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## H.B. 565: Criminal Procedures Affecting the Mentally Ill Offender

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## H.B. 565: CRIMINAL PROCEDURES AFFECTING THE MENTALLY ILL OFFENDER

### I. INTRODUCTION

In criminal prosecutions, a defendant may be involuntarily committed to a mental hospital through either of two generally accepted procedures.<sup>1</sup> The most prevalent of these is the involuntary commitment of a criminal defendant who, before being fully tried, is preliminarily adjudged incompetent to stand trial.<sup>2</sup> Greater notoriety, however, has been gained by commitment procedures initiated through the defense of insanity. Successful establishment of an insanity defense will provide for the acquittal and subsequent commitment of a defendant by reason of his mental condition at the time of the criminal act.<sup>3</sup> Thus, the removal of a mentally ill defendant from the criminal process is the laudable objective which accords legitimacy to these compulsory confinement procedures.<sup>4</sup> Nevertheless, involuntary commitment proceedings, which can result in potentially prolonged incarceration, may violate a defendant's constitutional rights unless state statutory provisions provide adequate procedural safeguards.<sup>5</sup>

In 1978, the Ohio Legislature enacted House Bill 565.<sup>6</sup> The bill establishes the procedures for determining whether a defendant is incompetent to stand trial and whether he is not guilty by reason of insanity. In addition, procedures are outlined for the treatment and hospitalization of a defendant who is ultimately found incompetent to stand trial or not guilty by reason of insanity.<sup>7</sup> Although Ohio's previous commitment procedures were not judicially decreed unconstitutional, they appeared to manifest several constitutional infirmities.<sup>8</sup> H.B. 565 is designed to alleviate the constitutional deficiencies found in the former statute by providing detailed procedures and

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1. Salmon, *Contesting Incompetency to Stand Trial*, 2 OHIO N. U. L. REV. 739, 739 (1975).

2. T. SZASZ, *PSYCHIATRIC JUSTICE* 20, 48-51 (1965).

3. S. BRAKEL, *THE MENTALLY DISABLED AND THE LAW* 404 (1971).

4. Salmon, *supra* note 1, at 740.

5. See notes 26-36 and accompanying text *infra*.

6. Am. Sub. H.B. 565 113th General Assembly, codified in OHIO REV. CODE ANN. §§ 2945.37-.40 (Page Supp. 1979).

7. The bill makes other changes in laws relating to the disposition of mentally ill defendants and inmates. See OHIO REV. CODE ANN. §§ 5125.05-.11 (Page Supp. 1979).

8. Legal scholars had questioned the legal strength of Ohio's previous commitment procedures. See generally Caulfield, *Ohio Commitments of the Mentally Ill Offender*, 4 CAP. U. L. REV. 1 (1974).

necessary time constraints to protect the civil liberties of mentally ill defendants.<sup>9</sup> Section 2945.37, for example, requires a full hearing to be held before a criminal defendant may be committed as incompetent to stand trial.<sup>10</sup> Sections 2945.371, 2945.38, and 2945.39, in pertinent parts, provide for out-patient care of a defendant whose mental condition needs to be clinically examined in order to evaluate competency to stand trial or sanity during the commission of the crime.<sup>11</sup> Finally, the most significant provision is section 2945.38(c), which provides for the civil commitment of defendants found to be incompetent without a substantial likelihood of regaining competency.<sup>12</sup>

## II. ANALYSIS

### A. *Determination of Competence to Stand Trial*

#### 1. Temporary Commitments

A hearing must be held when the issue of the defendant's competence to stand trial is raised.<sup>13</sup> At this hearing, the prosecution and defense counsel are afforded the right, conferred by the statute, to submit evidence on the issue of the defendant's competence.<sup>14</sup> The defendant is presumed to be competent unless it is proved by a preponderance of the evidence that he is incompetent.<sup>15</sup> Statutory inclusion of these procedures gives the defendant a right to a plenary hearing. Ostensibly, the party espousing the defendant's incompetence must, at a minimum, present sufficient evidence to overcome the

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9. See *Testimony of Phillip J. Resnick, M.D., on House Bill 565 (1978)* (copy available in library of the Legislative Service Commission, Columbus, Ohio). Dr. Resnick is an assistant professor of psychiatry at Case Western Reserve, School of Medicine.

