

ORIGINAL

In the  
Supreme Court of Ohio

STATE OF OHIO,	:	Case No. 2008-2424
	:	
Plaintiff-Appellant,	:	
	:	On Appeal from the
v.	:	Montgomery County Court of Appeals,
	:	Second Appellate District
THONEX WILLIAMS,	:	
	:	Court of Appeals Case
Defendant-Appellee.	:	No. 22532
	:	

REPLY BRIEF OF *AMICUS CURIAE*  
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IN SUPPORT OF PLAINTIFF-APPELLANT STATE OF OHIO

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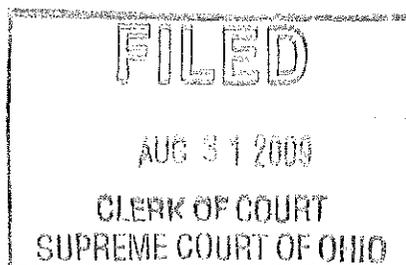
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## INTRODUCTION

While the parties and amici disagree about much in this case, all four seem to agree on one point: Ohio's system for civil commitment of criminal defendants under R.C. 2945.39—if they are mentally ill, incompetent to stand trial, and unrestorable to competence—has features different from the criminal justice system and different from the probate court system used for other civil commitments. For Appellee Thonex Williams (and his amicus the Public Defender), these differences render the system unconstitutional. Williams insists that civil commitment is actually criminal in nature, and he also insists that the system must be run exactly like the probate system, with no differences at all, or equal protection is violated. He further insists that the law violates due process because the system is not rationally related to a purpose of restoring competence to stand trial. But he is wrong on all counts.

As the Attorney General's opening amicus (and the State's brief) showed, the civil commitment system at issue is constitutional, and nothing in Williams's response changes that. In almost all respects—such as the standard for commitment, the hospitals to which those committed are sent, the standard for release or for changing conditions, and more—the system used for criminal defendants is identical to that used for those committed by probate courts. And the few minor differences, such as the common pleas court's oversight of the entire process, rationally reflect the undeniable reality that Williams is not the same as others civilly committed, because he has been found to present an extra level of danger to society. That danger also means that the law's legitimate purpose is *protecting the public* along with treating the patient; the purpose is not, as Williams insists, to restore competence to stand trial. That means that the proper question for due process is whether the system is rationally related to its actual public-protection purpose, and the answer to that is yes.

For these and other reasons below, R.C. 2945.39 is constitutional.

## ARGUMENT

### A. Civil commitment under R.C. 2945.39 does not violate due process, as the system is rationally related to the purpose of public protection and patient treatment.

The parties and amici all agree on the test that applies to Williams's due process claim: "due process requires that the nature and duration of commitment bear some reasonable relation to the purpose for which the individual is committed." *Jackson v. Indiana* (1972), 406 U.S. 715, 738. See also *State v. Sullivan* (2001), 90 Ohio St. 3d 502, 506 (quoting *Jackson* standard); *In re Burton* (1984), 11 Ohio St. 3d 147, 153 (same); see Williams Appellee Brief ("Br.") at 17 (quoting *Jackson* standard); Public Defender Amicus Br. ("PD Br.") at 6 (citing *Sullivan* for same standard); State Br. at 21-22 (citing *Sullivan*); Attorney General ("AG") Br. at 17 (citing *Sullivan* and *Jackson*). Both the State and the Attorney General explained that the purpose of commitment under R.C. 2945.39, after a defendant has been found unrestorable to competence, is no longer restoration; the purpose is to protect the public while treating the individual. State Br. at 22-23, AG Br. at 17-18. Williams and the Public Defender, however, base their due process arguments on the mistaken premise that the law's purpose is restoration, not public protection. When that premise is corrected, their arguments collapse.

Because Williams maintains that restoration is the law's sole purpose, he never grapples directly with the legitimacy of the actual purpose—public protection—or with the relationship of the commitment to *that* interest. See Williams Br. at 16-19, PD Br. at 6-7. That is, Williams never even asserts that public protection is not a legitimate interest, and he never says that the "nature and duration" of the commitment here is not rationally related to that purpose under *Sullivan* and *Jackson*. He insists that the law's real purpose is restoration, calling the law "merely a way for the state to hold an individual until they can be placed on trial." Williams Br. at 18. The Public Defender is also open in its attempt to cast restoration as the baseline interest

against which to apply the *Sullivan* test, insisting “[t]he purpose of the commitment *should be* restoration to competency, which is not reasonably related” to the maximum length of commitment. PD Br. at 6 (emphasis added). But the Court’s application of the rational basis test cannot be tied to restoration as the State’s interest.

