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JURISDICTIONAL STATEMENT

The Appellant, Carl H. Greeno, was found not guilty by reason of mental disease or defect in May 1991, on the charges of assaulting a police officer in the second degree and armed criminal action. (S.L.F. 3; Tr. 22; App. 1-2).¹ As an insanity acquittee, Greeno applied to the Buchanan County Circuit Court for a conditional release from the Missouri Department of Mental Health under § 552.040.10, RSMo

¹ “L.F.” refers to the Legal File in this case. “Tr.” refers to the transcript from the hearings of May 17 and 19, 1999. “App.” refers to the Appendix attached at the end of the Appellant’s Substitute Brief. “S.L.F.” refers to the Supplemental Legal File. “R. App.” refers to the Appendix attached to the Respondent’s Substitute Brief.

Cumulative Supp. 1998.² The Buchanan County Circuit Court had jurisdiction over this case because it is the court having probate jurisdiction over the facility where he is housed, the Northwest Psychiatric Rehabilitation Center in St. Joseph, Missouri. Section 552.040.10, RSMo. The circuit court denied the application.

Greeno appealed the judgment to the Missouri Court of Appeals, Western District, because the case did not involve any matter within the exclusive jurisdiction of the Missouri Supreme Court. Mo. Const. art. V, § 3. An order denying a conditional release is an order from which an appeal lies. *Styles v. State*, 877 S.W.2d 113 (Mo. banc 1994). As such it is a judgment pursuant to Mo.S.Ct.R. 74.01(a). This Court sustained the Respondent's Application to Transfer this case following the issuance of the Court of Appeals' decision.

² This version of the statute was in effect at the time of Greeno's conditional release hearing in May 1999. All future citations to the Revised Statutes of Missouri will be to this version, unless otherwise noted.

STATEMENT OF FACTS

In November 1990, Greeno entered the home of a woman at night, uninvited, went into the bedroom of her thirteen year old daughter and began crawling in bed with the girl.³ (S.L.F. 3, 14). When she awoke, she saw Greeno was partially disrobed and had “exposed his buttocks to her.” (S.L.F. 15). She screamed but he tried to stifle her screams by putting his hand over her mouth. (S.L.F. 15). He then left the house, drove away in his car, and, while trying to elude the police who were chasing him, he “smashed” his car into the police car. (S.L.F. 3, 14). Greeno had been in a bar before he went to the house, and there was a bottle of alcohol next to the girl’s bed. (S.L.F. 13; Tr. 204). The woman said that prior to that night, Greeno, in telephone calls to her, threatened to kill her. (S.L.F. 15).

Greeno was charged with Assault of a Police Officer in the Second Degree, a Class B Felony, and Armed Criminal Action, a Class A Felony in the Jackson County Circuit Court. (App. 1-2). In May 1991, he was adjudicated not guilty by reason of mental disease or defect to those charges and committed to the custody of the Missouri Department of Mental Health (hereinafter “Department”). (S.L.F. 3; Tr. 22).

³ This account of the events that evening is taken from information provided by the woman and her daughter. (S.L.F. 3, 14-15) Greeno’s recollection of those events differs in some points. (S.L.F. 13-14)

He is currently housed in the Northwest Missouri Psychiatric Rehabilitation Center (“Northwest”) (the former St. Joseph State Hospital), a Department facility, in St. Joseph, Missouri. (App. 20; Tr. 291-293). He has also been treated at the Fulton State Hospital, and has been admitted to the Veteran’s Administration hospitals⁴ in Topeka, Kansas and Kansas City, Missouri. (S.L.F. 3; App. 20, 30).

1. Greeno’s Mental Condition and History

⁴ The record does not show what treatment, if any, Greeno may have received at the VA facilities. Dr. Peterson did not talk to any doctors or review any charts from those facilities, instead he relied on information provided to him by Mr. Greeno. (Tr. 91-96)

Greeno suffers from post-traumatic stress disorder, chronic (“PTSD”). (Tr. 40, 191; S.L.F. 7, 15; App. 37-38). PTSD is a mental disease or defect pursuant to Chapter 552, RSMo, and it is chronic and permanent. (Tr. 41-42, 197; S.L.F. 7, 8, 15; App. 39). He also has a diagnosis of alcohol and cannabis abuse, both by history, and in remission.⁵ (Tr. 191; S.L.F. 7; App. 38). PTSD is an anxiety disorder that is caused by a traumatic event. (Tr. 191-92). The doctors who have treated or examined Greeno believe the PTSD resulted from the time he spent in the military. (Tr. 191-92; App. 37). While serving in the United States Marine Corp from 1965 through 1968, he was in Vietnam, where he sustained physical and psychological injuries. (Tr. 191; S.L.F. 5, 11; App. 30). He suffers from nightmares, night tremors, “flashbacks,” hypervigilance, depression, and hyperarousal. (S.L.F. 11; Tr. 196-97). 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,”⁶ and has resulted in “severe alcohol use, marijuana use, and illegal actions.” (App. 37).

He also has a lengthy history of psychiatric treatment dating back to 1971. (S.L.F. 2-3). In October 1979, he was hospitalized for a “self-inflicted knife wound and was placed on a psychiatric ward,” and he was admitted again in 1980 with “lacerations of the left frontal region.” (S.L.F. 2, 3).

Greeno has a history of alcohol and drug abuse. He began drinking at the age of 16, and he

⁵ Dr. Vlach, a psychiatrist and the medical director ?? at Northwest (*see* p. __ , *infra*), diagnosed Greeno as having alcohol dependence, in remission in a controlled environment, and cannabis abuse, by history, in remission in a controlled environment. (Tr. 191, 244)

⁶ While Dr. Peterson believes that urge may now be gone (Tr. 106), Greeno’s violent conduct and his threatening verbal and physical behavior (that will be discussed more extensively herein), belie that conclusion.

“claims” that after he returned from Vietnam, he “indulged in alcohol excessively to ‘stay passed out so that he wouldn’t dream.’” (S.L.F. 4). He claims to have quit drinking in 1987, but began again in 1990 when his flashbacks reportedly were getting worse. (S.L.F. 4). As for his marijuana use, he experimented with drugs and smoked marijuana daily until the age of 39. (S.L.F. 4).

2. Prior Criminal History

Greeno had a long history of criminal and violent behavior even before the events that led to his plea of not guilty by reason of mental disease or defect (“NGRI”). (S.L.F. 3-4). He has DUIs from August 1975, March 1977, April 1978, and May 1983. (App. 25). He was arrested in for disorderly conduct in 1972. (S.L.F. 3). In 1976 he was arrested for assault and rape (later reduced to common assault) (S.L.F. 3; App. 25). He was charged with rape in April 1980, but the charge was dismissed. (App. 25). He was arrested for assault in 1983, and for illegal use of a weapon in 1984. (S.L.F. 3). In 1987 he was arrested and convicted of the felony of interstate telephone threat, a federal offense, and he served a 40-month sentence for that crime. (S.L.F. 3-4; App. 9, 25).

3. Conditional Release

Greeno’s record of criminal other dangerous behavior resumed after he was granted his first conditional release by the Callaway County Circuit Court in September 1993. (S.L.F. 3; Tr. 22-23). The court permitted him to live in his house in Kansas City while on release. (S.L.F. 3).

In April 1994, when he had been drinking and driving without a license, he admitted himself to the Fulton State Hospital for about two weeks. (S.L.F. 3). In March 1995, he became upset upon learning about the bombing of the federal building in Oklahoma City, so he got in his car and drove down the highway “the wrong way, trying to get someone to smash into him and kill him.” (S.L.F. 3; App. 36). Following this suicide attempt, he checked himself into a VA hospital, until his discharge in April 1995. (S.L.F. 3; App. 36).

Dr. Peterson reports that Greeno was drinking in 1994 or 1995 after he learned of the killing of a Navy Seal in South America. (App. 31). Greeno got “blitzed on Wild Turkey,” then drove down Interstate 70 the wrong way. (App. 31). He was arrested, but when released he checked himself into the Kansas City VA medical center. (App. 31).