10. OHIO REV. CODE ANN. § 2945.37 (Page Supp. 1979).

11. *Id.* §§ 2945.371(A) -.371(B), 2945.38(D), 2945.39(B).

12. *Id.* § 2945.38(C).

13. *Id.* § 2945.37. Under this section there are three possible sources from which the question of competence may be derived. The issue may be raised by the defense, the prosecution, or the court may take judicial notice of the question *sua sponte*.

14. *Id.* For purposes of brevity, as used here and in the remainder of this note the word "competence" should be considered synonymous with the phrase "competence to stand trial."

15. *Id.* The standard for determining competence to stand trial was not mentioned in the former statutes, but was established at common law: whether the defendant is of "sufficient soundness of mind to understand and appreciate the nature of the charge against him, to comprehend his situation, and whether he is mentally capable of furnishing his counsel the facts essential to the presentation of a proper defense." See *State v. Bushong*, 146 Ohio St. 271, 274, 65 N.E.2d 407, 408-09 (1946). Cf. OHIO REV. CODE ANN. § 2945.37 (Page Supp. 1979), which codified in a slightly altered form the standard for competence to stand trial.

statutory presumption of competency. Upon the evidence submitted, the court shall make a determination of the defendant's competence.<sup>16</sup>

Once the issue of the defendant's competence is raised, the court may order an evaluation of the defendant's mental condition before a full hearing is held.<sup>17</sup> If an evaluation is ordered, there is no requirement that the defendant be committed to a state institution for temporary observation. Although the court may order the temporary observational commitment of a defendant who refuses to submit to a complete examination, the import of the statute is unmistakably to encourage out-patient examinations.<sup>18</sup>

Prior to H.B. 565, if the issue of the defendant's competence was raised, the court would make a prima facie determination whether an examination of the defendant was warranted.<sup>19</sup> If an examination was ordered by the court, the propriety of a temporary commitment for purposes of examination was unquestioned.<sup>20</sup> Therefore, an accused could be summarily committed to a mental institution for temporary observation merely because the court entertained reasonable doubts about his competency.<sup>21</sup> Under the prior procedures, after the in-patient examination was completed, the defendant was returned to the trial court.<sup>22</sup> A final determination of competence was then made from which there was no statutory right to a full hearing. If the defendant was found to be incompetent, he was indefinitely committed to a state institution.<sup>23</sup> Any person facing the prospect of a loss of liberty is en-

16. OHIO REV. CODE ANN. § 2945.37 (Page Supp. 1979).

17. "If the issue of a defendant's competence to stand trial is raised . . . the court may order one or more, but not more than three evaluations of the defendant's mental condition." *Id.* § 2945.371.

18. *See id.* § 2945.371(B).

19. 1929 OHIO LAWS 123, 177 (currently codified at OHIO REV. CODE ANN. § 2945.37 (Page Supp. 1979)). This statute, which was repealed by the current section read, in part, as follows: "If the attorney . . . suggests to the court that such person is not then sane . . . the court shall proceed to examine into the question of the sanity or insanity of said person . . ." *Id.*

20. 1929 OHIO LAWS 123, 178 (currently codified at OHIO REV. CODE ANN. § 2937.40 (Page Supp. 1979)). This statute, which was repealed by the current section, read in pertinent part: "In any case . . . in which present insanity of the accused is under investigation . . . the court shall have power to commit the defendant to a local insane hospital . . . where the defendant shall remain under observation for such time as the court may direct not exceeding one month. . . ." *Id.*

