

**IN THE SUPREME COURT OF MISSOURI**

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**SC83382**

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**CARL H. GREENO,**  
*Appellant,*

**V.**

**STATE OF MISSOURI,**  
*Respondent.*

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**APPEAL FROM ORDER DENYING  
CONDITIONAL RELEASE**

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**APPELLANT'S SUBSTITUTE BRIEF**

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## JURISDICTIONAL STATEMENT

This is an appeal from the judgment of the probate court of Buchanan County, Missouri, Honorable J. William Roberts, Judge. Since no circumstances were present which would give the Supreme Court of Missouri initial appellate jurisdiction, this appeal was originally lodged in the Missouri Court of Appeals Western District pursuant to Article V, Section 3 of the Missouri Constitution. On March 20, 2001, this Court sustained Respondent's Application to Transfer this case after the Court of Appeals' opinion.

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## STATEMENT OF FACTS

Appellant, Carl H. Greeno, appeals from the order of the Probate Court of Buchanan County, Missouri, denying his Application for Conditional Release from the Missouri Department of Mental Health.

Mr. Greeno was originally committed to the Department of Mental Health as “not guilty by reason of mental disease or defect” by the Circuit Court of Jackson County May 6, 1991. (Petitioner’s Exhibit 2, App. 4)<sup>1</sup>. Mr. Greeno had been charged with assault of a police officer in the second degree and armed criminal action. (Petitioner’s Exhibit 1, App. 1 - 2; L.F. 6)<sup>2</sup>. Mr. Greeno was conditionally released on September 28, 1993 by the probate division of the Circuit Court of Calloway County. (L.F. 7; Petitioner’s Exhibit 2, App. 4). Thereafter, Mr.

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<sup>1</sup> Petitioner’s Exhibits 1 through 8, all received in evidence at the evidentiary hearing, are reproduced in the appendix for the Court’s convenience.

<sup>2</sup> The record in this case consists of a Legal File (L.F.) and a transcript (Tr.) of the evidentiary hearing. A Supplemental Legal File (Supp.L.F.) was filed by Respondent.

Greeno was arrested and charged with an offense of assault in the second degree said to have been committed October 8, 1995. (Petitioner's Exhibit 2, App. 6, Tr. 251).

On April 10, 1996, while Mr. Greeno was awaiting trial for that offense, his conditional release was revoked. The reason given for the revocation was a finding that he had, in fact, committed the new offense, thereby violating an implied condition of his release. It is significant that Mr. Greeno was not revoked for any mental health reason. In fact, the officer conducting the hearing explicitly found that Mr. Greeno was exhibiting no active symptoms of a mental illness. (Petitioner's Exhibit 2, App. 6). In January, 1998, Mr. Greeno stood trial on the charges of assault and armed criminal action. On January 26, 1998, the jury was unable to reach a unanimous verdict and was discharged. (Petitioner's Exhibit 3, App. 9 - 11). The jury count was eleven to one for acquittal. (Tr. 212, 219). Thereafter, on February 5, 1998, the case was dismissed. (Petitioner's Exhibit 4, App. 12). Nonetheless, Mr. Greeno remained in the custody of the Department of Mental Health. (L.F. 7).

Mr. Greeno sought a conditional release from his commitment to the Department of Mental Health. (L.F. 1 - 5). A hearing on that application was held May 17 and May 19, 1999. (L.F. 6). At the hearing, Mr. Greeno presented the testimony of Dr. Steven Peterson, M.D., a psychiatrist. (Tr. 9 - 136). Mr. Greeno also presented the testimony of Mr. Michael Shearin, a psychologist employed by the Department of Mental Health. (Tr. 137 - 169). Mr. Greeno also presented the testimony of Ms. Marilyn McEvoy, a psychiatric aide at Northwest Missouri Psychiatric Rehabilitation Center (Tr. 170 - 180) and Mr. Dan Stenger, a security officer and former psychiatric aide at the Center. (Tr. 180 - 184). Respondent presented testimony from

Dr. David Vlach, M.D., the medical director of Northwest Missouri Psychiatric Rehabilitation Center. (Tr. 185 - 290). Respondent also presented the testimony of Ms. Cecilia Iboaya, a clinical social worker at the Center. (Tr. 291 - 329). At the conclusion of the evidence on May 19, 1999 the case was taken under advisement. (Tr. 333). On June 11, 1999, the court entered a judgment denying the conditional release. (L.F. 6 - 11).