Other dangerous events during Greeno's conditional release also brought criminal charges that were dismissed: driving under the influence, driving without a license, driving without insurance, and reckless driving (March 1994); assault and auto theft (July 1994); assault (March 1995); and public indecency (he paid a fine) (October 1995). (App. 25; S.L.F. 2, 4). Finally, he was arrested for second degree assault and armed criminal action in 1995.

In December 1995, he was arrested on charges of second degree assault and armed criminal action. (S.L.F. 2, 4). He allegedly struck a woman with a hammer causing her to suffer scalp lacerations and a broken arm in October 1995. (Tr. 219; App. 6). After the assault, he left threatening messages on her telephone answering machine. (App. 6). The case went to trial in January 1998, but a jury could not reach a verdict, and in February the charges were dismissed. (App. 9-12). The Department's hearing officer reached a different conclusion, however.

Greeno's conditional release was revoked by the Department on April 10, 1996, based on the October incident. (App. 4-8). The hearing officer concluded that Greeno indeed struck the woman with a hammer and caused her injuries. (App. 6; Tr. 219). Prior to issuing the decision, the Department provided Greeno with a hearing where he was represented by counsel and he had the opportunity to present witnesses and evidence. (App. 4, 5). The female victim testified during that hearing. (App. 4, 5).

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 or prosecuted for escape from commitment. (Tr. 266, 274).

4. Conduct While Hospitalized

In 1993, while Greeno was at the Fulton State Hospital, a doctor noted that he "shows very little insight," and he is "intrusive, has been threatening, assaultive, and has spit" in the face and threatened a hospital doctor. (S.L.F. 34). The doctor also recognized Greeno's "significant background of violence that does not appear well-controlled." (S.L.F. 35). Greeno refused to participate in individual therapy and

to attend AA meetings. (S.L.F. 36; Tr. 245). The Fulton staff recommended that he should not be released because of his lack of insight and his threatening and assaultive behavior against staff.

(S.L.F. 36).

Since his hospitalization at Northwest, Greeno has been involved in a number of incidents where he has threatened and verbally abused the hospital staff. The records from Northwest detail these recent confrontations:⁷

- On November 20, 1998, he said, “Why don’t you tell that f____g c____ not to knock on my door. . . . It’s a mistake that could cause me a heart attack, you b_____.” (S.L.F. 32). That same day, he said to a different staff person, “You are a worthless, unprofessional moron, a Gestapo B____. I’m going to make someone around here hurt. The mother f____g slimy b____es. They want trouble, I’ll show them trouble.” Then later that same day he said, “I should put a bullet in the b_____.” (S.L.F. 32; Tr. 110-111; App. 28).
- On December 24, 1998, he said to one of the staff, “F____ the level system [and] stay out of my business.”⁸ He remained angry and went on to say, “You shouldn’t talk to me that

⁷ A number of other incidents are mentioned in the report filed by Dr. Peterson. (App. 27-29)

⁸ The level system is the classification method by which a patient’s progress is identified and which, if successful, can lead to a recommendation for release from the hospital. (Tr. 279-281)

way. Stay out of my business or I'll get you." (S.L.F. 31; Tr. 112).

- On December 30, 1998, in a loud and threatening voice he told the staff member that he would "break her f____g neck." (S.L.F. 30; Tr. 112-13).
- On January 3, 1999, when a mistake was made concerning his food tray and the food tray for a peer, he angrily said to a staff member, "If I was out on the street I'd beat you to a pulp." (S.L.F. 29; Tr. 113; App. 29).
- On January 12, 1999, he yelled at a staff member that he, Greeno, had a very hot temper, and that "when I get mad there will bodies all over bloody bodies so [I'm] warning you." While he said this, his face was red and he was clenching and unclenching his fists, and pacing back and forth. (S.L.F. 28; Tr. 113; App. 29).
- On January 22, 1999, he pointed a finger at a staff member and yelled, "I don't want you b____ to ever offer me medicine. Don't get two feet from me. I will hurt you. You b____, never give me medicine." He then went to another staff member and said, "I don't want that f____g back stabbing b____ near me. You tell her to never come around me." (He said this while he was standing in an area that was not authorized for patients to be in.) He then said, "I had a problem with another b____ like that and I put her husband in the trunk of a car. She better never come around me." A few minutes after this happened, he called another staff member on the phone and told her to keep another staff member away from him, and he called her a "back stabbing two faced b____!" (S.L.F. 27; Tr. 114).
- Later, on January 22, 1999, he told a staff member about his anger toward a different staff person, and he said, "If she had taken one step further I would have blackened both eyes, broke [sic] her jaw, and broken every bone in her body." When the staff member

attempted to talk to Greeno about his anger and threats, Greeno responded that he “did not care if he was sent to Fulton for hurting someone as ‘she deserved it.’” During the same conversation, Greeno mentioned that one of Greeno’s friends offered to help him “shoot his way out” of the hospital. Greeno reminded the staff person about his military training and experiences after Vietnam where he “actively sought dangerous situations where he could use his military training to fight.” (S.L.F. 26; Tr. 114-15).

- Again on January 22, 1999, he told another staff person that “he was not going to stand for a staff member telling him what to do. . . . ‘I’m not a child and I won’t be ordered around. If it takes me beating the hell out of someone to prove that then that’s what I’m going to do. I don’t care if it’s a man or a woman.’ He went on to say that there is one staff member who he would ‘like to make an example out of.’” (S.L.F. 25; Tr. 115).
- On February 6, 1999, he was seen watching a movie that contained graphic war images, gunfire, and death. Even though he became upset, he did not make any efforts to avoid watching the film. (S.L.F. 24).
- On February 6, 1999, he cursed at a female nurse and called her a “little c___ b___ whore.” He went on to say that “if that b___ started this on 3-11, you’d have a riot, we’d kick some ass, that c___ needs her ass kicked.” (S.L.F. 24; Tr. 115).
- On February 23, 1999, he told a PA-I that he had “targeted” two staff members “to get rid of.” (S.L.F. 23).
- On February 24, 1999, he entered the medicine room, into an unauthorized area, approached a female nurse and said, “If you ever walk up to me again, I’m spitting in your f___g face.” The nurse believed that Greeno “plans to harm others.” (S.L.F. 23; Tr. 116).

- On February 26, 1999, he was talking to a staff member and, referring to a nurse on the evening shift, said, “If that fascist son-of-a-b_____ tries to mess with my money, I’ll knock his teeth out! . . . People like him end up in the trunk of a car.” He also said, “That punk a__ mother f_____! He better have security on the wing tonight. That’s not a threat, that’s a warning!” The staff person believed that Greeno was trying to incite other patients against the nurse. (S.L.F. 22; Tr. 116).
- On March 28, 1999, Greeno was talking about a female nurse when he said, “That f_____g b_____ won’t let anyone do nothing. They need to fire that stupid b_____.” (S.L.F. 21; Tr. 116-17).
- On April 30, 1999, he said to a female staff person that she was a “lying b_____,” and that he would “rip [her] head off.” When the female staff person asked Greeno if he was threatening her, he said, “F_____ no. I’m not threatening you. I don’t threaten, I just do. I’ll spit in your face.” He continued to threaten to spit on the staff person, and when she asked him to calm down, he said, “You don’t need to tell me to calm down. I’ll calm down when I want to calm down [and] not until then.” (S.L.F. 17, 18).
- On May 9, 1999, Greeno and another patient got in an argument and the exchange became serious enough that a staff person had to stand between them to keep them apart. Even after the staff person intervened, Greeno “kept trying to incite [the other patient] to fight him.” (S.L.F. 20).

