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## STATEMENT OF FACTS

“The statement of facts shall be a fair and concise statement of the facts relevant to the questions presented for determination without argument.” Rule 84.04(c). The Statement of Facts in the Respondent’s Substitute Brief offends all four of these requirements. (Resp.Sub.Br. 11-27). It is unfair; it contains numerous erroneous, untrue, misleading or unsupported assertions which are included not to aid the Court in determining this matter, but rather to paint Mr. Greeno as a dangerous individual unworthy of the protections of the United States Constitution and the laws of the State of Missouri. It is far from concise; extending over some sixteen pages.<sup>1</sup> Additionally, many of the “facts” set forth have little or nothing to do with questions presented for this Court’s determination. Finally, Respondent’s Statement of Facts is thoroughly argumentative. Therefore, Appellant feels compelled to identify and correct some of these assertions.<sup>2</sup>

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<sup>1</sup> Regrettably, the large number of assertions in need of correction in Respondent’s Statement of Facts preclude this Statement of Facts from being as concise as counsel would like.

<sup>2</sup> In the Missouri Court of Appeals, Western District, Respondent’s Brief contained a similar Statement of Facts, which also incorrectly attributed to Appellant the secondary diagnosis of cocaine abuse. After Appellant filed his Reply Brief identifying and correcting many erroneous assertions in Respondent’s Statement of Facts, Respondent filed an amended Brief correcting a few of the references to cocaine abuse; however, Respondent

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left intact many other erroneous, untrue, misleading and unsupported assertions. Most of those same assertions have now been found in Respondent's Substitute Brief. One can only conclude that these mischaracterizations are intentional.

Respondent begins its “Statement of Facts” with a lurid account which purports to describe Mr. Greeno’s “index offense,” that is, the offense for which he was adjudicated not guilty by reason of mental disease or defect excluding responsibility. In fact, Respondent’s lurid account consists mainly of alleged conduct with which Mr. Greeno was never even charged, let alone adjudicated to have committed. Mr. Greeno was charged with assault of a police officer in the second degree, and armed criminal action, for driving his vehicle into a police car. (App. 1 - 2).<sup>3</sup> Mr. Greeno was never charged with burglary in the first-degree, or any sort of attempted sexual assault, as he surely would have been had the police investigation born out the lurid tale set forth by Respondent. (The practice of the Jackson County

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<sup>3</sup> Pages 1 - 3 of the Appendix reproduce the Information charging Mr. Greeno, which was received in evidence at the conditional release hearing as Petitioner’s exhibit 1. While drafting this Reply Brief, Appellant’s counsel noted that page 2 of the Appendix had been inadvertently omitted from the Substitute Brief. Copies of that page have been provided to the Court for insertion into the Appendix.

Prosecuting Attorney in filing any and every count which can be arguably supported by the evidence is manifest by the fact that Mr. Greeno was charged in Count I with assaulting the officer with a dangerous instrument - his automobile - and again charged in Count II with armed criminal action for the use of an automobile in assaulting the officer.)

In a footnote, Respondent asserts that the lurid account is “taken from information provided by the woman and her daughter.” (Resp.Sub.Br. at 11, note 3). In fact, that account is taken from the Certificate of Mental Evaluation of Mr. Greeno by Dr. Parwatikar in 1996 (S.L.F. 1 - 9)<sup>4</sup> and a report of mental examination done by Mr. Robert Mankoff and Dr. Steven Mandracchia in 1991 (S.L.F. 10 - 16) upon which Dr. Parwatikar drew for his account. Mr. Mankoff and Dr. Mandracchia, in turn, gleaned an account of these allegations from police reports (S.L.F. 13 - 15), which they contrast with Mr. Greeno’s account of what happened. Dr. Mankoff and Mr. Mandracchia noted that this discrepancy between the police report and Mr.

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<sup>4</sup> Dr. Parwatikar’s report is demonstrably inaccurate in other areas as well. For example, he asserts that Mr. Greeno admitted himself to the V.A. Hospital on March 27, 1995 following a suicide attempt when Mr. Greeno “was very upset with the Oklahoma City bombing and began driving down the highway the wrong way trying to get someone to smash into him and kill him. He was at the V.A. Hospital until 04-21-95 . . .” Of course, the Oklahoma City bombing occurred on April 19, 1995. *United States v. McVeigh*, 153 F. 3d 1166, 1176 (10<sup>th</sup> Cir. 1998). At that time, Mr. Greeno had already been in the V.A. Hospital over three weeks.