Dr. Peterson testified that he reviewed a number of documents in connection with his evaluation of Mr. Greeno, including Mr. Greeno's entire clinical chart from Northwest Missouri Psychiatric Rehabilitation Center. (Tr. 14). He conducted clinical interviews of Mr. Greeno totaling four and one-quarter hours. (Tr. 15). In addition, he administered four psychological tests: the MMPI, the PAI, the Millon and the Shipley Institute of Living Scale. (Tr. 15, 16). He prepared a twenty-one page report summarizing his findings, which was received in evidence. (Tr. 14; Petitioner's Exhibit 6, App. 20 - 40). Dr. Peterson concluded that Mr. Greeno has post traumatic stress disorder related to his Vietnam combat experiences. (Tr. 40). He noted that Mr. Greeno had emotional and therapeutic connections with the Veterans Administration Hospital in Kansas City which would facilitate outpatient treatment there. (Tr. 59, 92 - 93). Dr. Peterson concluded that if conditionally released Mr. Greeno would not be likely to be dangerous to others. (Tr. 59 - 60).

Mr. Shearin testified that he, like Mr. Greeno, was a Marine Corps veteran of the Vietnam War. (Tr. 144). During Mr. Greeno's stay at Fulton State Hospital, Mr. Shearin was in almost daily contact with him. (Tr. 141). He recommended that Mr. Greeno receive treatment in a venue containing other Vietnam veterans, such as that available in the Veterans

Administration Medical Center in Kansas City and the Vet Center in Kansas City. Mr. Shearin testified that the intimidating verbal statements attributed to Mr. Greeno by staff at Northwest Missouri Psychiatric Rehabilitation Center were learned by Mr. Greeno during his Marine Corps experience. (Tr. 165).

Ms. McEvoy testified that she was Mr. Greeno's primary psychiatric aide for several months after he arrived at Northwest Missouri State Psychiatric Rehabilitation Center. (Tr. 171 - 172). She testified that she had never observed Mr. Greeno behave in a way that caused her to fear that he was a danger to someone else. (Tr. 173). She also testified that Mr. Greeno was never involved in any physical assaults on anyone during the period when she was his primary psychiatric aide. *Id.*

Mr. Stenger testified that he had escorted Mr. Greeno to the Veterans Administration Hospital at least four or five times. (Tr. 181). Due to Mr. Greeno's good behavior, the last few times he was escorted to the V.A. Hospital, he was not in restraints. Mr. Greeno had appropriate relationships with the treatment staff at the Veterans Administration Medical Center. (Tr. 183). He was never involved in any inappropriate or assaultive behavior during any of those trips. (Tr. 182).

Dr. Vlach testified that he was not currently Mr. Greeno's treating physician. (Tr. 189). However, he had reviewed Mr. Greeno's chart (*id.*) and was Mr. Greeno's treating physician for some months after Mr. Greeno was admitted to Northwest Missouri Psychiatric Rehabilitation Center in July 1998. He diagnosed Mr. Greeno with post traumatic stress disorder, alcohol dependency and cannabis abuse. (Tr. 191). He testified that the alcohol

dependency and cannabis abuse were “in remission in a controlled environment.” (Tr. 244).

He indicated that to the best of his knowledge, Mr. Greeno had used neither alcohol nor cannabis since his hospitalization. (*Id.*). Dr. Vlach opined that Mr. Greeno’s verbal outbursts were related to the post traumatic stress disorder. (Tr. 201 - 202, 210 - 211). When asked if Mr. Greeno would be dangerous if conditionally released, he testified, “I believe that if he’s conditionally released - I can’t say he would be imminently dangerous. I certainly couldn’t commit him - okay - under the commitment statutes; but I think he’s exhibited a pattern of behavior secondary to his PTSD that, you know, within a reasonable period of time, he would exhibit some dangerous behavior.” (Tr. 238).