Greeno frequently has been hostile, aggressive and very violent; those aggressive behaviors have increased and become more frequent since November 1998. (Tr. 291, 299-300). His conduct is so obnoxious and threatening that some of the hospital staff have transferred from his unit to get away from him, and some have resigned. (Tr. 300). While staff has not restrained Greeno, there are occasions

where some of them have intervened between him and other people toward whom he was becoming aggressive. (Tr. 301). Not only does he get angry at and aggressive with staff members on issues that concern him, but he will incite other patients to refuse to comply with treatments administered by some of the nurses. (Tr. 306-07). The staff feel threatened by Greeno, and they take the threats seriously. (Tr. 313). A social worker who treats Greeno on a regular basis believes that Greeno should not be released. (Tr. 291, 314-15).

Concerning his threatening behaviors toward the staff, the Circuit Court noted that his “aggression was primarily focussed on women and working staff (as distinguished from doctors or degreed personnel),” and that he “goes just as far as he can go, short of receiving a security write-up.” (L.F. 8).

5. Psychiatric Assessment

Dr. David Vlach, a psychiatrist and the medical director at Northwest, treated Greeno from July 1998 through January 1999. (Tr. 185-86). He was a Major in the United States Air Force and has specialized training and experience in treating patients diagnosed with PTSD, including war veterans who suffer from combat-induced PTSD. (Tr. 187-88). According to Dr. Vlach, Greeno is dangerous to himself and others when he experiences flashbacks because the symptoms he exhibits are hyperarousal, hostility, and aggressiveness. (Tr. 195-96). Greeno’s criminal and violent behavior arises out of the PTSD, and his violent behavior will continue if he were to be released. (Tr. 196-97, 210, 238-39). His PTSD cannot be cured. (Tr. 197). And while he will continue to be bothered and upset by certain events, he can learn to better control his behavior. (Tr. 197). Even so, Greeno has not learned to control his anger or behavior. (Tr. 276). Because of these problems and others, Greeno should not be released. (Tr. 210, 238-39).

The two major symptoms that Greeno expresses when he is suffering from his disease are anxiety and aggression. (Tr. 196, 198). With respect to his anxiety, it can be treated through psychological

programs, which Greeno claims that he participated in while he was at a VA hospital.⁹ (Tr. 198). It is significant that in 1994, Greeno was feeling suicidal after he was arrested for a DWI, reckless driving and driving without a license charges, and then went to the VA, but he left the hospital against medical advice. (Tr. 198-99). Dr. Vlach expressed concern that Greeno committed dangerous behaviors before he checked himself into a hospital, because if his treatment had been effective, he would have gone to the hospital before committing suicidal or violent acts, not after. (Tr. 199-200).

As for his aggressiveness, Greeno's other significant symptom, Greeno has acted with "extreme rage" while at Northwest. (Tr. 245). Dr. Vlach doesn't see any evidence that Greeno views his aggressiveness as a problem, so it is hard for him to work on it. (Tr. 200). Nor does Dr. Vlach see any evidence that Greeno's treatments have addressed that issue. (Tr. 200-01). To the contrary, Greeno has not learned to control his anger or behavior. (Tr. 276).

Dr. Vlach opined that Greeno would be violent if he were to be released because his most violent and threatening behaviors have occurred after his stay at the VA hospital from 1980 to 1995, and because the behaviors persisted even while he was at Northwest. (Tr. 201, 210).

Greeno thinks he is a victim of "a system gone wrong," so he will not participate in treatment, even though Northwest has treatment programs that could treat his PTSD and help him learn to control his behavior. (App. 30; Tr. 202-03). Greeno did not participate in any meaningful way in treatment while he was at the Fulton State Hospital (S.L.F. 34-36, Tr. 245), and he needs to participate in some kind of

⁹ Dr. Vlach, however, hasn't seen records of any treatment Greeno may have received for PTSD or aggression at the VA. (Tr. 201).

treatment before he would be a suitable candidate for release. (Tr. 203-04).

With respect to Greeno's alcohol abuse problem, Dr. Vlach considers it significant that Greeno has been arrested seven times for driving while intoxicated and that he has "two or three convictions" for it. (Tr. 204) There was also evidence that he may have been consuming alcohol the night he entered the room of the young girl in 1990. (Tr. 204). And, when he was on conditional release, he was arrested for driving while intoxicated. (Tr. 205). Greeno needs treatment for this problem. (Tr. 209).

Dr. Vlach and his staff were not able to confirm whether Greeno received alcohol treatment from the VA hospitals,¹⁰ but during the time that Dr. Vlach was treating Greeno, Greeno denied that he has an alcohol problem. (Tr. 205-06). So there are no clinical indications that Greeno had any successful treatment or insight in this area. (Tr. 205-08). And Greeno refused to attend AA groups while he was a patient at the Fulton State Hospital from 1991 to 1993. (S.L.F. 4). The use of alcohol is a very high risk factor for violent behavior in PTSD patients, including Greeno. (Tr. 209). And for Greeno, alcohol consumption leads him to commit dangerous behaviors. (Tr. 205).

With respect to his PTSD, Greeno has only partial insight into the illness; he does not acknowledge that his aggressiveness stems from his PTSD. (Tr. 209). Because of his lack of insight, "both Mr. Greeno and the community [would be] at risk were he to be granted a conditional release," because most of his criminal behaviors have resulted from the "aggressive aspect of his illness." (Tr. 210). Greeno also has a well-established pattern of aggression, hostility, antisocial and criminal behaviors that stem from his PTSD. (Tr. 211-221). The pattern includes his criminal acts and assaults, and graphic verbal threats of violence. (Tr. 210). He is also unable to compromise. (Tr. 210). In situations where someone makes a

¹⁰ Likewise, Dr. Peterson was not sure if Greeno received treatment for his alcohol abuse problems while at the VA hospitals. (Tr. 79-80, 82-83).

mistake with him, as in an episode where he exploded at hospital staff because he received an incorrect food tray, Greeno's tendency is to "escalate that to the point of becoming verbally abusive and, in some instances, threatening," all of which stem from his PTSD. (Tr. 210-11).

These behaviors need to and can be addressed by treatment, and as Dr. Vlach has observed, Greeno still exhibits symptoms of PTSD for both the anxiety and aggressive behavior components of his illness. (Tr. 211).

According to Dr. Vlach, Greeno's conduct while on conditional release (assaulting a woman and then threatening her over the telephone) are significant because they are yet more examples of the aggressive, threatening and intimidating behavior he has developed since his combat experience. (Tr. 220). Given the similarities of his behavior (the federal conviction for telephone threats, the telephone threats that were part of the offense that led to the NGRI, and the telephone threats that he made against the female victim while he was on conditional release) and the lack of treatment since 1985, he has made little progress in his ability to control his behavior. (Tr. 220). The only reason he hasn't been physically assaultive while he has been in the hospital is because he knows he is being watched by the staff. (Tr. 220-21, 229-30, 247).

And as for his alcohol abuse problems, Dr. Peterson believes it is possible that even though there is no indication that Greeno has consumed alcohol recently, it may be attributable to the fact that he is in the hospital where alcohol is not available to him. (Tr. 80). So even if Greeno were to be released, Dr. Vlach believes that once he is out of the controlled environment he would feel free to resume his assaultive behavior if he thinks he needs to do that to achieve his goal. (Tr. 220-21).

Greeno would benefit from taking psychotropic medications, and Dr. Vlach has recommended that Greeno take them, but he won't take them. (Tr. 232-37).

6. Procedural History

Greeno filed an application for conditional release with the Circuit Court of Buchanan County, and the court conducted a hearing on the application on May 17 and 19, 1999. (L.F. 1-5, 6; Tr. 2, 170). The Court issued an order denying the application on June 11, 1999. (L.F. 6-11). He then lodged an appeal with the Court of Appeals, Western District, and that court reversed the judgment on November 28, 2000. (R. App. A7-A16). This Court sustained the Respondent's Application for Transfer on March 20, 2001.

POINTS RELIED ON

I.

The trial court did not err when it denied Greeno's application for conditional release although it did not make a specific written finding that he has a mental illness that makes him dangerous, because it violates neither the Due Process and Equal Protection Clauses of the United States Constitution, nor Article I, Section 10 of the Missouri Constitution, in that there is no requirement that the court make such a finding, as this Court held in a recent unconditional release case, *State v. Revels*, 13 S.W.3d 293 (Mo. banc 2000). And to the extent *Styles v. State*, 838 S.W.2d 10 (Mo. App. W.D. 1992) and its progeny require trial courts to make such a finding in conditional release cases, those cases should be overruled by this Court.

