IN THE
MISSOURI SUPREME COURT

LLOYD GRASS,	)	
	)	
Appellant,	)	
	)	
vs.	)	No. 85517
	)	
	)	
STATE OF MISSOURI,	)	
	)	
Respondent.	)	

APPEAL TO THE MISSOURI SUPREME COURT
FROM THE CIRCUIT COURT OF WARREN COUNTY, MISSOURI
TWELFTH JUDICIAL CIRCUIT, DIVISION I
THE HONORABLE JOHN C. BRACKMANN, SPECIAL JUDGE

APPELLANT'S SUBSTITUTE STATEMENT, BRIEF AND ARGUMENT

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JURISDICTIONAL STATEMENT

Lloyd Grass appeals the circuit court's denial of his motion under Section 552.040, RSMo 2000,[1] for an unconditional release from the custody of the Missouri Department of Mental Health, to which he was committed after the State accepted his plea of not guilty of first-degree murder by reason of mental disease or defect in 1994. The Missouri Court of Appeals, Eastern District, first heard the case. Missouri Constitution, Article V, Section 3; Section 477.050. After the Court of Appeals affirmed, this Court granted Mr. Grass' application for transfer under Rule 83.03, vesting jurisdiction in the Court. Missouri Constitution, Article V, Sections 3 and 10.

[1] All further references will be to RSMo 2000.

STATEMENT OF FACTS

Lloyd Grass was charged with the first-degree murder of his wife, Sherry, in Warren County Circuit Court in October of 1992 (Supp. L.F. 1).[2] On September 6, 1994, the Honorable John C. Brackmann accepted Mr. Grass' plea of not guilty by reason of mental disease or defect excluding criminal responsibility (Supp. L.F. 2-3). In March 1995, Mr. Grass was transferred from Biggs Forensic Center, the maximum security unit at Fulton State Hospital, to St. Louis State Hospital,[3] a less restrictive environment in which to continue his rehabilitation (L.F. 23-24, 41).

In December 1995, the Circuit Court of the City of St. Louis granted Mr. Grass a conditional release (L.F. 24, 41). The order was stayed pending the State's appeal (L.F. 24), and the Court of Appeals reversed. **Grass v. Nixon**, 926 S.W.2d 67 (Mo. App., E.D. 1996). Several months after the Court's decision, Mr. Grass escaped from St. Louis State Hospital (L.F. 24).

Mr. Grass was captured in New York City in January 1997 and eventually extradited to Missouri (L.F. 24, 41). He was convicted of escape from commitment and sentenced to a term of five years in the custody of the Missouri Department of Corrections (Supp. L.F. 39-41). A motion for unconditional release from the custody of the Department of Mental Health was heard and denied in

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[2] The record on appeal will consist of a legal file (L.F.), supplemental legal file (Supp. L.F.), and the transcript from the release hearing (Tr.).

1999 (Tr. 33). Mr. Grass was paroled back to the custody of the Department of Mental Health, over his objections, in March of 2001 (L.F. 42).

Mr. Grass filed several motions for release after August of 1999 (L.F. 9-12, 16-30, 49-51). The parties proceeded on the April 12, 2000, petition for unconditional release at an evidentiary hearing held on December 18, 2001 (L.F. 10; 16-30). Mr. Grass had requested an independent mental evaluation when he filed the petition, in April of 2000, (L.F. 2), and the State filed a request for a mental examination with its objections to the petition in May (L.F. 3). In September of 2001, the State filed an evaluation of Mr. Grass performed by Rick Gowdy, Ph.D., and requested a hearing date (L.F. 5, 37-48; Tr. 17). It was the only evaluation done for the purpose of the hearing (Tr. 15-16).[4] The report does not allude to a court order or other source or request for the examination (L.F. 37-48).

Pretrial proceedings

Mr. Grass represented himself at the hearing on December 18, 2001 (L.F. 7). During the conference preceding the hearing, there was discussion about whether an order for an examination had been executed (Tr. 14-15). Judge Brackmann noted his exasperated entry of February 6, 2001: THE COURT

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[3] Now known as St. Louis Psychiatric Rehabilitation Center (Tr. 97).

[4] Several months before the hearing, Mr. Grass filed a report by Dr. Jerome Peters, but it was an evaluation performed for the purpose of determining if Mr. Grass should be moved to a less restrictive environment (L.F. 49-51; Tr. 40, 60).

NOTES THAT IT HAS SUSTAINED A MOTION FOR REEXAMINATION, BOTH PARTIES HAVING REQUESTED ONE, AND ASKS (BEGS) THE STATE TO TAKE CARE OF THIS. JCB (Tr. 14-15; L.F. 4) (*emphasis in original*). The court found an unsigned Order, prepared by the State, in the file (Tr. 15).

Mr. Grass argued that Dr. Gowdy's evaluation and testimony should be excluded from the hearing because of personal and professional bias, and because he was entitled by statute to an evaluation separate from the one arranged by the State (Tr. 10-12). The court remarked that the examination "must be the State's" since Mr. Grass was disavowing it (Tr. 18). Judge Brackmann told Mr. Grass that he could hire anyone he wished, but the court was not going to appoint a private psychiatrist (Tr. 16).

