IN THE SUPREME COURT OF OHIO

STATE OF OHIO,	:	
		Case No. 2023-0889
Plaintiff-Appellee,	:	
		On Appeal from the
v.	:	Ashtabula County Court of Appeals, Eleventh Appellate District
DELMAR HICKMAN,	:	
		COA Case No. 2022-A-0114
Defendant-Appellant.	:	

MERIT BRIEF OF AMICUS CURIAE OHIO PUBLIC DEFENDER IN SUPPORT OF APPELLANT DELMAR HICKMAN

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INTRODUCTION

The question in this case is whether a trial court has discretion to deny a recommended change to a committed person's conditions of confinement when the state fails to show by clear and convincing evidence that the recommendation should not be granted. Under the federal Due Process Clause and the Revised Code, the answer is no. In its decision below, the Eleventh District reached the opposite conclusion based in part on its application of dicta in *State v. Stutler*, 169 Ohio St.3d 639, 2022-Ohio-2792, 207 N.E.3d 671. This court should revisit that portion of *Stutler* and hold that a trial court has no discretion to deny a requested change in commitment in the absence of clear and convincing evidence indicating that the level change should not be granted.

STATEMENT OF INTEREST OF AMICUS CURIAE, OFFICE OF THE OHIO PUBLIC DEFENDER

The Office of the Ohio Public Defender ("OPD") is a state agency that represents indigent criminal defendants and coordinates criminal-defense efforts throughout Ohio. The OPD also plays a key role in the promulgation of Ohio law. The mission of the OPD is to protect and defend the rights of indigent persons by providing and supporting superior representation in the criminal and juvenile justice systems. The OPD has an interest in this case because it concerns the statutory and constitutional rights of persons who have been found not guilty by reason of insanity.

STATEMENT OF THE CASE AND FACTS

The OPD relies on the statement of the case and facts provided in Mr. Hickman's brief.

ARGUMENT

Appellant Delmar Hickman's Proposition of Law: A trial court has no discretion to deny a change in commitment requested in the absence of clear and convincing evidence indicating that the level change should not be granted.

When a state involuntarily commits a person who was found not guilty by reason of insanity, federal "[d]ue process requires that the nature of commitment bear some reasonable relation to the purpose for which the individual is committed." *Foucha v. Louisiana*, 504 U.S. 71, 79, 112 S.Ct. 1780, 118 L.Ed.2d 437 (1992). In Ohio, the Revised Code places the burden on the state to make that showing by clear and convincing evidence. R.C. 2945.401(G). The Eleventh District in its decision below relieved the state of its burden of proof, overriding statutory text and placing the Revised Code in conflict with the Due Process Clause. This court should reverse.

I. The Due Process Clause requires that the nature of a person's commitment bear a reasonable relation to the purpose of the person's commitment

The Due Process Clause provides that no state shall "deprive any person of life, liberty, or property, without due process of law[.]" Fourteenth Amendment, Section 1. "It is clear that 'commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection.'" *Jones v. United States*, 463 U.S. 354, 361, 103 S.Ct. 3043, 77 L.Ed.2d 694 (1983), quoting *Addington v. Texas*, 441 U.S. 418, 425, 99 S.Ct. 1804, 60 L.Ed.2d 323 (1979).

The Due Process Clause is triggered upon a person's commitment and applies throughout the person's commitment. "[A] finding of not guilty by reason of insanity is a sufficient foundation for commitment of an insanity acquittee[.]" *Id.* at 366. That finding is insufficient, however, to support confinement under conditions that are not reasonably related to the commitment's purpose. *See Jackson v. Indiana*, 406 U.S. 715, 738, 92 S.Ct. 1845, 32 L.Ed.2d 435 (1972). Rather, "[d]ue process requires that the nature of commitment bear some reasonable relation to the purpose for

which the individual is committed." *Foucha*, 504 U.S. at 79; *see also id.* at 88 (O'Connor, J., concurring in part and in the judgment) (citing sources for the point that insanity "acquittees [can] not be confined as mental patients absent some medical justification for doing so; in such a case the necessary connection between the nature and purposes of confinement would be absent").