21. Kaufman, *Evaluation Competency: Are Constitutional Deprivations Necessary?*, 10 AM. CRIM. L. REV. 465, 475 (1972).

22. For an excellent synopsis of how the prior procedures were implemented see Caulfield, *supra* note 8, at 4-5.

23. 1929 OHIO LAWS 123, 177 (currently codified at OHIO REV. CODE ANN. § 2945.38 (Page Supp. 1979)). This statute, which has been repealed, stated: "If the court or jury find him [the defendant] to be not sane, he shall be forthwith committed by the court to an insane hospital . . . until he is restored to reason. . . ." *Id.*

titled, according to the due process clause of the fourteenth amendment, to a full and fair hearing.<sup>24</sup> Under the former statute, there was no articulation of this constitutional right to a full hearing, nor a description of the manner in which it was to be conducted.<sup>25</sup> The conclusory fashion with which a defendant could be committed under the prior statute apparently motivated the legislature to adopt sections 2945.37 and 2945.371.

There are cogent constitutional reasons for the statutory authorization of out-patient examinations.<sup>26</sup> It has been firmly established that due process requires that the least restrictive means be employed to achieve state goals.<sup>27</sup> In the context of criminal incompetency law, the state's interest is to accurately assess the defendant's mental capacity to stand trial.<sup>28</sup> In contrast to the state's interest is the defendant's constitutional right to pretrial liberty. Due process will not countenance unnecessary deprivations of the defendant's liberty.<sup>29</sup> The least intrusive means should be employed to determine the defendant's competence.<sup>30</sup> Notwithstanding the state's bona fide interest in having a thorough examination performed, a defendant's right to pretrial liberty should be abrogated only to the extent reasonably necessary to secure an effective evaluation.<sup>31</sup> Because out-patient examinations do not result in the protracted confinement of a defendant, it is the least onerous means for achieving effective pretrial mental examinations.<sup>32</sup>

The issue of bail raises another constitutional argument against the

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24. A basic precept of due process of law is an opportunity to be heard. *E.g.*, *Granis v. Ordean*, 234 U.S. 385, 394 (1914). In *Pate v. Robinson*, 383 U.S. 375 (1966), the Supreme Court held that if a doubt exists as to a defendant's competence to stand trial, an adequate hearing on competence is constitutionally required.

25. Compare OHIO REV. CODE ANN. § 2945.37 (Page Supp. 1979) with note 17 *supra* for an illustration of the procedural safeguards included in H.B. 565.

26. For a comprehensive discussion of the constitutional objections against in-patient mental examinations, see Kaufman, *supra* note 21; Golten, *Role of Defense Counsel In The Criminal Commitment Process*, 10 AM. CRIM. L. REV. 385 (1972).

27. See *Shelton v. Tucker*, 364 U.S. 479, 488 (1960) (a legitimate governmental purpose cannot be pursued by means that broadly stifle fundamental personal liberties).

28. Kaufman, *supra* note 21, at 469.

29. *Id.*

30. *Lake v. Cameron*, 364 F.2d 657, 661-62 (D.C. Cir.), *cert. denied*, 382 U.S. 863 (1966) (the least restrictive means must be explored before a person can be confined to a psychiatric institution).

31. Kaufman, *supra* note 21, at 477. *Macey v. Harris*, 400 F.2d 772, 774 (D.C. Cir. 1968) (in-patient examinations should be ordered only if necessary for an effective diagnosis).

32. Kaufman, *supra* note 21, at 477. The use of out-patient examinations in other jurisdictions seems to work as well as in-patient evaluations. See *id.* at 466 n.11 and articles cited therein.

use of temporary commitments to determine competency. Once the question of competency is raised, the setting of bail is deferred.<sup>33</sup> The accused's fitness for bail should not be adversely determined solely because a mental examination has been ordered.<sup>34</sup> In Ohio, criminal defendants charged with noncapital offenses have a constitutional right to bail.<sup>35</sup> In light of this constitutional mandate, the practice of committing a defendant for pretrial observation, at least in noncapital cases, arguably violates his absolute right to a hearing on bail.<sup>36</sup>