A month before the hearing, Mr. Grass filed a request for findings of fact and the pertinent conclusions of law on the issue of whether he suffered from a mental disease or defect, citing Rule 73.01 and pertinent caselaw (L.F. 57). He reiterated his request before the introduction of evidence at trial, and Judge Brackmann said "I think you have an absolute right to that." (Tr. 18).

Resume of the testimony of witnesses, in order of appearance, bearing on issues raised in this appeal. Rule 84.04(c).

Jerome Peters, D.O., psychiatrist

When Dr. Peters first examined Lloyd Grass, in October 1992 shortly after the homicide, he concluded that Mr. Grass had suffered a brief reactive psychosis

(Tr. 27). Psychosis describes the state of mind wherein a person loses contact with reality (21). Psychological or physiological stress can induce a reactive psychosis (Tr. 36). Dr. Peters examined Mr. Grass again, in June 2001, to advise the administration as to whether he should be transferred out of the maximum security facility to a less restrictive environment elsewhere at the Hospital (Tr. 40, L.F. 49-51). He recommended that Mr. Grass be moved to a medium security facility (Tr. 45), but the recommendation was disregarded (Tr. 42).

Dr. Peters discussed another diagnosis found elsewhere in Mr. Grass' records, an illness known as "psychotic disorder not otherwise specified," and explained why he did not think it was an accurate diagnosis (Tr. 22-27, 56). Dr. Peters considers Mr. Grass' mental illness to be in full remission, which he explained by analogy to the condition of a cancer survivor after he has remained free of the disease for five years (Tr. 29-30). Dr. Peters listed no diagnosis for Mr. Grass on his June 2001 report because he saw no signs of a psychotic disorder (Tr. 52). In his opinion, Mr. Grass was not suffering from a mental disease or defect at the time of the report (Tr. 52), and at the time of the hearing, Dr. Peters considered him neither mentally ill nor dangerous (Tr. 58). Dr. Peters noted that his review of the records showed that Mr. Grass had never been violent, and he had never been prescribed psychotropic medication (Tr. 43-44).

Dr. Peters explained that he had not evaluated Mr. Grass' for purposes of formulating an opinion about his suitability for unconditional release from custody, and he could not offer such an opinion (Tr. 59). Dr. Peters also could not

offer an opinion, based on the evaluation he did in June 2001, about the likelihood of Mr. Grass becoming dangerous or mentally ill in the reasonable future (Tr. 59).

Lori DeRosear, MD., psychiatrist

Dr. DeRosear spent many hours in therapy with Mr. Grass when he was at St. Louis State Hospital from March 1995 through August 1996 (Tr. 67). She did not see any symptoms of psychosis during the time Mr. Grass was her patient (Tr. 70). Dr. DeRosear has not seen Mr. Grass since 1996 (Tr. 77), and did not offer a diagnosis at the hearing, but she testified at a hearing on Mr. Grass' petition for conditional release in 1995 that his illness was in remission. **Grass v. Nixon**, 926 S.W2d 67, 69 (Mo. App., E.D. 1996). Dr. DeRosear said that there is no medication for Mr. Grass' condition (Tr. 72). She was not able to predict if Mr. Grass would become sick again (Tr. 76).

Mario Carrera, M.D., psychiatrist

Dr. Carrera treated Mr. Grass at St. Louis State Hospital when he was there from March 1995 through August 1995 (Tr. 85). To his knowledge, Mr. Grass was never violent, and he did not take medication for mental illness (Tr. 87). Although he knew nothing of Mr. Grass' current medical status (Tr. 90), Dr. Carrera testified that Mr. Grass' illness was in remission at the 1995 hearing. **Grass**, *id*. Dr. Carrera said that he could not make a prediction about the likelihood of Mr. Grass' illness returning in the future (Tr. 91).

Antonina Gesmundo, MD., psychiatrist

Dr. Gesmundo was assigned as Mr. Grass' psychiatrist from September

1995 through February 1996 (Tr. 97). During the period that the doctor saw Mr. Grass, she did not see any signs or symptoms of mental illness (Tr. 103). Based on her knowledge of Mr. Grass when he was at St. Louis State Hospital, and her review of the records from Fulton State Hospital, Dr. Gesmundo testified that Mr. Grass was never violent, and he did not take medication for mental illness (Tr. 98). Although she knew nothing of Mr. Grass' current medical status (Tr. 101), Dr. Gesmundo testified at the 1995 conditional release hearing that Mr. Grass' illness was in remission. **Grass**, *id*.

Steven Mandracchia, Ph.D., psychologist

Dr. Mandracchia, working with a psychiatrist, evaluated Mr. Grass in September, 1997, for the purpose of making a report to the trial court after he was charged with escape from confinement (Tr. 112-113). Dr. Mandracchia testified that he found Mr. Grass to be criminally responsible at the time he escaped from St. Louis State Hospital, and that he was competent to be tried (Tr. 115). He further reported that Mr. Grass was not suffering from a mental disorder at the time of the examination (Tr. 115).