The rational basis test does not allow a law’s challenger to choose one purported interest as the basis for assessing its challenge; rather, a court considers *any* conceivable basis for a law. Indeed, in applying the rational basis test in the related equal protection context, the United States Supreme Court has explained that challengers “have the burden to negative every conceivable basis which might support” a challenged law. *FCC v. Beach Communications* (1993), 508 U.S. 307, 315. Further, the interest that justifies a law need not even be the interest that the legislature intended, *id.* at 318, and a court looks to any possible interest, or even “any combination of legitimate purposes,” *Vance v. Bradley* (1979), 440 U.S. 93, 97. The sole limit, under rational basis review, arises when an interest is not even “legitimate.” See *U.S. Dep’t of Agriculture v. Moreno* (1973), 413 U.S. 528, 534 (rejecting as illegitimate a stated purpose “to prevent so-called ‘hippies’ and ‘hippie communes’ from participating in the food stamp program”).

Here, the State’s interest in public protection is undeniably legitimate, and that interest is the relevant one for applying the *Jackson/Sullivan* test. See *Kansas v. Hendricks* (1997), 521 U.S. 346, 350 (acknowledging the legitimate public-protection civil purpose in civil commitment, separate from criminal prosecution, even if the commitment could be indefinite). Unlike in the cases cited above, which require consideration of even hypothetical interests that a legislature never cited, in this case we know that the General Assembly focused on public protection in designing this system. As the Attorney General’s summary of the legislative

history showed, the General Assembly carefully studied issues of mental illness, and the new system enacted in 1997 was aimed at serving both patient needs and public safety. See A.G. Br. at 6. The Assembly amended the commitment statutes after *Sullivan* to conform to that ruling, clarifying in R.C. 2945.39 that the separate process for treating those found unrestorable was triggered as soon as a court determined that there was “not a substantial probability that the defendant will become competent to stand trial even if the defendant is provided with a course of treatment.” See R.C. 2945.39, as amended in 2001 S.B. 122.

Thus, the statute at issue is squarely based on public protection, not restoration, and the commitment rationally relates to *that* purpose, satisfying the *Sullivan/Jackson* due process test. The law does not allow indefinite commitment based only on a criminal charge and incompetence to stand trial, as in *Jackson*. Rather, R.C. 2945.39 requires a court to find that the individual meets all of the standards under the general civil commitment scheme in Chapter 5122, such as dangerousness to self or others. R.C. 2945.39, R.C. 5122.01(B)(2). In addition, R.C. 2945.39 requires a court to find that the individual committed an act that would constitute a violent felony, which is, of course, a higher standard. Consequently, R.C. 2945.39 does not violate Williams’s or any individual’s due process rights under *Sullivan* and *Jackson*.

Williams’s alternate due process argument—namely, that the system is truly criminal and requires the full panoply of criminal law protections, such as jury trial, and so on—also fails to respond adequately to the State’s and the Attorney General’s opening briefs. As already explained, the civil/criminal dichotomy applied in *Hendricks* and similar cases applies only when that civil/criminal categorization is a predicate to applying double jeopardy or ex post facto analysis. AG Br. at 20-21; *Hendricks*, 521 U.S. at 361, 369. In *Hendricks*, the Court did not apply that dichotomy to the due process claim before it, *id.* at 356-60, and this Court did not

apply a similar test in *Sullivan*. The sole due process question here is whether a rational relationship exists between the law's purpose and function, as discussed above.

Moreover, even if this Court finds that it needs to determine whether the statute is criminal or civil, the statute is civil. Williams is mistaken in relying, as support for his claim that the R.C. 2945.39 procedure is criminal, on *State v. Upshaw*, 110 Ohio St. 3d 189, 2006-Ohio-4253. See Williams Br. at 8-9. *Upshaw* said that "the competency proceeding in [*Upshaw*] clearly aids and is subordinate to the underlying main proceeding, which is the criminal case itself." *Id.* at ¶ 16. *Upshaw*, however, dealt with the original competency hearing under R.C. 2945.38, which is held to determine if a defendant will stand trial; the case did not address the commitment proceedings under R.C. 2945.39, which are used only after the individual has been determined to be unrestorable. Again, Williams seeks to change the baseline, and attack his civil commitment as if it were aimed a restoring competence. But it is not: It is aimed at protecting the public, and for that reason, Williams's reliance on *Upshaw* is as mistaken as his reliance on *Sullivan*, and his due process claim fails on this alternate theory as well.