Dr. Vlach indicated that if Mr. Greeno would quit filing law suits and grievances and direct that energy towards treatment, he would support Mr. Greeno’s conditional release. (Tr. 239). Dr. Vlach also recommended additional conditions should Mr. Greeno be conditionally released, including not driving a car, and residing in a structured environment rather than in his home. (Tr. 240). Dr. Vlach agreed with Dr. Peterson that treatment at the Veterans Administration Medical Center would be appropriate. (Tr. at 242).

Ms. Iboaya testified regarding Mr. Greeno’s behavior at the hospital. She indicated that she did not believe Mr. Greeno should be released, since she had no way of assessing his performance because he would not participate in treatment programs. (Tr. 314 - 316). He had not progressed through the hospital’s “level system.” (Tr. 317). When asked if she believed that Mr. Greeno is currently dangerous to himself or others in the community if he were

released, she answered, “If he is released, not right away; but eventually - I mean it would not be too long.” (Tr. 318 - 319).

In its memorandum opinion accompanying the judgment denying conditional release, the trial court noted that Mr. Greeno has been diagnosed with post traumatic stress disorder caused by battle experiences in Vietnam. (L.F. 7). However, nowhere did the trial court find that Mr. Greeno currently suffered from a mental disease or defect. (L.F. 6 - 10). With regard to the issue of dangerousness, the trial court held that Section 552.040.12, of the Missouri Revised Statutes placed upon Mr. Greeno the burden of proving non-dangerousness by clear and convincing evidence. (L.F. 10). The court found, “. . . [T]he evidence of non-dangerousness given by Dr. Peterson’s opinion and the favorable testimony of other witnesses is not sufficient to meet the statutory test, when weighed against the opposing evidence . . .” (*Id.*).

Mr. Greeno timely filed his notice of appeal from the judgment of the trial court. (L.F. 12).

POINTS RELIED ON

I. THE TRIAL COURT ERRED IN DENYING APPELLANT’S APPLICATION FOR CONDITIONAL RELEASE BECAUSE THE TRIAL COURT MADE NO FINDING THAT APPELLANT WAS CURRENTLY SUFFERING FROM A MENTAL DISEASE OR DEFECT, BUT NEVERTHELESS DENIED APPELLANT’S APPLICATION FOR RELEASE, THEREBY VIOLATING PETITIONER’S RIGHTS TO DUE PROCESS OF LAW AND EQUAL PROTECTION OF THE LAWS UNDER THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 10 OF THE MISSOURI CONSTITUTION, IN THAT THOSE CONSTITUTIONAL PROVISIONS PROHIBIT THE INVOLUNTARY HOSPITALIZATION OF AN INSANITY ACQUITEE WHO IS NOT FOUND TO BE SUFFERING FROM A MENTAL DISEASE OR DEFECT AT THE TIME OF THE HEARING.