Bruce Harry, M.D., psychiatrist

Dr. Harry met with Mr. Grass extensively from May 1997 through June 1998 (Tr. 121). Dr. Harry did not observe any signs of psychosis during his time with Mr. Grass (Tr. 122). The doctor saw Mr. Grass again a few weeks before the hearing, and reviewed more recent reports relating to his condition (Tr. 122). Dr. Harry testified that in his opinion, a number of environmental factors came

together to produce the psychosis that Mr. Grass had experienced, and that no one of them could be considered the determinative cause (Tr. 132). He explained that the qualifier "in remission" did not mean a condition was cured, and analogized to the disease of cancer (Tr. 140). Dr. Harry briefly discussed the process by which an insanity acquittee earns the support of the Department for release from custody (Tr. 153). He recalled that Mr. Grass' participation in the programming had been variable—Mr. Grass was not cooperative during the time he was awaiting trial on the escape from commitment charge, but records showed that he was participating more fully since his return from the Department of Corrections (Tr. 139,144). Dr. Harry said that Mr. Grass had told him that he would try to escape again if he could not gain release through the courts (Tr. 136). He advised against an unconditional release for Mr. Grass at this time (Tr. 153).

Lisa Thomas, M.D., psychiatrist, Ph.D., psychologist

Dr. Thomas was the psychiatrist assigned to Mr. Grass from June 2001 until she was transferred to the Mid-Missouri Mental Health Center month before the hearing (Tr. 160). She testified that Mr. Grass had participated in the prescribed cognitive behavioral program to the satisfaction of his treatment team (Tr. 165). The team recommended his transfer to a less secure unit a number of times, but the recommendation was rejected without explanation (Tr. 164-166). Dr. Thomas testified that in her professional opinion, Mr. Grass did not suffer from mental illness at the time he was in her care (Tr. 172). On cross-examination, she agreed that it would not be possible to say that the symptoms

would never again emerge (Tr. 176).

Bruce Wilson, Ph.D., psychologist

Dr. Wilson became Mr. Grass' psychologist in March 2001 when he was returned from Moberly Correctional Center (Tr. 180). Mr. Grass attended a weekly class led by Dr. Wilson, and sometimes encountered him informally on the ward (Tr. 180). Dr. Wilson said that Mr. Grass' participation in the program was variable, but the doctor suspected his sincerity (Tr. 182).

Rick Gowdy, Ph.D., psychologist

Dr. Gowdy said that he considered his initial diagnosis of Mr. Grass' illness, a psychotic disorder not otherwise specified, which was based on examinations he performed in 1993 and 1994, to be accurate currently as well (Tr. 208, 211, L.F. 40). Dr. Gowdy explained that the fact that Mr. Grass exhibited psychotic symptoms over that period of twenty months caused him (Dr. Gowdy) to disagree with the judgments of Dr. Peters (Tr. 56, 58) and Dr. Thomas (Tr. 172) that Mr. Grass is not currently mentally ill (Tr. 208). Dr. Gowdy testified that Mr. Grass has been openly resistive to treatment (Tr. 215). He was most concerned with Mr. Grass' lack of insight into his mental illness (Tr. 219) and his deceitfulness as shown by the escape from St. Louis State Hospital in 1996 (Tr. 221).

The ruling and subsequent proceedings

Judge Brackmann denied the petition, filing a judgment with findings of fact on February 22, 2002 (L.F. 7, 58-59; A1-A2). He did not include a finding on

the issue of whether Mr. Grass' was currently mentally ill, but did conclude that Mr. Grass remains "a social menace." (L.F. 58-59; A1-A2). The State filed a motion asking the court to correct, amend or modify the judgment (L.F. 60-62), but Judge Brackmann took no action on the request (L.F. 8).

Mr. Grass appealed (L.F. 7), and the Court of Appeals, Eastern District, affirmed (ED 80880, June 24, 2003). This Court thereafter granted Mr. Grass' application for transfer under Rule 83.03.

POINTS RELIED ON

I.

The trial court erred in denying Lloyd Grass' objection to proceeding to the evidentiary hearing with the testimony of Rick Gowdy, Jr., Ph.D., and denying his motion for appointment of another expert to evaluate him and render an opinion about his fitness for release from custody of the Department of Mental Health, because Section 552.040 and the constitutional guarantees of due process as provided by the Fourteenth Amendment to the United States Constitution and Article I, Section 10 of the Missouri Constitution, entitled Mr. Grass to an examination by an independent expert. Dr. Gowdy was not independent in that he has been involved in Mr. Grass' case since its inception and is the Director of Forensic Services for the Department of Mental Health, which opposed Mr. Grass' release. This Court should remand the cause with instructions that the court order an examination at the State's expense by an independent expert.

State ex rel. Hoover v. Bloom, 461 S.W.2d 841 (Mo. banc 1971);

Ake v. Oklahoma, 470 U.S. 68, 105 S.Ct. 1087, 84 L.Ed.2d 53 (1985);

Foucha v. Louisiana, 504 U.S. 71, 112 S.Ct. 1780, 118 L.Ed.2d 437 (1992);

Starr v. Lockhart, 23 F.3d 1280 (8th Cir.), *cert. denied*, 513 U.S. 995 (1994);

United States Constitution, Amendment XIV:

Missouri Constitution, Article I, Section 10;

Section 552.040; and

DOR 4.475.