Whether the nature of a person's commitment bears a reasonable relation to the purpose of the commitment must be judged according to a standard of proof. "The function of a standard of proof, as that concept is embodied in the Due Process Clause and in the realm of factfinding, is to 'instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication.'" *Addington*, 441 U.S. at 423, quoting *In re Winship*, 397 U.S. 358, 370 (1970) (Harlan, J., concurring).

The United States Supreme Court has held that the minimum applicable standard of proof depends on the nature of the commitment proceeding. In a civil commitment proceeding, for instance, due process requires the state to show that the commitment is appropriate by clear and convincing evidence. *Id.* at 431-433. By contrast, "[t]he preponderance of the evidence standard comports with due process for commitment of insanity acquittees." *Jones*, 463 U.S. at 368.

The court has never suggested or held, however, that a state may eliminate the standard of proof altogether. Indeed, such a decision would eliminate the requirement that there be a reasonable relation between the nature and purpose of commitment. *Id.* And it would also upend the Due Process Clause's protection against deprivations of liberty without due process of law.

II. Ohio's statutory scheme provides due process by placing the burden on the state to show that the nature of commitment is appropriate by clear and convincing evidence

Consistent with the Due Process Clause, the Revised Code places the burden on the state to prove by clear and convincing evidence that there is a reasonable relation between the nature

and purpose of a person's commitment. The Revised Code does so in R.C. 2945.401, which governs the commitment of persons who have been found not guilty by reason of insanity.

Revised Code 2945.401 provides that "a person found not guilty by reason of insanity and committed pursuant to section 2945.40 of the Revised Code shall remain subject to the jurisdiction of the trial court pursuant to that commitment * * * until the final termination of the commitment[.]" R.C. 2945.401(A). Once a person has been committed, R.C. 2945.401 further provides for periodic review of the nature of the person's commitment. R.C. 2945.401(C).

"[A]t any time after evaluating the risks to public safety and the welfare of the * * * person," a designee of the institution at which the person is committed "may recommend a termination of the * * * person's commitment or a change in the conditions of the * * * person's commitment." R.C. 2945.401(D)(1). Among the conditions that can be recommended are "on-grounds unsupervised movement, off-grounds supervised movement, or nonsecured status[.]" *Id.* Nonsecured status, the condition relevant here, "means any unsupervised, off-grounds movement or trial visit from a hospital or institution, or any conditional release[.]" R.C. 2945.37(A)(3).

When a designee makes a recommendation, the trial court must hold a hearing on the recommendation. R.C. 2945.401(C), (D)(1)(d). At the hearing, the prosecutor represents the state, R.C. 2945.401(H), and "has the burden of proof[,]" R.C. 2945.401(G). If the designee recommends termination of commitment, the prosecutor has the burden "to show by clear and convincing evidence that the * * * person remains a person with a mental illness subject to court order or a person with an intellectual disability subject to institutionalization by court order[.]" R.C. 2945.401(G)(1). If the designee recommends a change in conditions of confinement, by contrast, the prosecutor must "show by clear and convincing evidence that the proposed change represents a threat to public safety or a threat to the safety of any person." R.C. 2945.401(G)(2).

The prosecutor can attempt to satisfy their burden of proof in several different ways. First, "[i]f the * * * designee's recommendation is for nonsecured status or termination of commitment, the prosecutor may obtain an independent expert evaluation of the * * * person's mental condition" and "may introduce the evaluation report" at the hearing. R.C. 2945.401(D)(1)(c). Second, the prosecutor may "present other evidence at the hearing in accordance with the Rules of Evidence." *Id.* Finally, the prosecutor may "cross-examin[e] and impeach[] [the committed person's] evidence." *Stutler*, 169 Ohio St.3d 639, 2022-Ohio-2792, 207 N.E.3d 671, at ¶ 16. The prosecutor must put forward clear and convincing evidence but retains discretion over how to do so.