*Addington v. Texas*, 441 U.S. 418 (1979)..... 21, 24

*Foucha v. Louisiana*, 504 U.S. 71 (1992)..... 17, 18, 20, 21, 23, 24

*Styles v. State*, 838 S.W.2d 10 (Mo.Ct.App. W.D. 1992)..... 17, 18, 19, 20

*State v. Revels*, 13 S.W.3d 293 (Mo. banc 2000).....18, 19, 20

II. THE TRIAL COURT ERRED IN REQUIRING APPELLANT TO PROVE BY CLEAR AND CONVINCING EVIDENCE THAT HE WOULD NOT BE DANGEROUS TO OTHERS IF RELEASED, BECAUSE PLACING SUCH A BURDEN ON APPELLANT VIOLATED APPELLANT’S RIGHTS TO DUE PROCESS OF LAW AND EQUAL PROTECTION OF THE LAWS UNDER THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE 1, SECTION 10 OF THE MISSOURI CONSTITUTION, IN THAT APPELLANT HAD PREVIOUSLY BEEN CONDITIONALLY RELEASED, VITIATING ANY PRESUMPTION OF CONTINUING MENTAL ILLNESS, THE CONDITIONAL RELEASE WAS REVOKED BECAUSE APPELLANT WAS FALSELY ACCUSED OF A NEW OFFENSE AND NOT FOR ANY MENTAL HEALTH REASON, AND APPELLANT WAS NOT EXHIBITING ANY ACTIVE SYMPTOMS OF MENTAL ILLNESS AT THE TIME HIS CONDITIONAL RELEASE WAS REVOKED.

*Addington v. Texas*, 441 U.S. 418 (1979).....21, 24

*Foucha v. Louisiana*, 504 U.S. 71 (1992).....17, 18, 20, 21, 23, 24

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## ARGUMENT

I. THE TRIAL COURT ERRED IN DENYING APPELLANT'S APPLICATION FOR CONDITIONAL RELEASE BECAUSE THE TRIAL COURT MADE NO FINDING THAT PETITIONER WAS CURRENTLY SUFFERING FROM A MENTAL DISEASE OR DEFECT, BUT NEVERTHELESS DENIED APPELLANT'S APPLICATION FOR RELEASE, THEREBY VIOLATING PETITIONER'S RIGHTS TO DUE PROCESS OF LAW AND EQUAL PROTECTION OF THE LAWS UNDER THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 10 OF THE MISSOURI CONSTITUTION, IN THAT THOSE CONSTITUTIONAL PROVISIONS PROHIBIT THE INVOLUNTARY HOSPITALIZATION OF AN INSANITY ACQUITEE WHO IS NOT FOUND TO BE SUFFERING FROM A MENTAL DISEASE OR DEFECT AT THE TIME OF THE HEARING.

Appellant Carl Greeno was found not guilty by reason of mental disease or defect pursuant to the provisions of Chapter 552 of the Missouri Revised Statutes. He sought a conditional release under the provisions of Section 552.040.10 et seq. At the evidentiary hearing on the application for conditional release, the experts agreed that Mr. Greeno's primary diagnosis is post traumatic stress disorder.<sup>3</sup> However, there was no evidence adduced at the

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<sup>3</sup> The Axis II diagnoses of alcohol abuse and cannabis abuse, whether characterized

hearing that post traumatic stress disorder is, in fact, a mental disease or defect as that term is defined in Section 552.010. In its memorandum opinion and judgment, the trial court made no finding that Mr. Greeno currently suffered from any mental disease or defect as defined in Chapter 552. Despite the lack of any finding of mental disease or defect, the trial court denied Mr. Greeno's application for release.

The due process clause of the Fifth and Fourteenth Amendments to the United States Constitution permits the continued hospitalization of a person adjudicated not guilty by reason of mental disease only “. . . as long as he is both mentally ill and dangerous, but no longer.” *Foucha v. Louisiana*, 504 U.S. 71, 77 (1992). In other words, to justify the denial of a release, be it conditional or unconditional, the court must find both that the individual seeking release presently has a mental disease or defect and also the person is likely to be dangerous to others while on conditional release. *Styles v. State*, 838 S.W.2d 10, 11 (Mo.Ct.App. W.D. 1992); Mo.Rev.Stat. § 552.040.14). As the court in *Styles* noted, “[A] denial of a conditional release must be based on a finding that the person is suffering from a mental disease or defect to justify the denial of the release.” *Styles*, 838 S.W.2d at 11.

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as “by history” (Tr. 25) or “in remission in a controlled environment” (Tr. 244) are clearly not mental diseases or defects within the meaning of §552.010.