State v. Revels,

13 S.W.3d 293 (Mo. banc 2000)

Styles v. State,

877 S.W.2d 113 (Mo. banc 1994)

§ 552.040.12, .14 and .20, RSMo

Mo. Const. art I, § 10

Mo.S.Ct.R. 73.01(c)

Chapter 552

§ 552.040

§ 552.040.12, RSMo

§ 552.040.14, RSMo

§ 552.040.20, RSMo

§ 630.005(23), RSMo

II.

The trial court did not err by requiring Greeno to prove by clear and convincing evidence that he no longer has a mental illness that makes him dangerous because Sections 552.040.12, .14, and .20, RSMo, place that requirement on him, and his acquittal of violent criminal charges on the grounds of mental disease or defect creates a presumption of continuing mental illness, in that neither his 1993 conditional release, nor the findings made at the time of its revocation, vitiated the presumption, and the evidence at his 1999 conditional release hearing did not rebut that presumption nor establish the absence of such an illness.

State v. Revels,

13 S.W.3d 293 (Mo. banc 2000)

Styles v. State,

877 S.W.2d 113 (Mo. banc 1994)

§ 552.040.12, .14 and .20, RSMo

Chapter 552

§ 552.010, RSMo

§ 552.040, RSMo

§ 552.040.3, RSMo

§ 552.040.9, RSMo

§ 552.040.12, RSMo

§ 552.040.14, RSMo

§ 632.300, RSMo

Black's Law Dictionary 4, 1294 (6th ed. 1990)

Stedman's Medical Dictionary 1526 (25th ed. 1995)

III.

The trial court did not err in finding that Greeno had a “propensity toward violence” and would be dangerous if he were to be released because the weight of the evidence demonstrates that Greeno did not clearly and convincingly establish that he would not be dangerous, as required by Sections 552.040.12, .14 and .20, RSMo, in that he has a long history of violent behavior, he verbally threatened staff and patients in the hospital, and a medical expert opined that given those factors, and others, including Greeno’s continuing mental illness and lack of insight into it, Greeno would be dangerous if released.

Grass v. Nixon,

926 S.W.2d 67 (Mo. App. E.D. 1996)

Marsh v. State,

942 S.W.2d 385 (Mo. App. W.D. 1997)

State v. Dudley,

903 S.W.2d 581 (Mo. App. W.D. 1995)

§ 552.040.12, .14 and .20, RSMo

§ 552.040.12, RSMo

§ 552.040.14, RSMo

§ 552.040.20

SUMMARY OF ARGUMENT

Carl H. Greeno appeals from an order of the Buchanan County Circuit Court denying his application for conditional release from the custody of the Missouri Department of Mental Health (“the Department”). Greeno has a mental disease or defect that causes him to be dangerous: post-traumatic

stress disorder (chronic). He also has a diagnosis of alcohol and cannabis abuse, by history, in remission. He failed to persuade the circuit court by clear and convincing evidence, which is his burden, that he met the statutory requirements for release, and that he would not pose a danger to society if he were to be conditionally released from the custody of the Department. See §§ 552.040.12, .14, and .20, RSMo. Even though the trial court did not make a specific finding that Greeno has a mental disease or defect that makes him dangerous, and the trial court required him to prove he is dangerous, this Court's decision in *State v. Revels*, 13 S.W.3d 297 (Mo. banc 2000) makes it clear that his rights under the Due Process and Equal Protection Clauses were not violated. Because he failed to meet his burden, and because the Court's finding that he has a mental disease or defect that makes him dangerous can be inferred from the denial of his release, this Court should affirm the decision of the circuit court and uphold the denial of Greeno's application for conditional release.

STANDARD OF REVIEW

The standard of review of the denial of a conditional release is the same as that applied to appellate review of judgments following a bench trial. *Styles v. State*, 877 S.W.2d 113, 115 (Mo. banc 1994) (“*Styles II*”). Thus review of the denial of conditional release is governed by *Murphy v. Carron*, 536 S.W.2d 30 (Mo. banc 1976). See *Styles II*, 877 S.W.2d at 115. “A bench tried judgment which reaches the correct result will not be set aside even if the trial court gives a wrong or insufficient reason for its judgment.” *Graue v. Missouri Property Ins. Placement Facility*, 847 S.W.2d 779, 782 (Mo. banc 1993). The circuit court’s judgment will be sustained unless there is no substantial evidence to support it, unless it erroneously declares or applies the law, or unless it is against the weight of the evidence. *Murphy*, 536 S.W.2d at 32. A judgment will be set aside as being against the weight of the evidence upon “a firm belief that the decree or judgment is wrong.” *Id.* The reviewing court must give due regard to the trial court’s opportunity to have judged the credibility of the witnesses, and view the evidence and concomitant inferences in a manner favorable to the prevailing party while disregarding all contradictory evidence. *City of Beverly Hills v. Velda Village Hills*, 925 S.W.2d 474, 475 (Mo. App. E.D. 1996). This Court will not substitute its judgment for that of the trial court. *Spradlin v. City of Fulton*, 982 S.W.2d 255, 263 (Mo. banc 1998).

Where the trial court does make a specific finding, the reviewing court must assume the fact was found in accordance with the result reached. *State v. Revels*, 13 S.W.3d 293, 297 (Mo. banc 2000); *State v. Tooley*, 875 S.W.2d 110, 111 n.1 (Mo. banc 1994).

ARGUMENT

I.

The trial court did not err when it denied Greeno’s application for conditional release although it did not make a specific written finding that he has a mental illness that makes him dangerous, because it violates neither the Due Process and Equal Protection Clauses of the United States Constitution, nor Article I, Section 10 of the Missouri Constitution, in that there is no requirement that the court make such a finding, as this Court held in a recent unconditional release case, *State v. Revels*, 13 S.W.3d 293 (Mo. banc 2000). And to the extent *Styles v. State*, 838 S.W.2d 10 (Mo. App. W.D. 1992) and its progeny require trial courts to make such a finding in conditional release cases, those cases should be overruled by this Court.

The issue before the Court is whether a trial court must make a specific written finding that Greeno no longer suffers from a mental disease or defect that makes him dangerous before it can deny his conditional release him from the custody of the Department pursuant to Section 552.040.12, .14, and .20 RSMo., even though Greeno did not ask the trial court to make specific findings, there is a continuing presumption that he has such an illness,¹¹ and the evidence supported the conclusion that he would be

¹¹ Throughout this brief, the terms “mental illness” and “mental disease or disability” will be used interchangeably, even though mental illness has another definition under other Missouri statutes. *See, e.g.*, § 630.005(23), RSMo. As Justice Thomas has noted, not only do “psychiatrists disagree widely and frequently on what constitutes mental illness,” the United States Supreme Court “has used a variety of expressions to describe the mental condition of those properly subject to . . . confinement.” *Kansas v. Hendricks*, 521 U.S. 346, 359, 117 S.Ct. 2072, 2080 (1997). He went on to say, “[W]e have never required State legislatures to adopt any particular nomenclature” in drafting commitment statutes, and as a

dangerous. This Court should hold that the trial court is not required to make such a finding because while this is an issue of first impression for the Court in the context of a *conditional* release for an insanity acquittee, the identical issue was presented to the Court in *State v. Revels*, 13 S.W.3d 293, 296 (Mo. banc 2000), and this Court held that such a finding was not required when a court denies an *unconditional* release.

A. The Due Process Clause does not mandate that a court make a finding of mental illness before denying a conditional release.