Greeno's account was important. (S.L.F. 14). They went on to assert: "Although the defendant is not charged with any alleged offenses concerning these above behaviors, should these be factual as they are reported by the witnesses they would appear to discredit the likelihood that at that time the defendant was suffering from a Post-Traumatic Stress Disorder flashback." (S.L.F. 15). After noting the significance of the discrepancy, and acknowledging that determining the reliability of the police report accounts was beyond the purview of their examination, Mr. Mankoff and Dr. Mandracchia stated "it is noted, however, that the examination itself revealed no evidence to question the authenticity of the defendant or the true presence of a Post-Traumatic Stress Disorder."

In fact, after noting that the account taken from the police reports (substantially the account set forth in Respondent's Substitute Brief), if true, "would appear to discredit the likelihood that at that time the defendant was suffering from Post-Traumatic Stress Disorder flashback," Mr. Mankoff and Dr. Mandracchia went on to find that Mr. Greeno, as a result of his Post-Traumatic Stress Disorder, did not know or appreciate the nature and all of the wrongfulness of his conduct and was incapable of conforming his conduct to the requirements of the law. (S.L.F. 15 - 16).

Respondent also asserts that Mr. Greeno, "is currently housed in the Northwest Missouri Psychiatric Rehabilitation Center . . . in St. Joseph, Missouri." (Resp.Sub.Br. 11 - 12). In fact, Mr. Greeno was hospitalized there at the time he filed his Application for Conditional Release and at the time of the hearing which is the subject of this appeal. However, after the denial of conditional release, Mr. Greeno was transferred to the Guhlman

Forensic Center at Fulton State Hospital, in apparent retaliation for having sought a conditional release against the recommendation of personnel at Northwest.

In describing Mr. Greeno's mental condition and history, Respondent ascribes to Mr. Greeno in the present tense symptoms which have been absent for many years, due to treatment Mr. Greeno received through the Veteran's Administration. For example, Respondent asserts, "PTSD has caused him to act violently and, according to Dr. Peterson (the doctor who testified for Greeno), produced in him the 'urge to annihilate,' and has resulted in 'severe alcohol use, marijuana use and illegal actions.'" (Resp.Sub.Br. 13). What Dr. Peterson's report actually says is, "through his own intense effort, the in-patient environment, the out-patient environment and supportive contacts, Mr. Greeno largely overcame his most severe symptoms of PTSD which included the urge to annihilate, severe alcohol use, marijuana use, and illegal actions." In other words, Respondent has taken a professional opinion of successful response to treatment and distorted it to paint a misleading and extremely negative picture of Mr. Greeno's present state.

Respondent also recites negative information concerning Mr. Greeno's alcohol and marijuana use gleaned from Dr. Parwatar's demonstrably inaccurate report. (Resp.Sub.Br. 13). That information is not relevant to any issue to be decided by this Court, since it concerns only information occurring long before the behavior which led to Mr. Greeno being found not guilty by reason of mental disease or defect.

Respondent also falsely asserts that Mr. Greeno "had a long history of criminal and violent behavior even before the offense that led to his plea of not guilty by reason of mental

disease or defect.” (Resp.Sub.Br. 14). In fact, Mr. Greeno has never in his entire life been convicted of any violent offense. His sole criminal conviction is a federal conviction for using a facility of interstate commerce, a telephone, to communicate a threat. Mr. Greeno completed his sentence and supervised release term for that offense. Respondent attempts to paint a frightening picture of Mr. Greeno by alluding to several arrests which did not result in conviction and one arrest which resulted in conviction of a municipal ordinance violation.<sup>5</sup> Mr. Greeno respectfully submits that to consider acquitted, dismissed, or uncharged conduct as a “long history of criminal and violent behavior” is a direct affront to the presumption of innocence which is inherent in the Due Process clause of the Fifth Amendment to the United States Constitution. Mr. Greeno submits, rather, that the only inference that can be drawn from the acquittal, dismissal or failure to charge such conduct is that Mr. Greeno did not, in fact, engage in such conduct.