II.

The trial court erred in failing to make findings of fact on the issue of Lloyd Grass' mental illness or lack thereof, in violation of his right to due process of law, as assured by the Fourteenth Amendment to the United States Constitution and Article I, Section 10 of the Missouri Constitution, and his right to requested findings under Rule 73.01, because the lack of findings on the issue materially interferes with appellate review, since a finding on the issue is dispositive. This Court should remand with instructions that the trial court make findings of fact on the issue of whether Mr. Grass was mentally ill at the time of the hearing.

State v. Revels, 13 S.W.3d 293 (Mo. banc 2000);

Greeno v. State, 59 S.W.3d 500 (Mo. banc 2001);

State v. Halbrook, 18 S.W.3d 523 (Mo. App., E.D. 2000);

Legacy Homes Partnership v. General Elec. Corp., 10 S.W.3d 161 (Mo. App., E.D. 1999);

United States Constitution, Amendment XIV;

Missouri Constitution, Article I, Section 10;

Section 552.040; and

Rule 73.01, V.A.M.R.

III.

The trial court erred in denying Lloyd Grass' petition for unconditional release from the Department of Mental Health, in violation of his right to due process of law as assured by the Fourteenth Amendment to the United States Constitution and Article I, Section 10 of the Missouri Constitution, because the decision was against the weight of the evidence in that Mr. Grass proved by clear and convincing evidence that he was not dangerous due to mental illness since the only evidence to the contrary lacked probative value in that it was from an expert with a conflict of interest. This Court should reverse the trial court and order Mr. Grass' unconditional discharge from the custody of the Department of Mental Health.

Foucha v. Louisiana, 504 U.S. 71, 112 S.Ct. 1780, 118 L.Ed.2d 437 (1992);

Jones v. United States, 463 U.S. 354, 103 S.Ct. 3043, 77 L.Ed.2d 694 (1983);

State v. Nash, 972 S.W.2d 479 (Mo. App., W.D. 1998);

Grass v. Nixon, 926 S.W.2d 67 (Mo. App., E.D. 1996);

United States Constitution, Amendment XIV;

Missouri Constitution, Article I, Section 10; and

Section 552.040.

ARGUMENT

I.

The trial court erred in denying Lloyd Grass' objection to proceeding to the evidentiary hearing with the testimony of Rick Gowdy, Jr., Ph.D., and denying his motion for appointment of another expert to evaluate him and render an opinion about his fitness for release from custody of the Department of Mental Health, because Section 552.040 and the constitutional guarantees of due process as provided by the Fourteenth Amendment to the United States Constitution and Article I, Section 10 of the Missouri Constitution, entitled Mr. Grass to an examination by an independent expert. Dr. Gowdy was not independent in that he has been involved in Mr. Grass' case since its inception and is the Director of Forensic Services for the Department of Mental Health, which opposed Mr. Grass' release. This Court should remand the cause with instructions that the court order an examination at the State's expense by an independent expert.

Statement of pertinent facts

Mr. Grass requested an independent mental evaluation when he filed the petition for unconditional release in April of 2000 (L.F. 2), and the State filed a request for a mental examination with its objections to the petition in May (L.F. 3). In April 2001, the Assistant Attorney General filed an objection to any pending release applications on behalf of the Department of Mental Health and the

chief executive officer of Fulton State Hospital (L.F. 5). In September of 2001, the State filed an evaluation of Mr. Grass performed by Rick Gowdy, Ph.D., and requested a hearing date (L.F. 5, 37-48; Tr. 17). Dr. Gowdy's report was the only evaluation done for the purpose of the hearing (Tr. 15-16).[5]

During the conference preceding the hearing, there was discussion about whether an order for a mental examination had been executed (Tr. 14-15). Judge Brackmann noted his exasperated entry of February 6, 2001: THE COURT NOTES THAT IT HAS SUSTAINED A MOTION FOR REEXAMINATION, BOTH PARTIES HAVING REQUESTED ONE, AND ASKS (BEGS) THE STATE TO TAKE CARE OF THIS. JCB (Tr. 14-15; L.F. 4) (*emphasis in original*). The court found an unsigned Order, prepared by the State, in the file (Tr. 15). In contrast to Exhibits G and H (Supp. L.F. 21-29 and 30-35), pretrial mental evaluations prepared by Dr. Gowdy in 1993 and 1994, the evaluation he did in 2001 for the purpose of this hearing does not allude to a court order or other source of a request for the examination (L.F. 37-48).

[5] The docket sheet shows that on September 28, Mr. Grass filed a report by Dr. Peters, but it was an evaluation for the purpose of determining if Mr. Grass should be moved to a less restrictive environment within the Hospital, a narrowly-focused examination at which—as the State pointed out at the hearing—public safety was not at issue (L.F. 49-51; Tr. 40, 60).