**B. Civil commitment under R.C. 2945.39 does not violate equal protection.**

Williams's equal protection argument boils down to two essential parts, both of which are flawed. First, he says that the U.S. Supreme Court's *Jackson* decision mandates equal treatment, in all respects, of the mentally ill charged with crimes and those not so charged. Williams Br. at 9-11. Second, he says Ohio violates that equality mandate, or any other equal protection test, because Ohio concedes small procedural differences between commitments by the court of common pleas under R.C. 2945.39 and commitments by the probate court under Chapter 5122. Williams is wrong on both counts: *Jackson* does not forbid such procedural differences, and none of the differences at issue violates equal protection.

First, *Jackson* established that the *substantive* standard for civil commitment and release must be *substantially* similar as between those who have been charged with crimes and those who have not. As *Jackson* put it, Indiana violated equal protection by “subjecting Jackson to a more lenient commitment standard and to a more stringent standard of release than those generally applicable to all others not charged with offenses,” because Indiana’s system “condemn[ed] him in effect to permanent institutionalization without the showing required for commitment or the opportunity for release afforded by” the civil commitment laws that applied to those not charged. 406 U.S. at 730.

The differences at issue in *Jackson* were stark. An initial commitment was triggered, for a criminal defendant, *solely* by a finding that the person was incompetent to stand trial, regardless of the charges, and without any finding of dangerousness, or any of the triggers required for civil commitment under Indiana’s general scheme. *Id.* 720-22. The system allowed for commitment of those who did “not qualify as ‘mentally ill’ under the State’s general involuntary civil commitment scheme.” *Id.* at 722. Likewise, the standards for release differed greatly. Those in the general scheme could be released “when the individual no longer requires the custodial care or treatment or detention that occasioned the commitment, or when the department of mental health believes release would be in his best interests.” *Id.* at 729. In contrast, those committed after being found incompetent to stand trial could be released only if “there was a substantial change for the better in [their] condition.” *Id.* *Jackson* was considered “unlikely” to see such an improvement, so he, and others like him, were “condemned” to “permanent institutionalization” without ever being found dangerous, initially or later. *Id.* at 729-30.

Unlike the stark differences condemned in *Jackson*, Ohio uses nearly identical standards for commitment and release under both R.C. 2945.39 and Chapter 5122. And the biggest

difference is one that makes the R.C. 2945.39 standard more stringent, not more lenient, as both Williams and the court below acknowledged. See Williams Br. at 12; *State v. Williams* (2d Dist.), 2008-Ohio-6245 (“App. Op.”), ¶ 63. Both require findings that the individual is a “mentally ill person subject to hospitalization by court order,” which incorporates a standard of danger to self or others. R.C. 2945.39 requires an extra finding, by clear and convincing evidence, that the individual committed the crime of which he is charged, and Williams admits that the appeals court “properly held this to be a more restrictive standard for commitment and, therefore, no Equal Protection violation occurred as in *Jackson*.” Williams Br. at 12. This more stringent standard for commitment is coupled with a standard for release that is nearly identical under R.C. 2945.39 and Chapter 5122. Under both types of commitment, the individual must be released if he is found to be “no longer [] a mentally ill person subject to hospitalization by court order.”<sup>1</sup> R.C. 2945.401(J)(1)(a); R.C. 5122.21(B).

The sole substantive difference between the two systems’ commitment and release standards, beyond the extra finding discussed above, is one justified by the context: the directive that “the court shall give preference to protecting public safety” in applying the standards under R.C. 2945.39. Whether that clause ever truly tips the scale is debatable, because the standard of dangerousness used in both contexts asks whether the individual “[r]epresents 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

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<sup>1</sup> R.C. 2945.401(J) also allows for release from commitment if the individual is restored to competency (although such restoration is no longer a purpose and is not a goal of treatment) or if the length of commitment equals the maximum time he could have been sentenced for. These alternative release triggers, as compared to the indefinite commitment allowed under Chapter 5122, are more *lenient* in Williams’s favor, just as the initial commitment standard is, and similarly do not violate *Jackson*.

serious physical harm, or other evidence of present dangerousness.” R.C. 5122.01(B)(2). Common sense suggests that someone who has been found to have committed a predicate violent felony, as the extra finding of R.C. 2945.39 requires, meets Chapter 5122’s definition of “harm to others” without an addition “preference” for “public safety.” But even if that extra clause does add something, it is a rational distinction between the two schemes, as that preference is rationally related to the underlying classification between those committed under R.C. 2945.39 and Chapter 5122: that the former have evidenced not a *risk* of harm, but actual harm.