The same is true of Respondent’s allegation of conduct attributed to Mr. Greeno during his prior conditional release. (Resp.Sub.Br. 15). Once again Respondent attaches an irrefutable presumption of guilt to allegations which resulted in charges which were dismissed, describing them as “other dangerous events during Greeno’s conditional release.” *Id.* Of course, “The charge of any offense is not evidence, and it creates no inference that any offense was committed or that the defendant is guilty of an offense.” MAI-CR 3d. 302.04. Respondent

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<sup>5</sup> Of course, municipal ordinance violations are not crimes.

not only disregards this fundamental principle, but, throughout Respondent's Statement of Facts, guilt is conclusively presumed from the fact of a charge.

Particularly egregious is Respondent's characterization of the allegations which resulted in the revocation of Mr. Greeno's conditional release. See Respondent's Brief 15 - 16. Mr. Greeno was falsely accused of assaulting Pamela Westbrook with a hammer. When Mr. Greeno finally had an opportunity to confront Mrs. Westbrook in a court of law concerning these allegations, and she was cross-examined by counsel who had the benefit of pre-trial discovery including access to her medical records which contained a totally different account of how her arm was broken, eleven of twelve jurors agreed that her testimony accusing Mr. Greeno was not credible. (Tr. 212, 219). The prosecutor dismissed the charges a few days later. (App. 9 - 12).

Despite the obvious fact that Ms. Westbrook's false allegations did not stand up in court, Respondent asserts as a fact that Mr. Greeno "left threatening messages on her telephone answering machine." (Resp.Sub.Br. 15). Indeed, Mrs. Westbrook testified at Mr. Greeno's trial that he had left threatening messages on her answering machine and the State produced what she said was a tape recording of those message. It was obvious to everyone who heard the recording that it was crudely manufactured by splicing together words taken out of context from several unrelated conversations, and the recording itself belied Westbrook's perjurious assertion that it reflected a message that had been left by Greeno on her answering machine. Respondent correctly notes that the hearing officer who conducted Mr. Greeno's conditional release hearing did, in fact, credit Mrs. Westbrook's testimony at that hearing;

however, Respondent fails to note that Mrs. Westbrook did not testify in person before the hearing officer but rather, testified over the telephone. (Resp.Sub.Br. 16). Moreover, the conditional release revocation hearing was conducted before Mr. Greeno had the benefit of discovery in preparation of the criminal trial, including access to Mrs. Westbrook's medical record where she told her physician her arm was broken when a black male stole her purse. (Mr. Greeno is white).

Finally, with regard to the discussion of Mr. Greeno's behavior while on conditional release, Respondent asserts, "Finally, during his release there were times when the forensic case monitor couldn't find Greeno and at one point asked that he be arrested and prosecuted for escape from commitment. (Resp.Sub.Br. 16). It is significant to note that no such allegation was made during the administrative revocation proceedings. The Department of Mental Health did seek revocation based on Mr. Greeno's alleged arrest for DUI on March 19, 1994 and on Mr. Greeno's alleged failure to report being charged with public indecency for urinating in public. Those allegations were not substantiated by the hearing officer. (See, App. 4 - 8). It is inconceivable that, had Mr. Greeno absconded or even been difficult to find, these allegations would not have been asserted as an additional ground for revoking his conditional release.

Moreover, when Dr. Vlach made that assertion at Mr. Greeno's conditional release hearing, he claimed that the case monitor had written a letter to that effect. (Tr. 266). However, that letter was never produced in court. In fact, when Dr. Vlach was questioned about the documentation of that incident, he referred to the Certificate prepared by Dr. Parwatikar.

(Tr. 273 - 274). Dr. Parwatikar's certificate contains no assertion that Mr. Greeno had in any manner absconded from conditional release supervision. Dr. Parwatikar's report does allude to an account by Mr. Ron Slater, Mr. Greeno's Forensic Case Manager, of Mr. Greeno's behavior while on conditional release. Nowhere does Mr. Slater assert that Mr. Greeno could not be found and nowhere does Mr. Slater assert that Mr. Greeno should have been arrested and prosecuted for escape from commitment. (S.L.F. 4).

