opinion, offered with a reasonable degree of psychological certainty, that the defendant would benefit from and is in need of treatment in a hospital for his mental illness.

APPENDIX

HOSPITAL REQUESTED REPORT REGARDING RETENTION & MOVEMENT ON IST-U-CJ COMMITMENT PURSUANT TO ORC – 2945.39(A)

If the Court finds that the defendant continues to be a mentally ill person subject to hospitalization by Court order, it is further my opinion, given with reasonable psychological certainty, that the least restrictive treatment alternative available that is consistent with public safety and the welfare of the defendant is a civil psychiatric hospital. The defendant no longer requires a maximum security psychiatric unit level of care.

John L. Tilley, Psy.D. 3/23/09

John L. Tilley, Psy.D. / / Date
Psychologist

DJF

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IN THE COMMON PLEAS COURT OF MONTGOMERY COUNTY, OHIO
CRIMINAL DIVISION

STATE OF OHIO	:	CASE NO. 2005 CR 5174
Plaintiff,	:	Judge Gregory F. Singer
vs.	:	
THONEX D. WILLIAMS	:	**ISTU-CJ** **ORDER FOR TRANSFER OF COMMITMENT FROM MAXIMUM SECURITY AT TWIN VALLEY BHC TO LOCKED CIVIL UNIT AT SUMMIT BHC**
Defendant.	:	
	:	O.R.C. Section 2945.401(C) and (D)(1)

CHARGES: POSSESSION OF COCAINE (F4)
2 Cts. GROSS SEXUAL IMPOSITION (force)(F4)
RAPE (force)(F1)
UNLAWFUL SEXUAL CONDUCT W/A MINOR (F3)

This matter came before the Court on June 2, 2009, pursuant to a recommendation from Twin Valley Behavioral Healthcare that this defendant be **transferred** from their maximum security *Timothy B. Moritz Forensic Unit* to the less restrictive locked civil unit at Summit Behavioral Healthcare. Defense counsel was present and defendant's presence was waived. The State was represented by the Prosecuting Attorney of Montgomery County.

On November 30, 2007, a finding of Incompetent to Stand Trial – Unrestorable – Criminal Jurisdiction retained (ISTU-CJ) was made in this matter pursuant to O.R.C. Section 2945.39(A) and defendant was committed to the maximum security Timothy B. Moritz Forensic Unit of Twin Valley Behavioral Healthcare. A hearing was held pursuant to 2945.401(C), O.R.C. to determine whether the defendant's mental health treatment has progressed sufficiently to warrant a transfer to a less restricted commitment facility and whether defendant will continue to comply with treatment if granted the requested transfer. Counsel stipulated to the contents of the report dated March 25, 2009 from Twin Valley BHC.

In consideration of all information presented, the Court **FINDS** by clear and convincing evidence that the defendant continues to be a mentally ill person, subject to hospitalization by court order as defined in 5122.01, O.R.C.

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The Court has further considered the current quantity of medication and other treatment the defendant is receiving and the likelihood that he will voluntarily take medication as prescribed and cooperate with other treatment modalities if granted the requested transfer to a less restrictive facility. Further, considering the risks to public safety and the welfare of the defendant, the Court **FINDS** that the defendant's mental condition has improved such that his commitment to the maximum security unit in Columbus is no longer appropriate.

IT IS THEREFORE ORDERED that:

1. The defendant shall be **transferred** from the Timothy B. Moritz Forensic Unit of Twin Valley BHC to the locked civil unit of Summit BHC, the least restrictive commitment alternative available consistent with public safety and the welfare of the defendant;

2. The defendant shall remain at Twin Valley BHC until such time as appropriate bed space becomes available at Summit BHC;

3. The commitment facilities are authorized to administer medications as deemed appropriate for treatment of this defendant; and

4. This Court shall be advised IMMEDIATELY of any misconduct or non-compliance by the defendant.

IT IS FURTHER ORDERED THAT THE MONTGOMERY COUNTY SHERIFF SHALL TRANSPORT DEFENDANT FROM TWIN VALLEY BHC TO SUMMIT BHC IMMEDIATELY UPON NOTIFICATION OF AVAILABLE BED SPACE.

_____
JUDGE GREGORY F. SINGER

Prepared by Montgomery County Prosecutors Office/vew
Assistant Prosecuting Attorney: **ERIC T. MICHENER, #0074559**
ANN K. LEISTNER, #0072876

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MONTGOMERY COUNTY SHERIFF'S OFFICE – Jail Control