In *Revels*, this Court held that the Due Process Clause of the United States Constitution was not violated by the Missouri statutory scheme governing unconditional releases. *Id.* at 296. *Revels*, like *Greeno*, argued that *Foucha v. Louisiana*, 504 U.S. 71, 112 S.Ct. 1780, 118 L.Ed.2d 437 (1992), “requires as a matter of due process, that the trial court make an express finding of a mental disease or defect before denying” a release, but this Court rejected that argument because “no such holding appears in *Foucha*.” *Id.* It also found that the Missouri statutes governing those releases satisfy the “holding of *Foucha*” that ““the indefinite detention of insanity acquittees who are not mentally ill but who do not prove they would not be dangerous to others.”” *Id.* (quoting *Foucha*, 504 U.S. at 83, 112 S.Ct. at 1787). Likewise, *Foucha* does not help *Greeno* given this Court’s pronouncement that it is inapplicable to cases

result, “the States have . . . developed numerous specialized terms to define mental health concepts” that often do not “fit precisely with the definitions employed by the medical community.” 521 U.S. at 359, 117 S.Ct. at 2081.

where, as here, mental health of a release applicant remains in dispute. *State v. Tooley*, 875 S.W.2d 110, 113 (Mo. banc 1994); *Styles II*, 877 S.W.2d at 115.

This Court's analysis of the constitutional issues in the context of an unconditional release case as articulated in *Revels* are applicable to the instant conditional release case. The statutory provisions governing the conditional release of insanity acquittees are virtually identical to those standards controlling unconditional releases – the ones this Court specifically found to be constitutional in *Revels*. See §§ 552.040.12, .14, and .20, RSMo.

Greeno articulates no constitutional basis for distinguishing this case from *Revels*. Instead he relies on a policy argument suggesting that unconditional release candidates present a potentially greater harm to society than do conditional release candidates. That argument is mere speculation. It misses the point. See Appellant's Substitute Brief, pp. 18-19.

In both types of releases, courts are confronted with the weighty decision of whether to release an individual with a history of violent behavior resulting from a mental disease back into the community. Society deserves to be protected from dangerous individuals. The purpose of Chapter 552, RSMo, is to keep those individuals who have been exonerated of responsibility for their crime because of a mental illness confined until they no longer pose a danger to society. See *Marsh*, 942 S.W.2d at 387; see also *State v. Hoover*, 719 S.W.2d 812, 817 (Mo. App. W.D. 1986). Even though Greeno would be under the supervision of the court through the personnel of the Department if he were to be released, he would still be living outside of a secure facility that provides constant supervision and oversight 24 hours a day, and placed in the community where his behavior and activities would be monitored with much less frequency, and without the access to the trained staff who could intervene quickly and efficiently should he become

violent.¹² And given the trial court's finding that it is his very confinement that keeps him from becoming physically violent, it would be self-defeating to mandate that the state remove the sole factor contributing to the limited mental health of an NGRI acquittee simply because he has not physically lashed out at anyone recently. Both *Foucha* and the future safety requirement of § 552.040.12, .14 and .20, RSMo, recognize as much.

In addressing the constitutionality of a portion of these release statutes, this Court already had one opportunity to distinguish between conditional and unconditional releases and it did not make such a distinction. In *State v. Tooley*, 875 S.W.2d 110 (Mo. banc 1994), the Court held that it was constitutional to place the burden of proof on an NGRI acquittee who sought an unconditional release. In *Styles II*, the Court faced the same issue with respect to conditional releases. The difference in the type of release was not significant for purposes of the constitutional issues in those cases, neither is it in the case before the Court today.

Certainly the legislature could distinguish between conditional and unconditional releases with regard to burdens of proof and persuasion. But Greeno presents no constitutional requirement that it do so, nor a constitutional basis for the courts to read such a distinction into the law. Thus his argument fails.

B. Greeno does not discuss how the failure to enter a finding on his mental illness violates rights to due process under Article I, Section 10 of the Missouri Constitution.

Greeno asserts that the trial court's denial of his application for conditional release without making a specific finding on his mental illness violates his rights under the due process provision of the Missouri Constitution, art. I, § 10. In his Argument, however, he does not explain or offer support for this

¹² According to the conditions of his proposed release, he would live at his own home. (L.F. 4)

conclusion, thus his point should be denied.

This Court's analysis and discussion of the due process issues in *Revels* and *Styles II* however, adequately address and rebut any concerns about any alleged infirmities of the conditional release statute with respect to the Missouri Constitution.

C. The Equal Protection Clause does not shift the burden of proof on the issue of mental illness to the State.

Greeno urges this Court to adopt the standards applicable to a civil commitment proceeding and to shift the burden of proof to the State because "*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 person acquitted by reason of mental disease." Appellant's Substitute Brief, p. 20. Greeno's reliance on *Foucha* is misplaced, however, because the State has not conceded the issue of mental illness.

Tooley, 875 S.W.2d at 113; *Styles II*, 877 S.W.2d at 115.

Additionally, Greeno's argument overlooks the continuing presumption of illness causing him to be dangerous and that it is his burden to establish, at the time of his release hearing, that he is free from that illness. Section 552.040.12, RSMo; *Revels*, 13 S.W.3d at 297; *Jones v. United States*, 463 U.S. 354, 363-366, 370, 103 S.Ct. 3043, 3049-3051, 3053 (1983). A judicial finding that at a given point in time an individual may not be suffering from an illness to the extent that it makes him dangerous does not mean that point is established forever.

In this regard, this case parallels *Revels*. Prior to filing the application for unconditional release that was the subject of the appeal, Revels received two conditional releases. *Revels*, 13 S.W.3d at 295. If Greeno's argument were to be accepted, there would have been no need for this Court to analyze the issue of his mental illness further than to find that he no longer suffered from such an illness because of the findings at the time of the conditional release hearing.

Greeno's argument also flies in the face of the testimony of his own medical expert that his illness is permanent and chronic.¹³ (Tr. 41-42). Also, even though he received a conditional release in 1993, that decision did not constitute a finding that he is permanently free of a mental illness that makes him dangerous. He erroneously equates the lack of symptoms with the lack of a mental disease or defect. A person can have a mental illness or disease, yet not be displaying any symptoms. *See* discussion at pp. 50-51, *infra*. By requiring that Greeno and all other insanity acquittees must receive judicial approval before they can be granted a conditional or unconditional release, the law recognizes as much. Section 552.040, RSMo. The undisputed medical evidence is that regardless of whether he exhibits symptoms at any particular time, Greeno's condition is permanent and incurable. (Tr. 41-42, 197). He can, of course, learn to manage the symptoms and control his behaviors. But he has not. (Tr. 197).

D. Greeno raises the issue of findings for the first time on appeal.

Greeno makes much ado of the trial court's failure to set forth findings of fact to justify its denial of his conditional release application. He did not, however, request any such findings of the circuit court pursuant to Supreme Court Rule 73.01(c), and there is no language in a statute otherwise mandating that the court enter either detailed or general findings on the denial of a conditional release. This is not surprising as a recitation of the facts found at hearing serves little purpose where a litigant fails to make a

¹³ Dr. Vlach, testifying for the State, described Greeno's condition thus: "[T]he tendency or the vulnerability or potential to be bothered by some of these events is not going to go away in Mr. Greeno's case. But . . . he can learn to control better." (Tr. 197)

case that is his burden to make. Where Greeno had the burden of proof below, this Court should simply assume from the circuit court's judgment that Greeno simply failed to meet that burden. *Revels*, 13 S.W.3d at 295-96; *Tooley*, 875 S.W.2d at 111 n.1.