With regard to the description of fifteen or sixteen "incidents where [Mr. Greeno] has threatened and verbally abused the hospital staff," set forth in Respondent's Statement of Facts, (Resp.Sub.Br. 17 - 21), Mr. Greeno notes that these incidents are excerpted from progress notes where some 460 incidents could have been reported had they occurred. (See, Tr. 101 - 103). Of course, Mr. Greeno is understandably frustrated about having had his conditional release revoked based on false accusations and being requested to participate in treatment programs he completed before he was originally released. He is also frustrated with the "level system" which is applied to deny him access to social and recreational opportunities, since he declines treatment. He occasionally expresses his frustration verbally. (See, e.g., S.L.F. 31).

Respondent also inaccurately describes some of the incidents reflected in the progress notes. For example, Respondent asserts that, "on May 9, 1999, Greeno and another patient got into an argument . . ." (Resp.Sub.Br. 21). In fact, the progress note reads, "Patient number 56344-3 walked over to Mr. Greeno & angrily stated that you shouldn't talk about my brother like that do you want to fight or something. Mr. Greeno jumped up & stated that he was just

sitting here eating.” (S.L.F. 20). It is also extremely significant that nowhere can Respondent assert that Mr. Greeno has ever instigated inappropriate physical contact, violent or otherwise, with any staff member or other patient. In fact, one of the incidents described by Respondent contained no threatening behavior whatsoever; Mr. Greeno was merely seen watching a movie. (Resp.Sub.Br. 19).

In sum, Respondent’s Statement of Facts is not “a fair and concise statement of the facts relevant to the questions presented for determination without argument.” Rule 84.04(c). Rather, Respondent’s Statement of Facts attempts to paint a frightening portrait of Mr. Greeno which is altogether inaccurate and misleading.

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.

*Foucha v. Louisiana*, 504 U.S. 71 (1992)..... 20, 21, 22, 23, 24

*Marsh v. State*, 942 S.W.2d 385 (Mo.Ct.App.W.D. 1997) ..... 21

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*Moore v. Board of Education of Fulton School*,  
836 S.W.2d 943 (Mo.banc. 1992)..... 20

*Stallworth v. State*, 895 S.W.2d 656 (Mo.Ct.App.W.D. 1995) ..... 21

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*Marsh v. State*, 942 S.W.2d 385 (Mo.Ct.App.W.D. 1997) .....30, 32

## ARGUMENT

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.

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). Article I, Section 10 of the Missouri Constitution provides due process protections coextensive with those provided by the United States Constitution. *See, e.g., Moore v. Board of Education of Fulton School*, 836 S.W.2d 943, 947 (Mo.banc. 1992); *State v. Mann*, 23 S.W.3d 824, 836 (Mo.Ct.App.W.D. 2000).

Appellate courts of this State have consistently held that, “Under *Foucha*, it is necessary for a court to make a finding that an insanity acquittee is suffering from a mental illness or defect before it can order that such person shall remain in a mental institution. Thus, 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 v. State*, 838 S.W.2d 10, 11 (Mo.Ct.App.W.D. 1992); *Viers v. State*, 956 S.W.2d 465, 467 (Mo.Ct.App.W.D. 1997); *Marsh v. State*, 942 S.W.2d 385, 388 (Mo.Ct.App.W.D. 1997); *McKee v. State*, 923 S.W.2d 525, 527 (Mo.Ct.App.W.D. 1996); *Stallworth v. State*, 895 S.W.2d 656, 658 (Mo.Ct.App.W.D. 1995). The Court which denied Mr. Greeno’s Application for Conditional Release made no such finding; therefore, Mr. Greeno is entitled to be conditionally released.

Respondent urges that this Court overrule nine years of jurisprudence applying *Foucha* to applications for conditional release, based upon this Court’s holding in *State v. Revels*, 13 S.W.3d 293 (Mo.banc. 2000) (specific finding of mental disease not required when a court denies an *unconditional release*). Respondent argues as if the distinction between conditional release proceedings, controlled by *Styles*, and unconditional release proceedings, controlled by *Revel*, are a figment of Mr. Greeno’s imagination. However, that distinction was made by this Court in *Revels* itself. “The *Styles* opinion does not control *Revels*’ case because it addressed a conditional release, which is governed by sub-sections 10 through 18, and 20 of Section 552.040.” *Revels*, 13 S.W.3d at 296.