Under section 2945.371, a defendant who is required to undergo a mental evaluation to determine competency may be released on bail or recognizance.<sup>37</sup> This statutory provision suggests a legislative attempt to adhere to the constitutional demand that there be a right to a hearing on bail. Moreover, it fully comports with the availability of outpatient examinations. The only restriction on the defendant's liberty is that he must be available at the time and place at which his examination is to be performed.<sup>38</sup>

The legal arguments advanced against the use of temporary commitments are two-fold. Commitment usurps the defendant's fundamental right to bail and is contrary to the due process requirement of least restrictive alternatives.<sup>39</sup> These constitutional challenges are augmented by a pragmatic reason favoring the limited utilization of inpatient care.<sup>40</sup> Institutionalization with severely mentally ill patients can be a painfully distressing experience which may exacerbate a patient's condition.<sup>41</sup> Commitment of a defendant to a mental institution may have a pernicious psychological impact on an otherwise mentally stable individual.<sup>42</sup> There is no sound reason for commitment to deter-

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33. Although there is a dearth of case law on the issue, it has been maintained that in practice a court will disregard the issue of bail if the defendant's competency is in question. *Id.* at 471 n.24.

34. *Id.* at 472.

35. OHIO CONST. art. I § 9 reads: "All persons shall be bailable by sufficient sureties, except for capital offenses . . . ."

36. The Supreme Court of Ohio has held: "The right to bail . . . is absolute . . . , the only exception being for capital offenses." *Locke v. Jenkins*, 20 Ohio St. 2d 45, 46, 253 N.E.2d 757, 757 (1969).

37. OHIO REV. CODE ANN. § 2945.371 (Page Supp. 1979).

38. *Id.* § 2945.371(B).

39. See notes 26-36 and accompanying text *supra*.

40. Caulfield, *supra* note 8, at 9.

41. *Id.* See also *United States ex rel Schuster v. Herold*, 410 F.2d 1071, 1078 (2d Cir.), cert. denied, 396 U.S. 847 (1969), (court took cognizance of the damage that can result from such a commitment).

42. Note, *Incompetency to Stand Trial*, 81 HARV. L. REV. 454, 462 (1967).

mine competency if out-patient care will produce substantially similar results, namely, an effective examination of the defendant.<sup>43</sup>

## 2. Indefinite Commitments

In 1972 the United States Supreme Court held, in *Jackson v. Indiana*,<sup>44</sup> that the indefinite commitment of a mentally incompetent criminal defendant was a denial of equal protection and due process. If there is no reasonable basis for believing that the defendant will ever be restored to reason, sufficient to stand trial, he must either be civilly committed or released.<sup>45</sup> The Court further stated that the state may detain the defendant in a mental institution only for a reasonable period of time.<sup>46</sup> During the defendant's confinement, the state must determine whether there is a substantial probability that he will attain the mental capacity to stand trial in the foreseeable future.<sup>47</sup> In *Burton v. Reshetlyo*,<sup>48</sup> the Ohio Supreme Court held the *Jackson* decision fully applicable to the Ohio incompetency to stand trial statute. The court stated that once it has been determined that there is little likelihood of a defendant attaining competency, he must either be released or accorded the full panoply of civil commitment rights.<sup>49</sup>

Prior to *Jackson*, a defendant characterized as unlikely to attain competence to stand trial was in a precarious position. The defendant was confined to a mental institution and was not tried for the crime charged until he achieved the requisite level of competence.<sup>50</sup> The likelihood of the defendant achieving the competence to stand trial, however, was slight. Ironically, the defendant's commitment could result in a longer confinement at a mental hospital than if imprisoned for the alleged crime.<sup>51</sup> A finding of incompetency for a defendant who never attained the mental capacity to stand trial was tantamount to a commitment for life.<sup>52</sup> The possibility of an indeterminate incarceration was the evil which was ameliorated by *Jackson*.

The anomalous position of those incapacitated defendants who were unlikely to ever become competent was recognized by H.B. 565.