E. *Styles I* and its progeny must be overruled.

Greeno urges this Court to follow the *Styles v. State*, 838 S.W.2d 10 (Mo. App. W.D. 1992) ("*Styles P*") decision and to hold that specific findings on the issue of mental illness are mandated by the constitution. Appellant's Substitute Brief, pp. 17-20. The Court of Appeals below agreed with him and so found. *Greeno v. State*, No. WD 57517, slip op. at 6-10 (Mo. App. W.D., Nov. 28, 2000) (R. App. A12-A16). As discussed above, however, due process does not require the entry of such findings, so to the extent *Styles I* and its progeny¹⁴ require the entry of such a finding, that case and the appellate cases

¹⁴ *Viers v. State*, 956 S.W.2d 465, 467 (Mo. App. W.D. 1997); *Marsh v. State*, 942 S.W.2d 385, 388 (Mo. App. W.D. 1997); *McKee v. State*, 923 S.W.2d 525, 527 (Mo. App. W.D. 1996); and, *Stallworth v. State*, 895 S.W.2d 656, 658 (Mo. App. W.D. 1995). In *Rawlings v. State*, 22 S.W.3d 719, 724 (Mo. App. W.D. 1999), the court made reference to the *Styles I* decision but its decision is based on

which have followed it should be overruled.¹⁵

The trial court's order is supported by the weight of the evidence and it does not engender a belief that it is wrong. *Murphy v. Carron*, 536 S.W.2d at 32. Greeno's first point must be denied.

other grounds.

¹⁵ *State v. Dudley*, 903 S.W.2d 581, 583 (Mo. App. W.D. 1995), an unconditional release case that followed *Styles I*, has already been overruled to the extent it requires specific findings of mental illness. *Revels*, 13 S.W.3d at 296[2].

II.

The trial court did not err by requiring Greeno to prove by clear and convincing evidence that he no longer has a mental illness that makes him dangerous because Sections 552.040.12, .14, and .20, RSMo, place that requirement on him, and his acquittal of violent criminal charges on the grounds of mental disease or defect creates a presumption of continuing mental illness, in that neither his 1993 conditional release, nor the findings made at the time of its revocation, vitiated the presumption, and the evidence at his 1999 conditional release hearing did not rebut that presumption nor establish the absence of such an illness.

A. Greeno must prove that he is not dangerous.

The trial court correctly held that Greeno did not establish by clear and convincing evidence that he no longer has a mental illness that causes him to be dangerous in order for him to be conditionally released from the Department. It is his burden to prove as much. Section 552.040.12, .14, and .20 RSMo; *see also Revels*, 13 S.W.3d at 297; and, *Styles II*, 877 S.W.2d at 115. Missouri law precludes a release “unless it is determined that the committed person is not likely to be dangerous to others while on conditional release.” Section 552.040.14, RSMo. The State has no duty to make an affirmative showing of present and future mental illness and dangerousness. *Styles II*, 877 S.W.2d at 115. The burden to establish the lack of dangerousness is placed on the acquittee because once he is found NGRI, there is a presumption of continuing mental illness that causes dangerousness. *Revels*, 13 S.W.3d at 297; *Jones*, 463 U.S. at 363-366, 370, 103 S.Ct. at 3049-3051, 3053. It is Greeno’s burden to persuade on those issues by clear and convincing evidence. *Styles II*, 877 S.W.2d at 114-115; *State v. Zingre*, 980 S.W.2d 355, 356 (Mo. App. S.D. 1998).

Clear and convincing evidence is “evidence that instantly tilts the scales in the affirmative when weighed against the evidence in opposition and the finder of fact is left with the abiding conviction that the

evidence is true.” *State v. Canchola*, 954 S.W.2d 691, 694 (Mo. App. W.D. 1997). It is “proof so clear, direct, weighty, and convincing as to enable the fact finder to come to a clear conviction, without hesitation, of the matter asserted . . . ; it is that degree of proof that will produce in the trier of fact a firm conviction as to the allegation sought to be established.” *Maxwell v. Bierbaum*, 893 S.W.2d 346, 348 (Ark. 1995) (citations omitted). Greeno’s evidence does not measure up to that standard.

Greeno asserts the trial court erroneously placed the burden on him because he did not have mental illness. Respondent will not repeat here its arguments regarding the constitutionality of Section 552.040, RSMo, but will instead refer the Court’s attention to the arguments in Point I of this Brief for a discussion on that point.

B. Greeno’s NGRI adjudication establishes the existence of his mental illness.

Greeno has been adjudicated NGRI, thus any release from the custody of the Department must be accomplished by the procedures set out in Chapter 552, RSMo. *See* § 552.040.3, RSMo.

(“Notwithstanding any other provision of law to the contrary, no person . . . shall be conditionally or unconditionally released unless the procedures set out in this section are followed.”). Greeno suggests that the court ignore that requirement and instead use the civil commitment standards and procedures.¹⁶ He bases that claim on his conditional release in 1993, and the finding of the Department’s administrative hearing officer in 1996 that he was not exhibiting active symptoms of a mental illness. *See* Appellant’s Substitute Brief, p. 23. His argument overlooks one critical fact: his status as an insanity acquittee was

¹⁶ In a civil commitment the state has the burden to prove that a person is dangerous and has a mental illness before he can be committed to a mental health facility. *See* § 632.300 *et seq.* Applying that a standard to the case of insanity acquittee is impermissible as it would contradict § 552.040, and *Styles II*, 877 S.W.2d at 115, *Tooley*, 875 S.W.2d at 113-14, and *Revels*, 13 S.W.3d 293.

neither extinguished nor altered as a result of those two proceedings. In order for him to obtain a release from the Department, he must follow the procedures set out in § 552.040, which means the burden is on him to establish the current basis for his release.

Greeno's reliance on *Foucha* is misplaced because in that case the state conceded that Foucha no longer suffered from a mental illness. *Foucha v. Louisiana*, 504 U.S. 71, 87, 112 S.Ct. 1780, 1789 (1992). The state has never conceded that point in this case; to the contrary, the state has vigorously opposed Greeno's release and has adduced substantial evidence to establish the existence of his illness. (Tr. 40, 41-42; S.L.F. 7, 15; App. 37-38). *Foucha* is thus inapplicable to this case.¹⁷

¹⁷ See *Styles II*, 877 S.W.2d at 115 (*Foucha* inapplicable to cases where the state does not concede that insanity acquittee does not have a mental illness that causes him to be dangerous); see also *Tooley*, 875 S.W.2d at 112.

Greeno apparently believes the findings of the Department's hearing officer amount to a judicial finding that he no longer has a mental disease or defect for which he can be held by the Department. Again, he is wrong. His argument disregards the continuing presumption of mental illness he carries as a result of his acquittal on the grounds of insanity.¹⁸ The only way for him to rebut that presumption is to establish it by clear and convincing evidence and to have a finding by a court of competent jurisdiction on the issue.¹⁹ As discussed more fully in Point I, the Department hearing officer does not have the authority to declare Greeno free of a mental disease or defect in any way that would be binding on the courts, and in fact, he did not. He merely found that, at the time of the hearing, Greeno was not exhibiting "active symptoms of a mental illness." (App. 8).

And even though he received a conditional release in 1993, that decision did not constitute a finding that Greeno is permanently free of a mental illness. Greeno erroneously equates the lack of symptoms with the lack of a mental disease or defect. A person can have a mental illness or disease, yet not be displaying any symptoms. *See, e.g., Grass v. Nixon*, 926 S.W.2d 67 (Mo. App. E.D. 1996). By requiring that Greeno and all other insanity acquittees must receive judicial approval before they can be granted a conditional or unconditional release, the law recognizes as much. Section 552.040, RSMo.

Because the State does not have the burden to establish the presence of a mental illness that makes him violent, Greeno would have this Court impose an improper standard on the trial court. The appropriate standard is articulated in *Styles II*, 877 S.W.2d at 115, and in *Revels*, 13 S.W.3d at 297, not, as

¹⁸ *See, e.g., Foucha* 504 U.S. at 87, 112 S.Ct. at 1789; *Jones*, 463 U.S. at 366, 103 S.Ct. at 366; *Tooley*, 875 S.W.2d at 112.

¹⁹ Courts must make such a finding before granting an unconditional or conditional release to an insanity acquittee. *See* § 552.040.9 and .14, RSMo.

Greeno suggests, *Foucha*. See Appellant’s Substitute Brief, p. 23. Reviewing the record using the proper standard, it is clear the overwhelming evidence supports a finding that he will be dangerous if he were to be released.