At the conclusion of the hearing, the trial court is tasked with deciding whether the prosecutor has met the applicable burden of proof. R.C. 2945.401(I). The Revised Code does not prescribe how the trial court must make that determination in most cases. When the designee recommends nonsecured status or termination of commitment, however, R.C. 2945.401 directs the trial court to "consider all relevant factors, including, but not limited to," six enumerated factors:

> (1) Whether, in the trial court's view, the defendant or person currently represents a substantial risk of physical harm to the defendant or person or others;
>
> (2) Psychiatric and medical testimony as to the current mental and physical condition of the defendant or person;
>
> (3) Whether the defendant or person has insight into the defendant's or person's condition so that the defendant or person will continue treatment as prescribed or seek professional assistance as needed;
>
> (4) The grounds upon which the state relies for the proposed commitment;
>
> (5) Any past history that is relevant to establish the defendant's or person's degree of conformity to the laws, rules, regulations, and values of society;
>
> (6) If there is evidence that the defendant's or person's mental illness is in a state of remission, the medically suggested cause and degree of the remission and the probability that the defendant or person will continue treatment to maintain the remissive state of the defendant's or person's illness should the defendant's or person's commitment conditions be altered.

R.C. 2945.401(E). After assessing all the evidence, "the trial court may approve, disapprove, or modify the recommendation and shall enter an order accordingly." R.C. 2945.401(I).

This statutory scheme is consistent with due process. By requiring periodic review of the committed person's conditions of confinement, R.C. 2945.401 ensures "that the nature of commitment bear some reasonable relation to the purpose for which the individual is committed." *Foucha*, 504 U.S. at 79. Further, by requiring the state to show by clear and convincing evidence that a change in a person's conditions of confinement would undermine the purpose of the commitment, the statute imposes a standard of proof that provides "confidence" in the "correctness of factual conclusions" reached by the trial court. *Addington*, 441 U.S. at 423. The Due Process Clause thus demands that Ohio courts adhere to R.C. 2945.401 and the process it prescribes.

III. The Eleventh District's decision reads the state's burden of proof out of the Revised Code and violates the Due Process Clause

The Eleventh District's decision below departed from R.C. 2945.401's plain text and ran afoul of the Due Process Clause. Although the appeals court recited the state's burden of proof, neither its factual recitation nor its legal analysis pointed to any evidence presented by the state that would be sufficient to satisfy its burden. To the contrary, the evidence cited by the appeals court consisted only of evidence presented by Mr. Hickman and the designee. *See State v. Hickman*, 11th Dist. Ashtabula No. 2022-A-0114, 2023-Ohio-1793, ¶ 2-11. That evidence suggested that Mr. Hickman had been successfully treated and did not pose a safety threat. *Id.*

Despite the state's lack of clear and convincing evidence, the Eleventh District held that the trial court did not abuse its discretion by denying the designee's recommendation that Mr. Hickman receive nonsecured status. *Id.* at ¶ 21. The court based its holding in part on dicta in *Stutler*. *Id.* at ¶ 17. In that case, this court said that "a trial court has more discretion to disapprove or modify an institution's recommendation for a committed person's nonsecured movement or

termination of the person's commitment" than other, less drastic changes in the person's conditions of confinement. *Stutler* at ¶ 15. The Eleventh District interpreted that portion of *Stutler* to mean that the trial court in this case "enjoyed broader discretion in reaching its conclusion than if the movant sought a change in commitment level, such as one involving 'off-grounds supervised movement.'" *Hickman* at ¶ 18. Indeed, the appeals court effectively held that the trial court had discretion to deny a recommended change despite the state's failure to satisfy its burden of proof.