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43. It has been suggested that a defendant committed to Lima State Hospital for observation will not receive any more individualized treatment than a patient examined by a competent psychiatrist through out-patient care. Caulfield, *supra* note 8, at 6.

44. 406 U.S. 715 (1972).

45. *Id.* at 738.

46. *Id.*

47. *Id.*

48. 38 Ohio St. 2d 35, 309 N.E.2d 907 (1974).

49. *Id.* at 45, 309 N.E.2d at 913.

50. See note 23 *supra* for text of Ohio's previous indefinite commitment statute.

51. 81 HARV. L. REV., *supra* note 42, at 456.

52. Kaufman, *supra* note 21, at 479.

The *Jackson* requirements are statutorily incorporated in the new law. A defendant found incompetent with little likelihood of attaining competence in the foreseeable future must be afforded civil commitment rights.<sup>53</sup> After a full hearing, in which a defendant is determined incompetent, the court must make a further finding whether there is a substantial probability he will become competent to stand trial within one year.<sup>54</sup> If the court finds the defendant incompetent and without a substantial probability of becoming competent within one year, the court shall cause an affidavit to be filed in the probate court.<sup>55</sup> The affidavit will allege that the defendant should be involuntarily committed pursuant to civil commitment procedures.<sup>56</sup>

If the court finds there is a substantial probability that an incompetent defendant will become competent to stand trial within one year, the defendant will be ordered to undergo treatment.<sup>57</sup> According to section 2945.38(D), the longest period of time a defendant can be required to undergo treatment is fifteen months.<sup>58</sup> Under section 2945.38(E), the person who supervises treatment must submit an examination report of the defendant's mental condition at designated intervals. At least once every ninety days after the date the order to undergo treatment was issued, a written report must be filed.<sup>59</sup> A written report must also be filed if the examining psychiatrist believes that the defendant has regained the competence necessary to stand trial,<sup>60</sup>

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53. See note 47 *supra*. Cf. OHIO REV. CODE ANN. § 2945.38(C) (Page Supp. 1979).

54. OHIO REV. CODE ANN. § 2945.38(B) (Page Supp. 1979). At the time of this writing, H.B. 274, which proposes amendment of section 2945.38(B), was before the 113th Assembly. The bill, if passed, would require a court that finds a defendant as incompetent to stand trial to make a further finding whether there is a substantial probability he will attain competence within two years. See Am. Sub. H.B. 274, 1979 Laws of Ohio (Baldwin).

55. *Id.* § 2945.38(C).

56. *Id.* Under the civil commitment statute, the legal criteria for commitment are whether the person is dangerous to society or in need of treatment in a mental hospital. See generally OHIO REV. CODE ANN. ch. 5122 (Page Supp. 1979). Empirical data has shown that, on the average, civil commitment will permit a defendant to be released sooner than if he were committed solely on account of his incapacity to stand trial. See *Jackson v. Indiana*, 406 U.S. 715, 734 (1972). See also Morris, *The Confusion of Confinement Syndrome: An Analysis of the Mentally Ill Criminals and Ex-Criminals by the Department of Correction of the State of New York*, 17 BUFFALO L. REV. 651 (1968).

57. OHIO REV. CODE ANN. § 2945.38(D) (Page Supp. 1979). "In determining placement alternatives, the court shall . . . order the least restrictive alternative available and consistent with treatment goals." *Id.* This added caveat is entirely consistent with the encouragement of out-patient treatment.

58. The duration of treatment is limited to the lesser of fifteen months or one-third of the longest minimum sentence, in the case of a felony, or one-third of the longest maximum sentence in the case of a misdemeanor. *Id.*

59. *Id.* § 2945.38(E)(1).