C. The evidence supports the conclusion that Greeno has a mental disease or defect.

There was ample evidence in the record that PTSD is a mental disease or defect within the meaning of §§ 552.010 and 552.040, RSMo, that his mental illness was present at the time of the 1999 hearing, and that it is his illness that makes him violent and dangerous. The testimony of Greeno’s doctor and Dr. Vlach confirm that Greeno has a mental disease. (Tr. 41-42, 197; S.L.F. 7, 15; App. 37-38). Both testified that Greeno suffers from PTSD. (Tr. 40, 191; S.L.F. 7, 15; App. 37-38). This diagnosis was shared by Greeno’s former psychotherapist, Tom Patterson, Ph.D., who described Greeno’s PTSD as “severe, chronic, and untreatable.” (App. 48). Greeno also has a diagnosis of alcohol and cannabis abuse, in remission. Dr. Parwatar, a psychiatrist and certified forensic examiner, and Dr. Mandracchia, both opined that PTSD is a mental disease or defect within the meaning of Section 552.010, RSMo. (S.L.F. 7, 15).²⁰ Dr. Peterson, the doctor Greeno presented to testify on his behalf, in his report noted that PTSD is, “[a]ccording to RSMo 552, . . . a mental condition.”²¹ (App. 39). In other words, Greeno

²⁰ They did not testify at the hearing but their opinions are contained in reports they prepared for the courts to evaluate Greeno’s competency to stand trial on the 1990 charges of assault of a police officer in the second degree and armed criminal action (S.L.F. 1-9), and the 1995 charges of second degree assault (of a female victim), and armed criminal action. (S.L.F. 10-16)

²¹ Even if the Court should find that Dr. Peterson’s evidence does not support a finding Greeno has a mental illness, the other evidence clearly and convincingly supports such a finding.

continues to suffer from the type of mental disease or defect contemplated by Section 552.040, RSMo.

Mental diseases or defects include

congenital and traumatic mental conditions as well as disease. They do not include an abnormality manifested only by repeated criminal or otherwise antisocial conduct, whether or not such abnormality may be included under mental illness, mental disease or defect in some classifications of mental abnormality or disorder. . . .

Section 552.010, RSMo.

There is ample evidence to establish that Greeno is exhibiting symptoms of the illness (i.e., his verbally abusive and threatening behavior to hospital staff and his violent and assaultive behavior while on conditional release). In his brief, however, Greeno overlooks a simple, but critically important fact: Even if he is not exhibiting symptoms of the disease, or if it is in remission, he still has a mental illness. The word remission implies that the illness, in this case the mental disease or defect excluding responsibility, still exists but that its symptoms are temporarily abated. *Stedman's Medical Dictionary* 1526 (25th ed. 1995) defines remission as an “[a]batement or lessening in severity of the symptoms of a disease,” or the “period during which such abatement occurs.” Abatement is the “[d]ecrease in severity of . . . symptoms.” *Taber's Cyclopedic Medical Dictionary* 1 (18th ed. 1997).²²

The mere absence of current symptoms — all that Greeno attempted to establish below — does not establish the absence of a mental illness. *Revels*, 13 S.W.3d at 295; *Grass*, 926 S.W.2d at 71-72;

²² See also *Black's Law Dictionary* 4, 1294 (6th ed. 1990) (similar definitions of remission and abatement).

Marsh, 942 S.W.2d at 390, 392. This Court has implicitly acknowledged this point. In *Revels*, the insanity acquittee was not exhibiting symptoms of a mental illness but his judgment or insight was no longer intact, and was impaired. *Revels*, 13 S.W.3d at 295. Yet the Court held that the trial court properly denied Revels' request for release. *Id.* at 296-97. All three divisions of the Missouri Court of Appeals have considered this issue in the context of either conditional or unconditional releases, and they agree that a person with a mental illness in remission still has a mental illness. *Grass*, 926 S.W.2d at 69-71; *Marsh*, 942 S.W.2d at 388-390; *State v. Ross*, 795 S.W.2d 648, 650 (Mo. App. S.D. 1990).

So even though Greeno now argues that there is no evidence to support a finding that he has a mental disease or defect that makes him dangerous,²³ the record clearly refutes this assertion.

²³ See Appellant's Substitute Brief, p. 23-24.

Even if this Court were to agree with the Court of Appeals²⁴ and find, however, that the record is not clear on this point, then the issue must be resolved against Greeno. He bears the burden to prove his lack of such an illness, and any uncertainty in the record on this key factual issue needed to determine his suitability for release is detrimental to his cause. Uncertainty on this issue mandates the affirmation of the trial court's order. In *Marsh v. State*, the Western District upheld the denial of a conditional release because the medical evidence concerning the acquittee was "replete with uncertainties." *Marsh*, 942 S.W.2d at 389. If Greeno seriously contends that the record is not clear on this point, then he failed to present clear and convincing evidence that he does not have a mental illness that makes him dangerous and he "must bear the burden where less certainty exists." *Grass*, 926 S.W.2d at 72.

The trial court's judgment is not against the weight of the evidence, nor does it erroneously declare or apply the law, *Murphy*, 536 S.W.2d at 32, thus it should be affirmed. Greeno's point should be rejected.

²⁴ *Greeno*, slip op. at 10 (R. App. A16).

III.

The trial court did not err in finding that Greeno had a “propensity toward violence” and would be dangerous if he were to be released because the weight of the evidence demonstrates that Greeno did not clearly and convincingly establish that he would not be dangerous, as required by Sections 552.040.12, .14 and .20, RSMo, in that he has a long history of violent behavior, he verbally threatened staff and patients in the hospital, and a medical expert opined that given those factors, and others, including Greeno’s continuing mental illness and lack of insight into it, Greeno would be dangerous if released.

Greeno did not establish by clear and convincing evidence that he will not be dangerous if he is released. Section 552.040.12, .14 and .20, RSMo. His history of violent and assaultive behavior, his violent outbursts toward staff and other patients while at Northwest, his continuing mental illness and his lack of insight into or understanding of the illness, all combine to make him dangerous, and the trial court so found. (R. App. A4-A5).

Greeno’s attempts to paint himself as non-violent because a jury could not reach a verdict on his 1995 assault charges (an alleged assault that occurred while he was on conditional release and that resulted in the revocation of that release), and that he was not physically assaultive while in the hospital, are not persuasive. *See* Appellant’s Substitute Brief, pp. 26-27. The record below provides more than adequate support for the circuit court’s rejection of his claim that he was not likely to be dangerous. The circuit court correctly concluded, on the basis of the whole record, that the only thing keeping Greeno’s violent behavior at bay is not Greeno himself, but the very fact of his confinement and the supervision and oversight of the trained staff.

The evidence of his dangerousness includes, but is not limited to, his behavior in the Department facilities (including his most recent aggressive and threatening behaviors against the hospital staff),

behavior that resembles his conduct outside the facility (e.g., his violent, illegal, and suicidal acts committed before he was placed in the custody of the Department, and then while he was on release),²⁵ his mental illness, and his lack of insight into it. Dr. Vlach testified that Greeno also continues to exhibit a pattern of threats that extend back to 1990 and the criminal conduct that resulted in his commitment to the Department, and given his failure to participate in treatment at Northwest, he is likely to continue repeating this pattern if he is released. (Tr. 209-211, 220-21). He believes that Greeno will be violent, and he would be concerned about the safety of the public, if Greeno is released from the hospital. (Tr. 238).

²⁵ See pp. 11-22, *supra*.

Dr. Vlach's testimony that Greeno might not be "imminently dangerous"²⁶ is of no moment since, instead, the court must be satisfied that Greeno "is not likely to be dangerous to others while on release," § 552.040.14, RSMo, and Dr. Vlach testified unequivocally that Greeno would indeed be violent and a threat to the public safety. (Tr. 210, 238) Thus to the extent Greeno asks this Court to adopt this standard, he urges this Court to read into the statute additional requirements, and thus commit error.