Mr. Grass argued that Dr. Gowdy's evaluation and testimony should be excluded from the hearing because of personal and professional bias, and because he was entitled by statute to an evaluation separate from the one arranged by the State (Tr. 10-12). The court remarked that the examination "must be the State's" since Mr. Grass was disavowing it (Tr. 18). Judge Brackmann told Mr. Grass that he could hire anyone he wished, but the court was not going to appoint a private psychiatrist (Tr. 16).

Dr. Gowdy is the Director of Forensic Services for the Department of Mental Health (Tr. 205-206). The Department has consistently opposed Mr. Grass' release petitions (L.F. 3, 5, 13, 35, 52-55), and Dr. Gowdy was previously the spokesperson for the Department in opposing the release granted in 1995, then rescinded by the Court of Appeals. *See* **Grass v. Nixon**, 926 S.W.2d 67, 69 (Mo. App., E.D. 1996). The Department of Mental Health last filed notice of opposing Mr. Grass' release less than three months before Dr. Gowdy evaluated him (L.F. 5).

This Court has held that an indigent insanity acquittee petitioning for release is entitled to an evaluation paid for by the State by an expert not under the influence of those having custodial control of him.

Section 552.040 provides, in pertinent part, that "Prior to the hearing any of the parties, upon written application, shall be entitled to an examination of the committed person, by a psychiatrist or psychologist . . . of its own choosing and at its own expense." 552.040.5 (*emphasis added*) (see A3-A8). The language is

substantially the same as the RSMo 1969 version, the subject of a constitutional challenge by an indigent insanity acquittee petitioning for release in **State ex rel. Hoover v. Bloom**, 461 S.W.2d 841 (Mo. banc 1971) (see A16-A18).

Hershel Hoover argued that he was entitled by Section 552.040 and on constitutional grounds to an examination by a psychiatrist of his own choosing at State expense. **Hoover**, 461 S.W.2d at 842. Hoover first posited that since the release statute conferred the right to an examination at his ("any party") request, due process required the State to pay for it because, absent the assistance of an expert, he would have no chance to make his case if the State disputed his sanity. *Id.* The Court agreed that without an independent evaluation, there was no reasonable possibility that Hoover could sustain the burden of proving his suitability for release: "The hearing necessarily will become an adversarial proceeding, and elementary fairness calls for at least an opportunity to rebut such professional testimony." **Hoover**, 461 S.W.2d at 844. Hoover's argument anticipated the United States Supreme Court case **Ake v. Oklahoma**, 470 U.S. 68, 105 S.Ct. 1087, 84 L.Ed.2d 53 (1985), discussed *infra*.

Although the **Hoover** Court agreed that the State was constitutionally bound to pay for an examination if the acquittee requested one, it identified the crux of the guarantee as independence, not personal choice. *Id.* There was at a department operating regulation (Operating Regulation No. 99) that offered petitioners an evaluation by a qualified staff member from one of three state Mental Health Centers. **Hoover**, 461 S.W.2d at 843. The Court reasoned that the

procedure provided a competent psychiatrist who could freely render his opinion based only on his professional training—in other words, one that was free from potential conflict due to being involved in the petitioner's treatment or directly in the employ of the superintendent who opposed the release. **Hoover**, 461 S.W.2d at 844.

The Court also found that Operating Regulation No. 99 satisfied requirements of the Equal Protection Clause since a non-indigent, entitled under the statute to employ an expert of his choice, could not purchase a favorable opinion, only one from an expert who was independent of the influence of those having custodial control. **Hoover**, 461 S.W.2d at 844.

Hoover should be read to require the court to appoint an independent examiner who will provide the petitioner with a second evaluation even where there is no allegation that the first report, done on behalf of the party opposing release, is suspect. First, the operating regulation provided that where the petitioner was proceeding over the superintendent's objection, he would be re-evaluated by a staff member from another facility. **Hoover**, 461 S.W.2d at 843, language that indicates an existing evaluation not favorable to the petitioner. The opinion later acknowledges as much

> "No semblance of due process could be claimed if petitioner were left alone to convince a court of his sanity when it is presumed the psychiatrist having custody of him will testify he is still insane.

461 S.W.2d at 844, and continues "elementary fairness calls for at least an opportunity to rebut such professional testimony." (*emphasis added*.)

The Court's ruling, that the statutory provision concerning release evaluations survived Hoover's constitutional challenges, relied on the operating regulation's assurance of a re-evaluation by an expert located at another facility. There is no analogue to that regulation in the current Department Operating Regulations.[6] The regulation titled "Release of Criminally Committed Clients" (DOR 4.475, A9-A15) does not contemplate release examinations except in the presumably rare instance of persons whom the Department supports for immediate release after acquittal due to mental disease or defect.

Judge Brackmann's failure to order the Department of Mental Health to provide Mr. Grass an independent evaluation did not meet the requirements of the statute, as recognized in **Hoover**. Leaving aside for the moment the question of whether Mr. Grass was entitled under **Hoover** to a second evaluation—a point that appellant emphatically does not concede—the case requires at the very least that Mr. Grass be afforded an independent evaluation, and he was not.