Second, just as the substantive standards of R.C. 2945.39 do not violate equal protection, so, too, the minor procedural differences between R.C. 2945.39 and Chapter 5122 reflect common-sense differences between the two contexts. The differences therefore are rational and do not violate equal protection. Williams does not seem to object to the mere fact that a court of common pleas, rather than a probate court, oversees the case, nor does he dispute the explanation of the judicial economy gained by having the same court address civil commitment after already learning the individual’s circumstances at the competency stage. See AG Br. at 15-17. Instead, he objects to procedural differences, such as the different timeframe for initial reports. Chapter 5122 requires an initial report on a patient’s status three months, while R.C. 2945.39 provides for a report after six months. That minor difference does not amount to a constitutional violation, especially in light of the fact that this “initial” report under R.C. 2945.39 is, in almost all cases, not truly a report on an “initial” commitment stage, as a commitment at the unrestorable stage under R.C. 2945.39 is typically preceded by a restoration-focused commitment under R.C. 2945.38. By contrast, commitment under Chapter 5122 is typically a truly “initial” commitment. That alone justifies a difference, and in addition, such a difference is justified by the higher

finding, discussed above, made under R.C. 2945.39, regarding the dangerousness evidenced by actual commission of a violent felony.

Nor is an equal protection violation established by Williams's complaint that a common pleas court must approve a release, or reduced conditions of confinement, under R.C. 2945.39, as opposed to Chapter 5122's provision for a medical officer to authorize release without court approval. First, court-approved release under R.C. 2945.39 is rationally justified by the circumstances that led to the commitment, that is, the commission of a felony. Second, the two systems are not as different as Williams suggests. A medical officer's approval for release under Chapter 5122 requires advance notice to the prosecutor and court, if the individual had been charged with a crime, allowing for de facto court review and re-commitment before the medical officer's "unilateral" release actually takes effect. See AG Br. at 23-24; R.C. 5122.21(A). Thus, both systems involve court involvement, or potential for it, before release, as applied to those who have committed crimes. And to the extent that Chapter 5122 does not require notice to a court or prosecutor for those who faced no charges, that difference is entirely rational.

Williams also cannot show a constitutional violation by virtue of his claim that this court-approval requirement caused a three-month delay in his transfer to a less-restrictive facility. First, the fact that he has been transferred, despite the delay he complains of, shows that the system for reduced conditions and for release does work, in contrast to a comparison to a criminal sentence or to the danger of "permanent institutionalism" as in *Jackson*. Second, because this information is not in the record, he has not shown whether he tried to alert the trial court to the medical recommendation or filed motions or made any effort to speed up the process. Finally, even if a three-month delay were a constitutional concern—and it is not—it would not render the statute unconstitutional on its face, as nothing in the statute addresses a

court's decisionmaking time after receiving a report. At most, Williams would have an as-applied claim for enforcing faster decisions.

Consequently, neither the common pleas court's role in approving changes, nor the initial reporting schedule, or any other identified difference between R.C. 2945.39 and Chapter 5122 amount to an equal protection violation. Williams identifies no other differences between the two systems, and the Attorney General is not aware of any.<sup>2</sup> R.C. 2945.39, therefore, satisfies the rational basis test, and it is constitutional.