The basis for this Court’s distinction between unconditional and conditional releases set forth in *Revels* is apparent from a reading of the relevant statutory provisions. Determining

if an insanity acquittee should be *unconditionally* released, the court is required to consider “whether or not the committed person presently has a mental disease or defect.” Mo.Rev.Stat. § 552.040.7(1). A person seeking an unconditional release has the burden of proving by clear and convincing evidence that he does not have, and in the reasonable future, is not likely to have a mental disease or defect rendering him dangerous to the safety of himself or others. Section 552.040.7(6). In *Revels*, this Court merely assumed that the trial court had followed the statute, and had made findings consistent with its judgment on an issue upon which *Revels* bore the statutory burden of proof. *Id.* at 296.

In contrast, Section 552.040.12, which lists the factors to be considered in determining whether an insanity acquittee should be *conditionally* released, is totally silent as to any mental disease or defect the insanity acquittee may or may not have at the time of the hearing. Obviously, Section 552.040.12, in and of itself, is insufficient to meet the standard set forth in *Foucha*. Therefore, in *Styles*, the Court of Appeals imposed a requirement that the trial court make a finding of mental disease or defect in order to deny a conditional release in a manner consistent with the due process mandates of *Foucha*. The trial court could not be presumed to have followed a statutory command to consider the presence or absence of mental disease when that factor was not included in the relevant portion of the statute. Had the *Styles I* court not imposed upon conditional release proceeds a requirement that the trial court explicitly find the existence of a mental disease or defect to deny a conditional release, it would have been compelled to find Section 552.040.12 unconstitutional in light of *Foucha*.

To the extent that *Revels* and *Styles* are in conflict with regard to Mr. Greeno's constitutional right to due process of law regarding his Application for Conditional Release, *Revels* should be reconsidered and the principles of *Styles* reaffirmed, since *Styles* more fully embodies the holding of the United States Supreme Court in *Foucha*. Though, as discussed above, Mr. Greeno believes that both *Revels* and *Styles* can and should be read in a manner consistent with *Foucha*, Respondent urges that *Styles* is inconsistent with *Revels* and must be reversed. Respondent bases its position on the peculiar notion that the constitutional protections of *Foucha* are available only in cases where the State concedes that a release applicant is not mentally ill. (*See*, Resp.Sub.Br. at 38). In other words, Respondent would make the scope of the protections afforded an insanity acquittee by the due process clause of the Fifth and Fourteenth Amendments to the United States Constitution and Article I, Section 10 of the Missouri Constitution entirely dependent upon the litigation strategy adopted by the party seeking to curtail those constitutional rights.

It is true that in *Foucha*, the issue of sanity was conceded by the state of Louisiana. That, however, does not limit the core holding of *Foucha*, which this Court has correctly identified. "Most importantly, the holding of *Foucha* prohibits 'the indefinite detention of insanity acquitees who are not mentally ill but who do not prove they would not be dangerous to others.'" *Revels*, 13 S.W.3d at 296. In *Foucha*, the release applicant's sanity was conceded. In *Revels*, the trial court was statutorily required to consider that issue and was assumed to have resolved it in a manner consistent with the judgment. In *Styles*, as in the instant case, both

the statute and the judgment were silent as to the presence of a mental disease or defect, and, under those circumstances, denial of the conditional release was held to violate *Foucha*.

Mr. Greeno has a constitutionally protected liberty interest in being free from confinement, including involuntary psychiatric hospitalization. “Freedom from bodily restraint has always been at the core of the liberty protected by the Due Process Clause from arbitrary governmental action.” *Foucha*, 504 U.S. at 80. By continuing to incarcerate Mr. Greeno in a mental hospital without any finding by any competent authority that he is presently suffering from a mental disease or defect, Respondent has violated Mr. Greeno’s due process rights under both the federal and state constitutions. When the trial court denied Mr. Greeno’s Application for Conditional Release, the law was crystal clear: conditional release could not be denied in the absence of a finding of mental disease or defect. The trial court made no such finding. Therefore, Mr. Greeno is entitled to be conditionally released. This case should be remanded to the trial court for the imposition of the conditions of Mr. Greeno’s conditional release.

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.