Dr. Gowdy's *curriculum vitae* (Supp. L.F. 36-38) shows him to be a well-qualified professional with a wealth of experience in the field of forensic psychology. It also indicates that he has held the position of Director of Forensic Services in the Department of Mental Health since 1995 (Supp. L.F. 36). Dr. Gowdy testified on behalf of the Department in opposing the conditional release of

Mr. Grass granted in 1995, then rescinded by the Court of Appeals. *See* **Grass**, *supra*, 926 S.W.2d at 69 (Mo. App., E.D. 1996). The Department filed a notice opposing Mr. Grass' release in April 2001, only months before Dr. Gowdy examined him in July, and another objection again on the day of the hearing (L.F. 5, 53-55).

Dr. Gowdy's evaluation is comprehensive and evidences a thorough knowledge of the history of the underlying offense and the course of Mr. Grass' hospitalization, but he simply cannot be characterized as "a professional[ly] independent of any influence by those having custodial control." **Hoover**, 461 S.W.2d at 844.

In arguing this point, appellant does not impugn the doctor's integrity or competence, but maintains that his executive position in the Department and past involvement in the case created a conflict of interest that precludes the independence deemed necessary by the **Hoover** court. Although DOR 4.475 addresses only release proceedings that have been instituted or approved by the acquittee's treatment or habilitation team, it suggests the influence and level of responsibility of the Director of Forensic Services in providing that the Director has the prerogative to halt Department support of any such petition on the acquittee's behalf. (DOR 4.475 (5)(A)3.(e) and (7)(A)).

Judge Brackmann's ruling also fails to satisfy **Hoover's** assignment to the trial court to assure, to the extent possible, that the petitioner receive an

[6] See http://www.dmh.missouri.gov/homeinfo/deptregs/dors/index.htm

independent evaluation. While stressing that there is no reason to suspect or disqualify all Department of Mental Health doctors, the Court commented

> "In the first instance, however, it is for the trial court to make the selection of the psychiatrist to make an "independent" examination. The judge, thereof should convince himself that the court-appointed psychiatrist, despite any prior personal or professional relationship, can function in such a capacity."

Hoover, 461 S.W.2d at 844. The court's testy docket entry in February of 2001, the unsigned Order found in file, and the fact that Dr. Gowdy's evaluation did not cite a court order (as did his earlier evaluations), suggest that the examination was informally arranged by opposing counsel or the Department. That is permissible if Dr. Gowdy is acknowledged as the State's expert, but it belies any contention that his examination was an independent one, adequate to prove Mr. Grass with an opportunity to "rebut the professional testimony of the opposing party." **Hoover**, 461 S.W.2d at 844.

Under principles of due process, the provision of Section 552.040.5 bearing on any party's right to a mental evaluation of the release petitioner must be read to provide an indigent petitioner with an evaluation at State expense, separate from any relied upon by an opposing party, to assist in presenting his case.

In **Hoover**, the Missouri Supreme Court conditioned its decision that the statutory procedure withstood Hoover's constitutional challenges on the

departmental operating regulation that provided for an examination by a doctor at an institution other than the one where the petitioner was confined. 461 S.W.2d at 843. In concluding that the procedure provided by the regulation was adequate to assure the petitioner's constitutional rights, the Court presaged the development of United States Supreme Court doctrine on due process protection in the arena of mental disability law.

Because Operating Regulation #99 has long since disappeared—and there does not appear to be an equivalent in the current Department Operating Regulations[7]—appellant proposes a short review of relevant cases concerning due process rights of defendants with mental disabilities, including those who are institutionalized after acquittal due to mental disease or defect, to illustrate that an indigent release petitioner is constitutionally entitled to a State-funded independent examination under the statute, and that "independence" in this context means not merely a disinterested expert, but one who is retained or assigned to assist in the presentation of the case.

Due process has been described as a "concept less rigid and more fluid than those envisaged in other specific and particular provisions of the Bill of Rights." **Betts v. Brady**, 316 U.S. 455, 462, 62 S.Ct. 1252, 1256, 86 L.Ed. 1595 (1942), and a lot of water has passed under the bridge of due process jurisprudence in the three decades since **Hoover** was decided. This Court's decision in **Hoover**

[7] See footnote 6, *supra*.

predates **Jackson v. Indiana**, the first case in which the United States Supreme Court considered the constitutionality of institutionalization based on criminal conduct when the committee had not been convicted. 406 U.S. 715, 92 S.Ct. 1845, 32 L.Ed.2d 435 (1972). In applying the Due Process Clause of the Fourteenth Amendment, the Court extended the principle derived from an earlier case addressing standards for an initial involuntary civil commitment,[8] that continuing involuntary confinement was a deprivation of Jackson's fundamental liberty interest, and held that due process required constitutionally adequate procedure to protect that interest. **Jackson**, 406 U.S. at 729, 738, 92 S.Ct. at 1853-1854, 1858.