Even though the doctor testifying for Greeno tried to minimize his conduct at Northwest by asserting that the hospital staff labeled it only as "simple assault" (i.e., verbal aggression) and did not place him in restraints, (Tr. 32-38, 103-04), the fact is that the staff at Northwest uses restraints sparingly and only as a last resort, and then only if the patient initiates physical violence. (Tr. 222-25). The staff exhausts every non-physical method of defusing an explosive patient before physical restraints would be considered appropriate. (Tr. 222-25). The trial court found the hospital "requires staff to 'back off' in the face of verbal aggression and does not consider a patient's conduct more than 'simple' assault, if the patient does not block the staff member's escape. This allows Mr. Greeno a great deal of latitude to abuse the staff with verbal threats, with near-impunity." (R. App. A4-A5).

The trial court also agreed with Dr. Vlach that the only thing that keeps Greeno from any physical acts of violence is the fact that he is confined (R. App. A5) and the presence of professionally trained staff. (Tr. 220-221, 229-30, 247). And the fact that Greeno was not physically restrained when he made the threats in no way minimizes their seriousness nor the fear the staff may have of him when he threatened to hurt them if they were outside the hospital. (Tr. 134, 313). The court believed Greeno was instrumental in "running off" some of the employees and that he "goes just as far as he can safely go,

²⁶ See Appellant's Substitute Brief, p. 28.

short of receiving a security write-up.” (R. App. A3).

Dr. Vlach expressed great concern about how the recency of Greeno’s threatening behavior betrays his lack of insight into his illness and how he is not managing his behaviors, and that he has a long established pattern of threatening people when he does not get his way. (Tr. 209-221, 276).

Additionally, Greeno does not have good insight into his mental illness or his alcohol addiction (Tr. 205-09), and while the doctors can identify some situations or episodes that have caused him to commit dangerous behaviors in the past,²⁷ no one can predict with any certainty what other type of incident or episode would exacerbate his illness and thereby cause him to commit more violence. But if past behavior is any predictor of future behavior,²⁸ if he were to be released, he will likely begin drinking again and become violent.

Even if one were to accept Greeno’s argument that he is not acting in a physically violent manner as a result of his illness, such conduct is not dispositive under *Foucha*, 504 U.S. 71, 112 S.Ct. 1780. There, Justice O’Connor said that there should be judicial deference to a statutory determination that “the inference of dangerousness drawn from a verdict of not guilty by reason of insanity continues even after a

²⁷ Examples include: Greeno’s history of alcohol consumption to “self-medicate” (Tr. 205-209); the occasion where he relived, or flashbacked to, a combat experience (as he said he did when he entered the bedroom of the thirteen year-old girl in 1990) (S.L.F. 13-15); and the time he drove down the wrong side of the highway after learning of the bombing of the federal building in Oklahoma City or the death of the American soldier. (S.L.F. 3; App. 31, 36)

²⁸ Presumably it is given Dr. Vlach’s concern that Greeno will continue repeating his pattern of violent and threatening behaviors. (Tr. 209-211, 220-21)

clinical finding of sanity.’²⁹ *Foucha*, 504 U.S. at 87, 112 S.Ct. at 1789. The trial court appears to have given that deference in this case. Neither is Greeno’s argument dispositive under *Jones*, 463 U.S. at 365, 103 S.Ct. at 3050 (“This Court never has held that ‘violence,’ however that term might be defined, is a prerequisite for a constitutional commitment”).

Moreover, in connection with release requests from insanity acquittees, “[c]ourts have . . . found the need for extreme caution when the crime previously committed by the party seeking release was murder, for in such a case the risks are immense if an error is made. . . . The Missouri statute similarly imposes a higher burden on those who have

²⁹ Further, Justice O’Connor’s concurring opinion makes clear that even if Greeno were to suggest that because his mental illness is in remission he is entitled to a release, was not the position being adopted by the Supreme Court. Justice O’Connor stated: “I do not understand the Court to hold that Louisiana may never confine dangerous insanity acquittees after they regain mental health.” *Foucha*, 112 S.Ct. at 1789 (O’Connor, J., concurring in part and concurring in the judgment) (*cited with approval in Tooley*, 875 S.W.2d at 113, n.4). Justice O’Connor provided the crucial fifth vote in *Foucha*, so her opinion effectively sets forth the law on this issue.

committed certain listed, particularly violent, crimes.” *Dudley*, 903 S.W.2d at 587; *see also Marsh*, 942 S.W.2d at 390. In the same vein, the Eastern District of this Court has noted that “the offense of murder demonstrates a mental illness that poses a risk to public safety of the highest order. Consequently, the evidence of the committed’s mental condition must be of an equally high order to constitute clear and convincing evidence.” *Grass*, 926 S.W.2d at 71.

Even though Greeno was not acquitted of murder charges, the principle articulated above in the *Grass*, *Dudley* and *Marsh* cases make clear that the assaultive behavior that placed him with the Department (and that he continued to exhibit while on conditional release), require a high degree of proof concomitant to those charges. The evidence of his conduct, reviewed with the appropriate level of caution, supports the trial court’s denial of his release application, and that decision should be upheld. The judgment tacitly recognizes the “legislative intent not to treat our community as a test tube for psychiatric discovery; clear and convincing certainty of public safety must exist prior to conditional release.” *Grass*, 926 S.W.2d at 67, 71-72.

Grass supports affirmation of the judgment. *Grass* was acquitted of murdering his wife, and following his commitment to the Department, he made application for conditional release. *Grass*, 926 S.W.2d at 68. The conditions of his release were similar to those proposed by Greeno. *Id.* The trial court granted the release, but the Court of Appeals reversed. *Id.*

At the hearing, *Grass* presented the testimony of three psychiatrists, all of whom opined that he was suffering from a “psychotic disorder, not otherwise specified,” in remission. *Id.* at 69. *Grass*’s experts testified that he was not a threat or a danger to

himself or others, that he possessed the capacity to appreciate the criminality of his violent crime against another person, and that he could conform his conduct to the requirements of the law. *Id.* The Department opposed Grass's release, and a psychologist and psychiatrist testified that the actual "trigger" that caused his break with reality (and which resulted in the murder of his wife) could not be determined. *Id.* None of the psychiatrists could explain the cause of Grass's illness or identify the stressors that triggered his violent behavior, and Grass was "equally ignorant of the stressors to avoid and the methods of treatment and prevention." *Id.* at 72. Grass's experts contended that "he is not a danger to others because he no longer acts psychotic; psychotic disorders do not typically recur; and harm to others upon a relapse could be avoided because Grass would demonstrate psychotic symptoms prior to a violent act and his release could be suspended." *Id.* at 71. The court weighed that evidence, in the context of the statute governing conditional releases, against the uncertainty associated with Grass's condition and his lack of insight into it, and reversed the trial court's grant of his release. *Id.* at 72.

Using the standard established in *Grass*, the case for reversing the trial court here is even more compelling. While Greeno's treatment team has identified the causes of his condition (unlike Grass's doctors), Greeno's insight is now lacking. Greeno is now making verbal threats at the staff, and with his track record of violent and illegal behavior when he is not housed in a state facility, it would be self-defeating to mandate that the state remove the primary factor contributing to the limited mental health of a not guilty by reason of insanity acquittee simply because that person has not physically assaulted anyone shortly before his release hearing. The future safety inquiry of

§ 552.040.12, .14 and .20, RSMo, recognizes as much, and Greeno has failed to meet the burden it places on him.

Greeno's third point must fail. The great weight of the evidence supports the trial court's judgment, *Murphy*, 536 S.W.2d at 32, thus it should be affirmed.

CONCLUSION

The trial court did not err when it denied Greeno's conditional release even though it did not make a written finding that he had a mental illness that makes him dangerous. The trial court's judgment should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of this brief, and a labeled disk containing same, were sent via U.S. Mail, postage prepaid, this 14th day of May, 2001, to:

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Certification of Compliance with Special Rule No. 1

The undersigned hereby certifies that the foregoing brief complies with the limitations contained in Special Rule No. 1(b), and that the brief contains 13,106 words.

The undersigned further certifies that the disk simultaneously filed with the hard copies of the brief has been scanned for viruses and is virus-free.

Assistant Attorney General