Respondent apparently misconstrues the nature of Mr. Greeno's equal protection claim. Mr. Greeno does not dispute that his original acquittal by reason of mental disease or defect may have warranted treating him differently than persons subject to civil commitment. *Jones v. United States*, 463 U.S. 354, 367 - 368 (1983). Here, in 1993 Mr. Greeno was conditionally released by the Probate Court of Calloway County. (L.F. 7). At that time, the Probate Court of Calloway County necessarily found that Mr. Greeno was not likely to be

dangerous to others while on conditional release (Mo.Rev.Stat. § 552.040.12(6)) and/or that Mr. Greeno was not suffering from a mental disease or defect.<sup>6</sup> Mr. Greeno contends that that finding by the Probate Court of Calloway County vitiated any presumption of continuing mental illness. In other words, the basis for holding Mr. Greeno in a psychiatric hospital disappeared in 1993 when he was conditionally released.

Mr. Greeno's conditional release was revoked in 1996. However, that revocation did not in any way revive the presumption of continuing mental illness. First of all, Mr. Greeno's conditional release was not revoked because of any mental health difficulties; even the officer conducting the hearing determined that Mr. Greeno was then exhibiting no symptoms of an active mental illness. (App. at 6). Even Dr. Parwatikar, who evaluated Mr. Greeno a few months after the revocation, opined that, at the time he allegedly violated his conditional release, "Mr. Greeno was not suffering from any mental disease which would have resulted in his lack of knowledge and appreciation of the nature, or the wrongfulness of the alleged offense or caused any impairment in his ability to conform his conduct according to the requirement of law." (S.L.F. 8).

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<sup>6</sup> Mr. Greeno's conditional release was granted approximately a year after the Court of Appeals' opinion in *Styles*.

Mr. Greeno's conditional release was revoked only because the hearing officer erroneously found that he had committed the assault on Pamela Westbrook of which he had been falsely accused. Of course, the revocation hearing was governed by Section 552.040.17, which imposes only a "reasonable cause to believe" burden of proof. When, more than a year and a half after the revocation hearing, Mr. Greeno was finally able to confront Ms. Westbrook in a court of law, the falsity of those charges was exposed. Eleven of twelve jurors voted to acquit Mr. Greeno (Tr. 212, 219) and the case was dismissed shortly thereafter. (App. 12). When the false accusation which resulted in the revocation of Mr. Greeno's conditional release was ultimately debunked, there remained no reason for Mr. Greeno's continued incarceration in a psychiatric hospital. Not only had the revocation proceeding failed to revive any presumption of mental illness, the only reason for the revocation had been disproved.

After the dismissal of the false charges upon which the hearing officer erroneously relied to revoke Mr. Greeno's conditional release, the superintendent of Fulton State Hospital had the authority to petition for the return of the liberty wrongfully taken from Mr. Greeno. Mo.Rev.Stat. § 552.040.10. But instead, the Department of Mental Health continues to disregard Mr. Greeno's liberty interest. The Department of Mental Health continues to wrongfully imprison Mr. Greeno as a result of those false accusations, thereby ignoring its obligation under the United States and Missouri Constitutions to protect him from wrongful imprisonment.

In this context, Mr. Greeno's situation was remarkably similar to that of the petitioner in *Foucha*. Where *Foucha* had been denied a conditional release because, although he was not

mentally ill, he was still believed to be dangerous, Mr. Greeno had his conditional release revoked not because he was mentally ill, but solely because he was incorrectly believed to be dangerous. Indeed, on the day after Mr. Greeno's conditional release was revoked, the following quotation from the United States Supreme Court would apply equally to Mr. Greeno: "However, the State now claims that it may continue to confine *Foucha* [Greeno] who is not now considered to be mentally ill, solely because he is deemed dangerous, without assuming the burden of proving even this ground for confinement by clear and convincing evidence. The court below gave no convincing reason why the procedural safeguards against unwarranted confinement which are guaranteed to insane persons and those who have been convicted may be denied to an insane acquitee and the State has done no better in this Court." *Foucha*, 504 U.S. at 86 (plurality).

While a finding of not guilty by reason of mental disease may, in and of itself, justify treating an insanity acquitee differently than a civilly committed insane person, the requisite findings for conditional release of the insanity acquitee remove the basis for such a distinction. This is so because the conditional release necessarily contains a finding that the acquitee is no longer dangerous to others as a result of mental disease. In other words, the acquitee has rebutted any presumption of continuing mental illness by clear and convincing evidence to obtain a conditional release. There is certainly no rational basis for requiring that presumption to be rebutted again, again and again, in the absence of any finding that might serve to revive the presumption. Since there is no basis to treat Mr. Greeno differently from a person subject to civil commitment with regard to the issue of proving dangerousness, to hold Mr. Greeno to a

higher burden of proof on that issue violates Mr. Greeno's rights under the equal protection clause.