One of the most consequential decisions in criminal law in recent history was **Ake v. Oklahoma**, in which the Court held that the Due Process Clause requires the states to assure an indigent defendant "the opportunity to participate meaningfully in a judicial proceeding at which his liberty is at stake." 470 U.S. 68, 77, 105 S.Ct. 1087, 1093, 84 L.Ed.2d 53 (1985). Where the defendant demonstrates to the trial judge that criminal responsibility will be a significant issue at trial, **Ake** requires that the State must, at a minimum, assure him access to a competent psychiatrist who will conduct an appropriate examination and assist in the evaluation, preparation, and presentation of the defense. 470 U.S. at 83, 105

[8] **Baxstrom v. Herold**, 383 U.S. 107, 86 S.Ct. 760, 15 L.Ed.2d 620 (1966), also cited in **Hoover,** 461 S.W.2d at 843.

S.Ct. at 1087. The Court noted that the appointment of a neutral expert, equally available to either the State or the defense, does not satisfy the requirements of due process. **Ake**, 470 U.S. at 84-85, 105 S.Ct. at 1097.

A United States Court of Appeals case that relied on **Ake** a decade later illustrates the importance of providing the defendant with an expert to assist him. The Eighth Circuit granted habeas relief based on a violation of **Ake's** guarantee of meaningful assistance to indigent defendants in the penalty phase of a capital trial in **Starr v. Lockhart**, 23 F.3d 1280 (8th Cir.), *cert. denied*, 513 U.S. 995 (1994). The court found that Starr's opportunity to subpoena and question the professionals who performed a competency evaluation at the state hospital did not afford meaningful participation under **Ake**. **Starr**, 23 F.3d at 1289.[9] It rejected Arkansas' argument that Starr's access to the state-hospital competency examiners was adequate, in part because that examination was not substantively appropriate to his needs in presenting mitigation evidence. **Starr**, 23 F.3d at 1289-1290.

More important to the issue here was the Eighth Circuit's second rationale, that Starr's opportunity to subpoena and examine the doctors who did the competency examinations was constitutionally inadequate because it fell short of his entitlement under **Ake** in that the doctors were not engaged for the purpose of

[9] The court found error in the denial of Starr's request for expert assistance at both phases of trial, but that it was constitutionally harmless in the guilt phase and granted relief as to sentencing only. **Starr**, 23 F.3d 1294.

assisting the defendant. **Starr**, 23 F.3d at 1289. The court rebuffed Arkansas' attempt to rely on pre-**Ake** state law, which did not afford him any greater assistance than equal access to court-ordered examiners: "While due process admittedly does not give defendants the right to assistance from their experts of choice, it does give appropriate defendants the right to experts who will 'assist in evaluation, preparation, and presentation of the defense.'" **Starr**, 23 F.3d at 1290, *quoting* **Ake,** 470 U.S. at 83, 105 S.Ct. at 1096. Only the Fifth Circuit has taken the position that a defendant's equal access to court-appointed "neutral" experts is adequate under **Ake**. (*See*, **Powell v. Collins**, 332 F.3d 376, 390-392 (6th Cir., 2003), for fuller discussion.)

In **Foucha v. Louisiana**, the United States Supreme Court began from the premise that continuing institutionalization constitutes a significant deprivation of liberty that merits due process protection. 504 U.S. 71, 80, 112 S.Ct. 1780, 1785, 118 L.Ed.2d 437 (1992). The Court found equally applicable to insanity acquittees the due process protection recognized for civil committees in **O'Connor v. Donaldson**, 422 U.S. 563, 95 S.Ct. 2486, 45 L.Ed.2d 396 (1975), that once the basis for a constitutionally permissible commitment ceases to exist, the State can no longer confine a person without violating his Fourteenth Amendment right to due process. 504 U.S. at 77, 112 S.Ct. at 1784. The reasoning in **Foucha** affirmed the principle set out in **Jones v. United States**, 463 U.S. 354, 103 S.Ct. 3043, 77 L.Ed.2d 694 (1983), that an insanity acquittee may be held only as long as he remains both dangerous and mentally ill. *Id*.

The question here can be posed: "Must Section 552.040's provision that recognizes the right of any party to an examination of the release petitioner be interpreted to require the State to provide an indigent petitioner with an examination by an independent examiner who is engaged to assist him?" The answer is "yes." It is required as a corollary of due process principles articulated in **Ake**.

Procedural due process imposes constraints on governmental decisions that deprive individuals of liberty interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment. **Mathews v. Eldridge**, 424 U.S. 319, 332, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976). In deciding if due process required states to fund appointment of a psychiatrist to aid in an indigent's defense, the **Ake** court evoked the tripartite test set out in **Mathews**: (1) the private interest affected; (2) the effect of the contemplated procedure upon governmental interests; and (3) the risk of an erroneous deprivation of liberty through the procedure used, and the probable value of the proposed safeguard. 470 U.S. at 76-78, 105 S.Ct. at 1093-1094.

Applying the same test to the question here, we balance: (1) Mr. Grass' interest in being free from confinement; (2) the State's interest affected by providing the assistance of an independent examiner; and (3) the probable value of the assistance of an independent examiner, and the risk of inaccuracy in the proceedings without it.