The Styles case was factually similar to the instant case. Mr. Styles, a patient at Fulton State Hospital, sought a conditional release, asserting that he had been diagnosed as suffering from schizo-affective disorder, which was then in remission. After a hearing, the probate court of Calloway County entered an order finding Styles still presented a likelihood of harm to others, and denied the conditional release. *Styles*, 838 S.W.2d at 10 - 11. The court made no finding that Styles suffered from a mental disease or defect at the time of the hearing. The testifying expert was never asked whether Styles suffered from a mental disease or defect at the time of the hearing. Nor was he asked if paranoid personality disorder or anti-social personality disorder (which he also diagnosed in Mr. Styles) was considered to be a mental disease or defect. *Styles*, 838 S.W.2d at 11. Therefore, the Court of Appeals concluded that there was not a sufficient record to permit a finding that Styles was suffering from mental disease or defect at the time of the hearing. *Id.*

*Styles* was heard before the decision of the United States Supreme Court in *Foucha*, supra. Therefore, the Court of Appeals remanded the case for further evidence on the question of whether or not Styles was suffering from mental disease or defect. However, the instant case was heard several years after *Foucha*, and after the decision in *Styles*. Certainly, the trial court in the instant case is well aware of the due process obligations set forth in those cases. Since the trial court made no finding that Mr. Greeno was, at the time of the hearing, suffering from a mental disease or defect within the meaning of Chapter 552, the trial court erred in not granting Mr. Greeno a conditional release. This case should be reversed with directions to grant the conditional release, based upon the controlling precedent of *Styles*.

There is an apparent tension between the Court of Appeals' holding in *Styles* and this Court's decision in *State v. Revels*, 13 S.W.3d 293 (Mo. banc. 2000). In *Revels*, this Court explicitly declined to overrule *Styles*, but rather distinguished it. "The *Styles* I opinion does not control *Revels*' case because it addressed a conditional release, which is governed by Sections 10 through 18, and 20 of Section 552.040." 13 S.W.3d at 296. There is certainly a reasonable basis for requiring an explicit finding of mental disease to warrant a denial of conditional release as in *Styles*, while implying such a finding from the fact of a denial of unconditional release. If an individual is conditionally released but, while on conditional release, suffers a recurrence of mental disease making him or her dangerous to others, the conditional release may be revoked and the person returned to hospitalization. However, a person who is unconditionally released is subject to no further constraints as a result of the prior finding of not guilty by reason of mental disease or defect. Should the unconditionally released person's mental disease recur, that person is not subject to involuntary hospitalization except through a civil commitment process. Only if the unconditionally released person is adjudged not guilty by reason of mental disease or defect of some subsequent offense can that person again be treated as an insanity acquittee. In other words, it makes sense to place a greater burden on a person seeking to terminate forever all consequences of being adjudged not guilty by reason of mental disease than on a person who seeks merely the ability to be supervised and treated if necessary outside the hospital setting.

Should this Court determine that the distinction between persons seeking conditional release and a person seeking unconditional release as stated in *Revels*, *supra*, is not viable,

Appellant respectfully submits that the due process clause as discussed in *Foucha*, supra, demands a finding of mental disease or defect to warrant denial of release. In *Foucha*, the State did not contend that *Foucha* was mentally ill at the time of the release. 504 U.S. at 78. Therefore, there was no reason in that case to explicitly require such a holding. However, the United States Supreme Court made it explicitly clear that, “the acquittee may be held as long as he is both mentally ill and dangerous, but no longer.” *Id.* at 77 (emphasis added). Since both a finding of mental illness and a finding of dangerousness are required to justify the continued detention of an insanity acquittee, the Court of Appeals was correct in holding, “Under *Foucha*, it is necessary for a court to make a finding that an insanity acquittee is suffering from mental disease or defect before it can order that such person shall remain in a mental institution.” *Styles*, 838 S.W.2d at 11. If there is an irreconcilable conflict between *Styles*, and *Revels*, with regard to the mandate of the due process clause as discussed in *Foucha*, *Styles*, and its numerous progeny are in tune with the mandate of *Foucha*. On the other hand, to the extent that it cannot be reconciled with *Styles*, *Revels* is at odds with *Foucha*, and should be overruled.

