

OPINION NO. 77-080**Syllabus:**

The term "alienist" as used in R.C. 2945.39 is limited to physicians whose speciality is mental illness. There is no requirement, however, that the alienist appointed be a Board certified psychiatrist.

To: Timothy B. Moritz, Director, Ohio Dept. of Mental Health and Mental Retardation, Columbus, Ohio
By: William J. Brown, Attorney General, December 1, 1977

I have before me your request for my opinion regarding R.C. 2945.39. Specifically, you have raised the following question:

What qualifications are necessary to act as an alienist in an administrative hearing described in Ohio Revised Code Section 2945.39?

R.C. 2945.39 provides for an administrative hearing on the issue of sanity for those persons committed to Lima State Hospital. It provides:

When a defendant pleads "not guilty by reason of insanity," and is acquitted on the sole ground of his insanity, such fact shall be found by the jury in its verdict, and it is presumed that such insanity continues. In such case the court shall forthwith direct that the accused be confined in the Lima State Hospital, and shall forthwith commit him to such hospital, and such

person shall not be released from confinement in said hospital until the judge of the court of common pleas of Allen county, the superintendent of the Lima State Hospital, an alienist to be designated by said judge and superintendent, or a majority of them, after notice and hearing, find and determine that said defendant's sanity has been restored, and that his release will not be dangerous.

The word "alienist" is defined in Black's Law Dictionary as:

One who has specialized in the study of mental diseases.
State v. Reidell, 9 Houst. Del., 470, 14 A. 550, 552.
Persons qualified by experience, knowledge, and previous opportunities to express opinion as to defendant's mental condition at a particular time.
People v. Norton, 138 Cal. App. 70, 31 P.2d 809, 810.

Webster's New World Dictionary of the American Language (2nd College Ed., 1972) defines alienist as:

A psychiatrist: term now used esp. of a psychiatrist who testifies in a court of law.

Unfortunately, the term is not defined anywhere in the Revised Code.

In a recent federal case, Davis v. Watkins, 384 F. Supp. 1196 (N.D. Ohio, 1973) some light was shed upon the operation of R.C. 2945.39. The action was brought by one of the patients at Lima State to secure a "right of treatment," and the reported decision was an order made by the district court. The order called for the establishment of "evaluation teams" to look at each patient in the institution. These "evaluation teams" were comprised of three persons, "one of which must be a Board Certified psychiatrist, or at least Board Eligible." Other members of the team could be clinical psychologist "with at least a Ph. D. or a social worker with at least a M.S.W. degree." The Court went on to say that:

If the team finds that the patient is neither mentally ill nor retarded nor dangerous as defined in pp. 1 (a) or (b), supra, the Superintendent of Lima State Hospital shall designate a member of the evaluation team as the alienist required in the release proceedings under Sec. 2945.39, Ohio Revised Code, and the superintendent and the alienist shall be bound by the findings of the evaluation team in their determination as to the patient's sanity and dangerousness in such release proceedings. 384 F. Supp. at 1202, supra, (Emphasis added)

Significantly, no limitation was placed upon which member of the "evaluation team" the superintendent could choose to serve on the administrative board. Therefore, no rule can gleaned from this case that requires an alienist to be a psychiatrist or a physician. Rather, the alienist could be a clinical psychologist or even a social worker.

While the Davis case effectively expands the term "alienist" to include psychologists and social workers, to accept such a broad definition of the term, in light of other relevant statutory provisions, would be anomalous. R.C. 2945.40 deals with pre-trial observation of a defendant who pleads insanity. It provides in pertinent part:

"In any case in which insanity is set up as a defense, . . . the court may commit the defendant to

a local hospital for the mentally ill, or the Lima State Hospital . . . The Court may in such case appoint one or more, but not more than three, disinterested qualified physicians, specialists in mental diseases, to investigate and examine into the mental condition of the defendant and testify as experts at his trial or other hearing." (Emphasis added)

In R.C. 2947.271 (B), the statute providing for an annual case review of each case after a patient has been committed under procedures set forth in R.C. 2947.25 on mentally deficient offenders, the legislature provided:

"In the event the superintendent fails to review a person's case as required by division (A) of the section, or in the event he determines, in each of three consecutive annual reviews of the case, that such person has not recovered or sufficiently improved, such person is entitled, upon his written request or the written request of his attorney, guardian, next friend, or the committing court, to have his case reviewed by panel of three physicians, at least one of whom shall be an alienist, . . . (Emphasis added)

Considering both of these sections, R.C. 2945.40 and R.C. 2947.271 (B), it is apparent that the General Assembly has shown a marked preference for physicians in situations where the issue is sanity. Since the General Assembly requires a physician to observe the defendant before trial, it would be anomalous to require something less in an R.C. 2945.39 hearing where the board must determine if the patient has been restored to sanity. It would be even more anomalous, when R.C. 2947.271 (B) requires three physicians ". . . at least one of whom shall be an alienist," to review the case of a mentally deficient offender, not to require that a physician be named as alienist under R.C. 2945.39. In fact, the language in R.C. 2947.271 (B), supra, indicates that an alienist is not only a physician, but is one who specializes in psychiatry. It therefore appears that the order in Davis, supra, is not controlling, and that the term "alienist" refers to physicians who specialize in mental illness rather than any person who works with the mentally ill.

Accordingly, it is my opinion and you are advised that:

The term "alienist" as used in R.C. 2945.39 is limited to physicians whose speciality is mental illness. There is no requirement, however, that the alienist appointed be a Board certified psychiatrist.