Respondent does not contend that at the conditional release hearing, the State met the burden of proving "dangerousness permitting confinement by clear and convincing evidence." *Foucha*, 504 U.S. at 86 (plurality). (Citing *Addington v. Texas*, 441 U.S. 418, 425 - 433 (1979)). Since the trial court applied the burden of proof with regard to the determination of dangerousness in a manner violative of the equal protection clause and, since, under the correct and constitutional standard, the State did not meet its burden of proving 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 PRESENTED 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 IMMINENTLY DANGEROUS IF RELEASED.

Mr. Greeno contends that at the hearing of this case, he did indeed meet his burden of proving by clear and convincing evidence that he would not be dangerous to others if conditionally released. Mr. Greeno contends that the trial court’s decision that he did not meet that burden was against the weight of credible evidence. Further review of the testimony in this regard leads to a firm belief that the trial court was wrong when it found otherwise. *Marsh v. State*, 942 S.W.2d 385, 388 (Mo.Ct.App.W.D. 1997).

Respondent attempts to meet this contention by distorting the facts and painting a misleading picture of Mr. Greeno’s behavior while both in the hospital and on conditional release. Most of the distortions and misstatements have been noted in the Statement of Facts, above. With regard to behavior while hospitalized, Respondent cannot point to a single incident where Mr. Greeno caused any physical harm to anyone else during his hospitalization. Not a single incident can be found where Mr. Greeno was so threatening or violent that the hospital staff was required to restrain him or even to send him to his room. In fact, even the State’s

expert witness, Dr. Vlach, acknowledged that Mr. Greeno would not be “imminently dangerous if released.” (Tr. 238).

Mr. Greeno presented substantial and compelling evidence of his non-dangerousness. Dr. 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 and summarized his findings in a twenty-one page report.<sup>7</sup> Three Department of Mental Health employees who had frequent contact with Mr. Greeno and observed his behavior under a variety of circumstances substantiated Dr. Peterson’s opinions. Dr. Peterson testified unequivocally to a reasonable degree of medical certainty, that if Mr. Greeno were conditionally released under the conditions set forth in the Forensic After Care Plan, Mr. Greeno would not likely be dangerous to others. (Tr. 59 - 60).

Respondent erroneously seeks to apply to Mr. Greeno the conditional release standards placed by statute on individuals convicted of first-degree murder or dangerous felonies as defined in Mo.Rev.Stat. § 556.061. (See, Resp.Sub.Br. at 58 - 59). There is no basis in law or fact for Respondent’s position. Mr. Greeno was found not guilty by reason of mental disease of driving his car into a police car. No injuries were sustained by anyone; the charge was that he “attempted to cause physical injury to a law enforcement officer . . .” (App. 1).

Mr. Greeno’s conditional release was revoked because he was accused of an offense he did not commit. Mr. Greeno has never been convicted of any offense in which he is alleged

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<sup>7</sup> Dr. Peterson’s extremely impressive credentials are set forth at Appendix 13 - 19.

to have caused any physical injury to anyone. Thus, Dr. Vlach's conclusions, based as they are on the assumption that Mr. Greeno is guilty of things he was acquitted of, not found guilty of, or never charged with, deserve little weight.

“[W]hen the record enters 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.” *Marsh v. State*, 942 S.W.2d 385, 388 (Mo.Ct.App.W.D. 1997). Mr. Greeno respectfully submits that a thorough review of the record and arguments in this case will leave this Court with the firm belief that the judgment denying conditional release is wrong. After considering all of the evidence in the case, and giving due weight to the testimony of Dr. Peterson and the other witnesses who testified on Mr. Greeno's behalf, this Court will be firmly convinced that if conditionally released, Mr. Greeno is not likely to be dangerous to others. Therefore, this Court should reverse the judgment of the trial court and order Mr. Greeno conditionally released.

CONCLUSION

WHEREFORE, for all of 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 confinement by 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 May, 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 6,674 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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