*Foucha* also dealt with the impact of the equal protection clause of the Fourteenth Amendment to the United States Constitution on decisions regarding the release of persons acquitted by reason of mental disease. 504 U.S. at 84 - 86. Such individuals may be treated differently than persons subject to civil commitment, because the finding of not guilty by reason of mental disease necessarily establishes that the defendant committed a criminal offense because of mental illness. *Jones v. United States*, 463 U.S. 354, 363 (1983). However, in *Foucha*, the state had conceded that *Foucha* was no longer mentally ill. Therefore, the rationale

for treating him differently than someone subject to civil commitment no longer obtained. *Foucha*, 504 U.S. at 85.

Mr. Greeno submits that his conditional release in September, 1993 necessarily included a finding that he was not, at that time, suffering from a mental disease or defect making him dangerous to others. See Mo.Rev.Stat. 552.040.14. It is clear that, at the time his conditional release was revoked, Mr. Greeno was exhibiting no active symptoms of a mental illness. (Petitioner's Exhibit 2, App. 6). Therefore, the equal protection clause requires that Mr. Greeno be afforded the same “. . . procedural safeguards against unwarranted confinement which are guaranteed to insane persons. . .” *Foucha*, 504 U.S. at 86. According to those civil standards, “. . . the State must establish the grounds of insanity and dangerousness permitting confinement by clear and convincing evidence.” 504 U.S. at 86 (citing *Addington v. Texas*, 441 U.S. 418, 425 - 433 (1979)). With regard to the issue of whether post traumatic stress disorder constitutes a mental disease or defect, it is clear that the state did not meet that burden of proof. For that reason, this case should be reversed and Mr. Greeno should be conditionally released.

II. THE TRIAL COURT ERRED IN REQUIRING APPELLANT TO PROVE BY CLEAR AND CONVINCING EVIDENCE THAT HE WOULD NOT BE DANGEROUS TO OTHERS IF RELEASED, BECAUSE PLACING SUCH A BURDEN ON APPELLANT VIOLATED APPELLANT'S RIGHTS TO DUE PROCESS OF LAW AND EQUAL PROTECTION OF THE LAWS UNDER THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE 1, SECTION 10 OF THE MISSOURI CONSTITUTION, IN THAT APPELLANT HAD PREVIOUSLY BEEN CONDITIONALLY RELEASED, VITIATING ANY PRESUMPTION OF CONTINUING MENTAL ILLNESS, THE CONDITIONAL RELEASE WAS REVOKED BECAUSE APPELLANT WAS FALSELY ACCUSED OF A NEW OFFENSE AND NOT FOR ANY MENTAL HEALTH REASON, AND APPELLANT WAS NOT EXHIBITING ANY ACTIVE SYMPTOMS OF MENTAL ILLNESS AT THE TIME HIS CONDITIONAL RELEASE WAS REVOKED.

The trial court, applying the provisions of Mo.Rev.Stat. §552.040.12.(6), placed upon Mr. Greeno the burden of establishing by clear and convincing evidence that he is not likely to be dangerous to others while on conditional release. Mr. Greeno contends that placing this burden on him, under the circumstances of this case, violates his rights under the due process clause and the equal protection clauses of the Fifth and Fourteenth Amendment to the United States Constitution.

As noted above, the due process clause mandates that an individual found not guilty by reason of mental disease cannot be hospitalized unless he or she is both mentally ill and dangerous. *Foucha*, 504 U.S. at 77. With regard to the issue of mental illness, the Missouri Supreme Court has held that the burden placed upon insanity acquitees to prove that they no longer suffer from a mental disease or defect under Section 552.040 does not violate the Constitution. *State v. Tooley*, 875 S.W.2d 110, 113 - 14 (Mo. banc. 1994). However, Mr. Greeno asserts that, under the principles of *Foucha*, and under the unique circumstances of his case, it does violate his constitutional rights to hold him to the burden of proving non-dangerousness by clear and convincing evidence.