60. *Id.* § 2945.38(E)(2).



or if the defendant's condition has so debilitated that there is no longer a substantial probability that he will become competent to stand trial.<sup>61</sup> Finally, a written report must be filed fourteen days before expiration of the maximum time (i.e. fifteen months) in which an order may issue.<sup>62</sup>

Upon receipt of any report from the examining psychiatrist, except the periodic report submitted every ninety days, the court must again hold a hearing on the issue of the defendant's competence to stand trial.<sup>63</sup> At this hearing, if the defendant is found competent, he will be prosecuted for the original offense charged.<sup>64</sup> Conversely, if he is found incompetent without a substantial probability that competency will be attained before expiration of the maximum time order, the court shall cause an affidavit to be filed in the probate court seeking civil commitment.<sup>65</sup> The court may modify or continue the original treatment order, if it finds a substantial probability that the defendant will be competent before expiration of the maximum time permitted for a treatment order.<sup>66</sup>

After analyzing the gamut of procedures provided in section 2945.38, it becomes clear that periodic judicial review of a defendant's mental condition is required by statute. Periodic inquiry into the likelihood of the defendant's improvement is in accordance with the premise underlying commitment that a defendant should receive adequate treatment in order to be tried.<sup>67</sup> The primary impetus for statutory establishment of Ohio's procedures under section 2945.38(E) was *Davis v. Watkins*.<sup>68</sup> *Davis* held that the state has a responsibility to provide care which is reasonably calculated to achieve recovery of the defendant's mental condition.<sup>69</sup> The *Davis* procedures are consistent

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61. *Id.* § 2945.38(E)(3).

62. *Id.* § 2945.38(E)(4).

63. *Id.* The statute further provides that the court shall hold a hearing within ten days after receipt of the report. *Id.* § 2945.38(F).

64. "If . . . the court finds the defendant is competent to stand trial, the defendant shall be proceeded against as provided by law." OHIO REV. CODE ANN. § 2945.38(F) (Page Supp. 1979).

65. The proper initiatory procedures for civil commitment proceedings would be made pursuant to section 2945.38(C). The court is required to dismiss the charges against a defendant found incompetent without a substantial probability of becoming competent to stand trial. *Id.* § 2945.38(G).

66. *Id.* § 2945.38(F).

67. 81 HARV. L. REV., *supra* note 42, at 471.

68. 384 F. Supp. 1196 (N.D. Ohio 1974).

69. *Id.* at. 1197. The court in *Davis* ordered that each person who was then a patient at Lima State Hospital and all future patients were to be examined by an evaluation team to determine whether within the foreseeable future they were likely to regain the requisite competency to stand trial. If the team found a patient competent to stand trial, he was to be "returned to the committing court forthwith." *Id.* at 1202.

with the *Jackson* requirement that the nature and duration of commitment bear some reasonable relation to the purpose for which the individual is committed.<sup>70</sup> *Jackson*, therefore, implies that due process requires the state to aid the accused in regaining the capacity to stand trial.<sup>71</sup> An indispensable element of this requirement would be the duty of the state to provide custodial care that facilitates the recovery of the accused.

The statutory procedures promulgated in California are strikingly similar to the incompetency to stand trial procedures enacted under H.B. 565.<sup>72</sup> California and Ohio each require periodic review by the court and mental health administrators and each provide concomitant provisions for ultimate dismissal of criminal charges.<sup>73</sup> Defendants who are unlikely to attain the capacity to stand trial in the foreseeable future will at least be granted a periodic hearing to determine whether civil commitment is justified.<sup>74</sup> The establishment of detailed procedural safeguards for the detention of incompetents in California indicates a legislative compliance with the demands of *Jackson*. The codification in section 2945.38 of similar procedures, directed toward the defendant's recovery and protection, should also place Ohio in the forefront of criminal incompetency law.

### *B. Commitment upon Entering Plea of Not Guilty by Reason of Insanity*

Sections 2945.39 and 2945.40 comprise the basic provisions for disposition of defendants who plead not guilty by reason of insanity.<sup>75</sup> If a defendant pleads not guilty by reason of insanity, the court may

70. 406 U.S. at 738.

71. See 3 OHIO N. U. L. REV. 198, 202 (1975).

72. Compare OHIO REV. CODE ANN. §§ 2945.37, 2945.371, 2945.38 (Page Supp. 1979) with CAL. PEN. CODE §§ 1369-1372, 1374 (West Supp. 1980).