For its part, the amicus Public Defender urges a higher scrutiny than rational basis, but that erroneous suggestion misunderstands what this case and R.C. 2945.39 are all about. See PD Br. at 5. The Public Defender suggests that mentally ill criminal defendants are “a discrete and insular minority” and that “R.C. 2945.39 raises the specter of legislation that is driven solely by animus towards the class it affects.” *Id.* (citing *Romer v. Evans* (1996), 517 U.S. 620 and *United States v. Carolene Products Co.* (1938), 304 U.S. 144, 153 n.4). But this Court and others have specifically rejected claims of heightened scrutiny based on criminal charges generally and on the civil/criminal difference in the context of the mentally ill. See, e.g., *Adkins v. McFaul* (1996), 76 Ohio St. 3d 350, 352 (“The legislature is free to discriminate on a rational basis in treatment of different classes of criminal offenders”); *Williams v. Meyer* (6th Cir. 2007), 254 Fed. Appx. 459, 462-63 (applying rational basis test to differences of treatment between civilly

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<sup>2</sup> To be more precise, the Attorney General is not aware of any differences that affect Williams or any other committed individual, and thus of anything that could affect their rights. The two systems differ in administrative or “behind-the-scenes” aspects that do not affect the patients. For example, the State absorbs the cost of hospitalizing and treating those committed under R.C. 2945.39, while counties bear the costs of those committed by probate courts under Chapter 5122. See Forensic Toolkit (May 2009), Ohio Dept. of Mental Health, available at <http://mentalhealth.ohio.gov/what-we-do/provide/forensic-services/publications-and-links.shtml>, at 5, 6, 22. Other such administrative differences may exist, but because they do not directly affect an individual, such differences do not affect any constitutional rights.

and criminally insane). And again, those committed under R.C. 2945.39 are committed civilly, and not subject to imprisonment or other criminal sanctions, so the proper comparison is to Chapter 5122, as detailed above, and not to criminal procedures such as the reasonable-doubt standard. See PD Br. at 5.

Equally important, the Public Defender's characterization of this system as "driven solely by animus" is completely at odds with the shaping of this system by mental-health professionals such as those at the Ohio Department of Mental Health. The system for treating mentally ill criminal defendants is not some "throw away the key" prison system with a pretextual mental-health label attached. As the opening amicus brief explained, this system was designed with input from mental-health experts and law enforcement alike, AG Br. at 6-9, and it is operated by dedicated professionals of Ohio's mental health system. Those professionals know and appreciate the needs of the mentally ill better than anyone. They know that most of the mentally ill are not violent, and in fact, the mentally ill are violent at lower rates than the rest of the population. And they know that even those mentally ill persons who are violent need treatment as much as, or more than, the nonviolent mentally ill. Their job is to treat, not punish; they have patients, not prisoners.

The Department of Mental Health has been overseeing those committed under R.C. 2945.39 for over a decade since the law was enacted, and in that time, they have served almost 200 patients, meeting their needs while protecting the public at the same time. All of these patients had committed violent felonies, and not just felonious assault or the "lowest" offenses on the list. Of 193 persons committed under R.C. 2945.39 since its enactment in 1997, the ODMH has treated 41 who committed murder and aggravated murder, along with a handful who committed manslaughter or attempted murder. Another 25 committed rape, as did Williams

here, and others committed attempted rape, burglary, robbery, and arson. The need to commit such offenders, even though they will not be restored to competency, is real, and the ODMH system is best equipped to face that challenge.

The ODMH's data also show that this treatment is not a code word for "permanent institutionalization," as patients are treated and released more often than not. Of the 193 committed, only 91 remain, and 3 have died while committed. Most have been released, with 29 fully discharged and 70 conditionally released, meaning that they are still under oversight, but are not institutionalized.

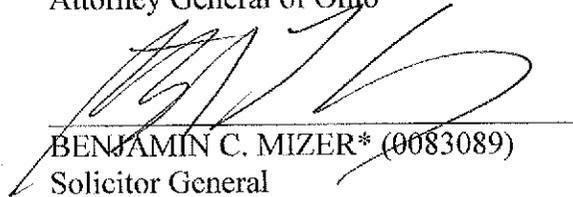
All this shows that the system is working. Ohio has created a system that both serves public safety and patients' treatment needs, while respecting patient/defendants' constitutional rights as well. The system deserves praise, not condemnation, and certainly not invalidation as unconstitutional.

## CONCLUSION

For the above reasons, the Attorney General respectfully asks this Court to reverse the Second District's decision below.

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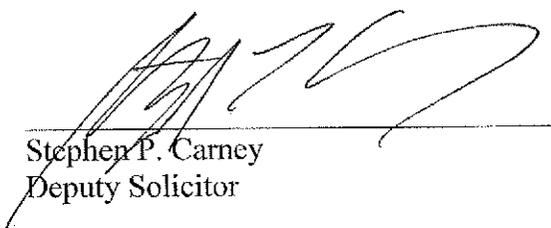
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