As noted above, Mr. Greeno's acquittal by reason of mental or defect may have warranted treating him differently than persons subject to civil commitment. *Jones*, 463 U.S. at 367 - 368; see *Foucha*, 504 U.S. at 85. However, when Mr. Greeno was conditionally released in 1993, the basis for treating him as an insanity acquittee was gone because the presumption of continuing mental illness was vitiated. As noted above, Mr. Greeno's conditional release was not revoked because of any mental illness. In fact, the hearing examiner explicitly found that Mr. Greeno was exhibiting no active symptoms of mental illness at the time of the revocation. (Petitioner's Exhibit 2, App. 6). Therefore, there is no rational basis for treating Mr. Greeno differently than a person subject to civil commitment with regard to the burden of proving "non-dangerousness." See *Foucha*, 504 U.S. at 86 - 87. To hold Mr. Greeno to the burden of proving "non-dangerousness" by clear and convincing evidence therefore violates his rights under the equal protection clause.

Since there is no basis for treating Mr. Greeno differently than a person subject to civil commitment with regard to the issue of proving “non-dangerousness,” “the State must establish the grounds of . . . dangerousness permitting confinement by clear and convincing evidence.” *Foucha*, 504 U.S. at 86 (citing *Addington*, 441 U.S. at 425 - 433). Mr. Greeno respectfully submits that the State came nowhere near meeting that burden.

The evidence established that Mr. Greeno has not been involved in any physical altercations with staff or other patients since the revocation of his conditional release. Dr. Vlach, the expert opposing conditional release, acknowledged, “I believe that if he is conditionally released - I can’t say he would be imminently dangerous. I certainly couldn’t commit him - okay - under the commitment statute. . .” (Tr. 238). In fact, Dr. Vlach testified that Mr. Greeno could control his behavior and refrain from physical aggression when he knew he was being monitored. (Tr. 237 - 238).

Since the trial court applied the burden of proof unconstitutionally with respect to the determination of dangerousness, and since, under the correct and constitutional standard, the State did not meet its burden of proving non-dangerousness, this case must be reversed and Mr. Greeno must be conditionally released.

III. THE TRIAL COURT ERRED IN DETERMINING THAT APPELLANT DID NOT MAKE A SUFFICIENT SHOWING OF “NON-DANGEROUSNESS” BECAUSE SUCH A DETERMINATION WAS AGAINST THE WEIGHT OF THE CREDIBLE EVIDENCE IN THAT THE EVIDENCE PRESENT BY APPELLANT ESTABLISHED THAT HE WOULD NOT BE DANGEROUS TO OTHERS IF CONDITIONALLY RELEASED, AND EVEN RESPONDENT’S WITNESSES ADMITTED THAT APPELLANT WOULD NOT BE EMINENTLY DANGEROUS IF RELEASED.

As noted above, Mr. Greeno contends that the trial court violated his due process and equal protection rights when it imposed upon him the burden of proving by clear and convincing evidence that he would not be dangerous to others if conditionally released. However, Mr. Greeno also contends that he did, in fact, meet such a burden. Mr. Greeno contends that the trial court’s decision that he did not meet that burden was against the weight of the credible evidence.

Generally, in a case of this nature, the trial court’s findings “will be sustained by the appellate court unless there is no substantial evidence to support it, unless it is against the weight of the evidence, unless it erroneously declares the law, or unless it erroneously applies the law.” *Murphy v. Carron*, 536 S.W.2d 30, 32 (Mo. en banc. 1976). “Appellate courts must exercise caution in setting aside a judgment as being ‘against the weight of the evidence,’ and should do so ‘with a firm belief that the decree or judgment is wrong.’” *Marsh v. State*, 942 S.W.2d 385, 388 (Mo.Ct.App.W.D. 1997). “However, when the record engenders a firm belief

that the judgment is wrong, the reviewing court may weigh the evidence including, of necessity, evidence and all reasonable inferences drawn therefrom, which is contrary to the judgment.”