Stutler's suggestion that trial courts have greater discretion to deny recommendations for nonsecured status or termination of commitment should be revisited and disavowed here. That suggestion was based on the interaction of two statutory provisions noted earlier. *Stutler* at ¶ 14-15. *Stutler* first observed that R.C. 2945.401(E) supplied "statutory factors that a trial court must consider when ruling on a request for *nonsecured status or termination of commitment*[.]" *Id.* at ¶ 14. Next, *Stutler* found significant that R.C. 2945.401(I) used the word "may" when empowering the trial court to "approve, disapprove, or modify" a designee's recommendation. *Id.* at ¶ 15. The decision read those provisions to confer greater-than-usual discretion to trial courts "to disapprove or modify a recommendation for nonsecured status or termination of commitment[.]" *Id.*

The problem with *Stutler*'s reading of R.C. 2945.401 is that it does not account for R.C. 2945.401(G), which places the burden of proof on the state whenever it opposes a designee's recommendation. The state's burden under that provision is the same whether the designee's recommendation is for nonsecured status or some other change to the conditions of confinement. *Id.* Either way, the state has the burden "to show by clear and convincing evidence that the proposed change represents a threat to public safety or a threat to the safety of any person." *Id.*

Read in context, R.C. 2945.401(E) does not diminish or eliminate the state's burden of proof under R.C. 2945.401(G). The provision states that "[i]n making a determination under this

section regarding nonsecured status or termination of commitment, the trial court shall consider all relevant factors" and six enumerated ones. R.C. 2945.401(E). The "determination" that the trial court must make under the section is whether the state has met its burden of proof under R.C. 2945.401(G). Thus, R.C. 2945.401(E) does not affect the state's burden of proof. The provision instead instructs the trial court on how to evaluate whether the state has satisfied that burden.

The six enumerated factors underscore the point. Each factor closely tracks the state's burden and helps guide the trial court's determination under R.C. 2945.401(G). For example, whether the committed person "currently represents a substantial risk of physical harm[,]" R.C. 2945.401(E)(1), is directly relevant to whether or not the state has shown "by clear and convincing evidence that the proposed change represents a threat to public safety or a threat to the safety of any person[,]" R.C. 2945.401(G)(2). Likewise, "[t]he grounds upon which the state relies for the proposed commitment" are essential to the trial court's determination. R.C. 2945.401(E)(4).

Nor does R.C. 2945.401(I) affect the state's burden or the trial court's discretion. That provision says that "[a]t the conclusion of a hearing conducted under division (D)(1) of this section regarding a recommendation from the designee * * *, the trial court may approve, disapprove, or modify the recommendation and shall enter an order accordingly." *Id.* As the provision itself makes clear, it applies to all recommendations made under division (D)(1), which include everything from "on-grounds unsupervised movement" to "off-grounds supervised movement" to "nonsecured status" to termination of commitment. R.C. 2945.401(D)(1). The provision simply recognizes the options available to the trial court following a hearing. It says nothing unique about nonsecured status or termination of commitment, and it does not affect the state's burden of proof or the trial court's discretion to deny a recommendation when the state has not met that burden.

Stutler's dicta is also inconsistent with the Due Process Clause. As the Eleventh District's decision demonstrates, granting trial courts greater discretion to deny nonsecured status or termination of commitment would eliminate federal due-process guarantees. The Eleventh District did not cite any evidence produced by the state in this case. Yet the appeals court held that the trial court did not abuse its discretion in denying the designee's recommendation for nonsecured status. The consequence of the Eleventh District's decision is that the state can continue to detain Mr. Hickman under conditions that have not been shown to bear a reasonable relation to the purpose of his commitment. That result cannot be reconciled with the Due Process Clause.

This court should revisit its dicta in *Stutler* and hold that "the prosecution's burden of proof under R.C. 2945.401(G)(2) remains in full force and effect" whenever the state opposes a recommended change in the conditions of confinement or a termination of commitment. *Stutler* at ¶ 15. That holding would give the meaning to each provision of R.C. 2945.401 and ensure due process for Mr. Hickman and others who have been found not guilty by reason of insanity.

CONCLUSION

For the reasons above, this court should reverse the Eleventh District's judgment and hold that a trial court has no discretion to deny a requested change in commitment in the absence of clear and convincing evidence indicating that the level change should not be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing **Merit Brief of Amicus Curiae Ohio Public Defender** was electronically delivered to Assistant Ashtabula County Prosecutor Christopher Fortunato at crfortunato@ashtabulacounty.us, and to Ashtabula County Assistant Public Defender Michael Ledenko at mledenko@ashtabulacountypd.com, on this 16th day of January, 2024.

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