73. The California incompetency to stand trial statute requires that an initial report disclosing the defendant's progress, if any, must be made to the court by the superintendent of the detaining institution within ninety days of commitment. Thereafter, at six month intervals or until the defendant becomes mentally competent, a report must be submitted to the court. See CAL. PEN. CODE § 1370(b)(1) (West Supp. 1980).

74. "If . . . there is no substantial likelihood that the defendant will regain his mental competence in the foreseeable future, the committing court shall order him returned to the court for proceedings pursuant to paragraph (2) of subdivision (c)." Section 1370(c)(2) of the California Code, CAL. PEN. CODE § 1370(c)(2) (West Supp. 1980), reads in part: "Whenever any defendant is returned to the court . . . and it appears to the court that the defendant is gravely disabled . . . the court shall order the conservatorship investigator of the county of commitment of the defendant to initiate conservatorship proceedings . . ."

75. OHIO REV. CODE ANN. § 2945.39-.40 (Page Supp. 1979).

order an evaluation of the defendant's mental condition at the time the alleged criminal offense was committed.<sup>76</sup> The examination must be completed within thirty days after the court order, and the examiner must prepare a written report on the defendant's mental condition.<sup>77</sup> The court-appointed examiner may be called as a witness by the court and is subject to direct and cross-examination.<sup>78</sup>

If an accused is found not guilty by reason of insanity, the trial court is required, by section 2945.40, to cause an affidavit to be filed in the probate court.<sup>79</sup> The probate court thereby acquires jurisdiction over the accused and will conduct proceedings to determine whether civil commitment is appropriate.<sup>80</sup> If the accused is not found to be mentally ill, the probate court is required to discharge him.<sup>81</sup> Alternatively, if the accused is found to be mentally ill, he will be subject to institutionalization through a civil commitment order.<sup>82</sup>

A defendant found not responsible for his criminal conduct, because of insanity, will "be removed from the criminal justice system and treated as dictated by his present mental condition."<sup>83</sup> A finding that the defendant was suffering from a mental disease at the time of the crime,<sup>84</sup> should not be the basis for present commitment. It seems more appropriate to condition commitment following acquittal through implementation of the procedures and standards established

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76. *Id.*

77. *Id.* § 2945.39(C).

78. *Id.*

79. "If a person is found not guilty by reason of insanity . . . the court shall cause an affidavit to be filed in the probate court . . ." *Id.* § 2945.40. *Cf.* § 2945.38 wherein a similar procedure is required when a defendant is found incompetent to stand trial without a substantial probability of becoming competent. See notes 53-56 and accompanying text *supra*.

80. See note 56 *supra*.

81. *Id.* § 2945.40.

82. *Id.*

83. German and Singer, *Punishing The Not Guilty: Hospitalization Of Persons Acquitted By Reason Of Insanity*, 29 RUTGERS L. REV. 1011, 1011 (1976). The authors advocate the defendant's present mental condition as the proper standard for commitment.

84. The test for a plea of "not guilty by reason of insanity" has been stated by the Ohio Supreme Court as follows: "[T]he accused must establish . . . that . . . at the time of the criminal act with which he is charged, either he did not know that such act was wrong or he did not have the ability to refrain from doing that act." *State v. Staten*, 18 Ohio St. 2d 13, 21, 247 N.E.2d 293, 299 (1969), *modified*, 408 U.S. 938 (1972).