*Id.* (citations omitted). Mr. Greeno respectfully submits that a review of the record in this case will engender the firm belief that the trial court’s judgment is wrong with regard to the issues of “non-dangerousness.”

The record establishes that Mr. Greeno was conditionally released in September 1993. In April, 1996, his conditional release was revoked because he had been accused of an assault alleged to have occurred October 8, 1995. (Petitioner’s Exhibit 2, App. 6). When Mr. Greeno finally had the opportunity to confront his accuser before a jury, eleven of the twelve jurors voted not guilty. (Tr. 219). A week later, the lead trial prosecutor dismissed the charges. (Petitioner’s Exhibit 3, App. 9, 11; Petitioner’s Exhibit 4, App. 12). It is clear that the false accusation which lead to the revocation of conditional release could not withstand adversarial scrutiny.

Throughout his hospitalization, there is no evidence whatsoever that Mr. Greeno was ever physically assaultive. The only evidence of any type of aggressive behavior by Mr. Greeno consisted of repeated instances of verbal threats, including threats to file grievances, to file lawsuits, or to report misbehavior of staff members. There are also verbal threats of physical violence which it was clear Mr. Greeno could not and would not carry out. At no time were any of the verbalizations so severe or threatening that Mr. Greeno was restrained or even sent to his room.

Dr. Stephen Peterson spent more time evaluating Mr. Greeno and more time reviewing the record than any of the State's witnesses. He performed psychological testing of Mr. Greeno. He wrote a twenty-one page report summarizing his findings and recommendations. His credentials are extremely impressive. (See Petitioner's Exhibit 5, App. 13 - 19). His observations and conclusions regarding Mr. Greeno were supported by the testimony of three employees of the Department of Mental Health who had frequent contact with Mr. Greeno on a regular basis; Michael Shearin, Marilyn McEvoy and Dan Stenger. Dr. Peterson testified unequivocally, to a reasonable degree of medical certainty, that if Mr. Greeno were conditionally released on the conditions set forth in the forensic aftercare plan, he would not be likely to be dangerous to others. (Tr. 59 - 60).

By contrast, Dr. Vlach was not Mr. Greeno's treating physician at the time of the hearing. He had not seen Mr. Greeno clinically for several months. His opinion that Mr. Greeno might be dangerous if conditionally released was based in large part on the assumption that Mr. Greeno had, in fact, committed the assault for which his earlier conditional release was revoked. He persisted in that assumption despite knowing that the case was dismissed after the jury voted eleven to one for not guilty. (Tr. 219 - 221). None of the opinions of Dr. Vlach were asserted to a reasonable degree of medical certainty. Dr.

Vlach even acknowledged that Mr. Greeno would not be "imminently dangerous" if released.

(T.R. at 238)<sup>4</sup>.

A thorough review of the testimony concerning possible dangerousness if released clearly leads to a firm belief that the trial court was wrong when it found that Mr. Greeno had not met his burden of showing non-dangerousness by clear and convincing evidence. For this reason, the judgment must be reversed and Mr. Greeno must be granted a conditional release.

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<sup>4</sup> Dr. Vlach's testimony that he would support Mr. Greeno's conditional release of Mr. Greeno would quite filing grievances and direct that energy toward treatment. (Tr. at 239) indicates that Dr. Vlach's concern was with hospital policy, not potential dangerousness.

CONCLUSION

WHEREFORE, for all the aforementioned reasons, Appellant Carl Greeno respectfully requests that this court reverse the judgment of the trial court, and that he be granted a conditional release from his commitment to the Department of Mental Health.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing and a copy of the disk required by Special Rule 1(f) were mailed on or before this \_\_\_\_ day of April, 2001, to:

Greg A. Perry  
Assistant Attorney General  
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CHARLES M. ROGERS

**CERTIFICATE OF COMPLIANCE**

I hereby certify that this Brief complies with the limitations contained in Special Rule No. 1(b) and contains 5,565 words according to the word count of WordPerfect 9.0. I also certify that the disk accompanying this brief as required by Special Rule 1(f) has been scanned for viruses and that it is virus free.

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