While this note was being written, H.B. 893 was under consideration by the 113th Assembly, proposing amendment of section 2945.39. The proposals contained therein suggest that the term "mental illness" be substituted in the place of "not guilty by reason of insanity." These new procedures would not materially affect the changes enacted by H.B. 565. See Am. Sub. H.B. 893, 1979 Laws of Ohio (Baldwin).

by Ohio's civil commitment legislation, which is concerned with an evaluation of present insanity.<sup>85</sup>

Prior to enactment of section 2945.40, a defendant acquitted by reason of insanity was treated under criminal commitment proceedings.<sup>86</sup> There was no determination of mental illness at the time of commitment. The previous procedures relieved the state of the burden of proving present insanity, by providing that the court or jury verdict contain a statutory presumption of continued insanity.<sup>87</sup> This legal presumption required that the defendant be indefinitely committed to Lima State Hospital, without a hearing, following the return of the verdict.<sup>88</sup> Furthermore, the prior statute provided only two types of proceedings which could secure the release of a defendant previously found "not guilty by reason of insanity."<sup>89</sup> The first was a quasi-judicial proceeding initiated by application to the Allen County Court of Common Pleas to hold to a hearing on whether the person committed was presently "sane and dangerous."<sup>90</sup> The issue of the individual's sanity could also be raised by a petition for writ of habeas corpus.<sup>91</sup>

The prior procedures arguably violated the defendant's right to due process because he was incarcerated based on a statutory presumption of insanity which had no rational bearing to his present mental status.<sup>92</sup> Even though alternative procedures were available to assure evaluation of the defendant's present mental condition, many months could pass before he was finally released from detention.

85. German and Singer, *supra* note 83, at 1013.

86. 1929 OHIO LAWS 123, 177 (currently codified at OHIO REV. CODE ANN. § 2945.39 (Page Supp. 1979)). This statute, which has been repealed, read in pertinent part: "When a defendant pleads 'not guilty by reason of insanity,' and is acquitted . . . the court shall forthwith direct that the accused be confined in the Lima State Hospital . . . ."

87. "When a defendant . . . is acquitted on the sole ground of his insanity . . . it shall be presumed that such insanity continues." *Id.*

88. Caulfield, *supra* note 8, at 18.

89. *Id.*

90. 1929 OHIO LAWS 123, 177 (currently codified at OHIO REV. CODE ANN. § 2945.39 (Page Supp. 1979) which repealed the previous enactment).

91. In Ohio, an action for a writ of habeas corpus may be brought under OHIO REV. CODE ANN. ch. 2725 (Page Supp. 1979) to determine whether the defendant's present mental condition justifies continued commitment as incompetent to stand trial. *See* Campell v. Watkins, 38 Ohio St. 2d 197, 311 N.E.2d 658 (1974). Oftentimes the lack of legal sophistication of many defendants and the difficulty of retaining counsel make the defendant's right to a petition for a writ of habeas corpus inadequate. *See* note 42 *supra*.

92. Although the United States Supreme Court has not explicitly spoken on the due process considerations in insanity acquittal cases, it was held in *Specht v. Patterson*, 386 U.S. 605 (1967), that commitment proceedings, whether denominated civil or criminal, are subject to the due process clause. *Id.* at 608.

### III. CONCLUSION

The conviction of a mentally incapacitated defendant engenders strong moral objections. To mitigate the punitive sanctions of the criminal justice system, an attempt is made to shelter those individuals incapable of effectively participating in that process. Although the special procedures relating to the mentally ill defendant are based on humanitarian motives, involuntary commitment in a mental institution is a deprivation of liberty which the state may not accomplish without due process of law. The thrust of H.B. 565 is to afford the mentally ill offender civil commitment rights.<sup>93</sup>

The bill demonstrates a legislative preference for employing the least restrictive alternative for evaluation by encouraging out-patient programs. Periodic judicial review and plenary hearings, which militate against unnecessary confinements, are clearly delineated in the statute. The statutory reforms prompted by H.B. 565 also effectuate the judicial mandates that had seriously questioned the constitutional validity of state policies affecting the mentally ill offender.

*Thomas J. Troetti*

Code Sections Affected: 2945.37-.40.

Effective Date: November 1, 1978.

Sponsor: Leonard (H)

Committee: Judiciary (H)

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93. H.B. 565 also repealed the Ascherman Act, 1939 OHIO LAWS 686, which required defendants convicted of certain offenses or who were thought to be mentally ill to undergo psychiatric examinations.