The first factor is the most easily stated. Mr. Grass' liberty is at stake and he has a constitutional right to release from confinement if he is not both mentally ill and dangerous. **Foucha**, *supra*. The second factor, the government's interest, involves both cost and benefit to the State. The cost of providing an independent examination by an expert appointed to assist the petitioner should not be prohibitive. Using examiners from other facilities was apparently feasible during the period that Operating Regulation No. 99 was in place, and the parade of Department-affiliated psychologists and psychiatrists who testified at Mr. Grass' hearing suggest sufficient numbers to perform such evaluations. And, similar to the Court's reasoning in **Ake**, the State's interest in prevailing at a release hearing is "necessarily tempered by its interest in the fair and accurate" determination of the necessity of continuing Mr. Grass' institutionalization. 470 U.S. at 79, 105 S.Ct. at 1094.

It is the third factor of the calculus, the probable value of the assistance of an independent examiner and the risk of inaccuracy in the proceedings without it, that makes the case for finding that due process requires the appointment of an expert to evaluate an indigent petitioner. First, the facts of this case illustrate the value to an indigent petitioner. As Mr. Grass complained to Judge Brackmann, "My request for court . . . I mean obviously I can't just call somebody up and have them come in like [the Assistant Attorney General] can, so I'm waiting for a court order for mine." (Tr. 15). Dr. Peters was an important witness for Mr. Grass, but admitted on cross-examination that he had not evaluated Mr. Grass' for purposes

of making offering an opinion about his suitability for unconditional release from custody, and thus he could not offer an opinion on the matter (Tr. 59). Likewise, none of the other expert witnesses who had been involved in Mr. Grass' treatment or examined him for various purposes over the years, and found him not to be mentally ill,[10] had been directed to perform an examination as to his suitability for release.

Under the release procedure prescribed in Section 552.040, the petitioner bears a heavy burden. He must prove by clear and convincing evidence that "[H]e 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, subsections 7 and 9. Additionally, since the offense underlying Mr. Grass' offense was murder, he must also prove that

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[10] Dr. DeRosear, no symptoms of mental illness during the year and a half that Mr. Grass was her patient (Tr. 70); Dr. Carrera, testified at 1995 conditional release hearing that Mr. Grass' illness was in remission; Dr. Gesmundo, no signs of menal illness in the year and a half she treated him (Tr. 103); Dr. Mandracchia, not mentally ill at the time of his pretrial competency examination in 1997 (Tr. 115); Dr. Harry, no signs of psychosis during year that they met extensively (Tr. 121); and Dr. Thomas, not mentally ill from the time he was assigned as her patient in June 2001 until she was transferred just before the hearing (Tr. 160, 172).

(1) [He] is not now and is not likely in the reasonable future to commit another violent crime against another person because of [his] mental illness; and

(2) [He] is aware of the nature of the violent crime committed against another person and presently possesses the capacity to appreciate the criminality of the violent crime against another person and the capacity to conform [his] conduct to the requirements of law in the future.

Section 552.040.20.

The substantive part of this standard is appropriate in light of the public safety interest, but a formidable one nonetheless. The difficulty is compounded by the prohibitive quantum of proof, that is, proof by "clear and convincing" evidence. "Clear and convincing evidence" is evidence that "instantly tilts the scales in the affirmative when weighed against the evidence in opposition." **State v. Marsh**, 942 S.W.2d 385, 390 (Mo. App., W.D. 1997).

The United States Supreme Court found Oklahoma's law requiring a defendant to prove by clear and convincing evidence that he was not competent to proceed to trial violated due process because the quantum of proof created an unacceptable risk that a defendant who was more likely than not incompetent could be forced to trial. **Cooper v. Oklahoma**, 517 U.S. 348, 369, 116 S.Ct. 1373, 1384, 134 L.Ed.2d 498 (1996). Noting that a heightened standard does not decrease the risk of error, instead it simply reallocates that risk between the parties, the court found the "clear and convincing" standard constitutionally

untenable because it created a significant risk of an erroneous determination that the defendant is competent. **Cooper**, 517 U.S. at 366, 116 S.Ct. at 1383 (*internal citations omitted*.)

As in Oklahoma's competency scheme, Mr. Grass has the burden to prove by clear and convincing evidence that he is suitable for unconditional release. That quantum of proof allocates the risk of an erroneous decision –that Mr. Grass might be denied release when it is more likely than not that he has met substantive standard—to him. In light of the petitioner's heavy burden under the statutory scheme, the assistance of an independent examiner is crucial. Being forced to proceed without such assistance in meeting the substantive standard potentiates the risk of an erroneous decision created by the "clear and convincing" quantum of proof required.

In **Jackson** and **Ake**, *supra*, the United States Supreme Court found that due process requires the states to provide adequate procedure to protect a person's fundamental liberty interest, including the meaningful assistance of an expert when that interest is at stake. In **Foucha**, *supra*, the Court recognized that an insanity acquittee's fundamental liberty interest survives his commitment, and an acquittee who is no longer mentally ill or no longer dangerous must be released. Accordingly, this Court should interpret Section 552.040's provision that any party has a right to a mental evaluation of the release petitioner to provide an indigent petitioner with an evaluation at State expense, separate from any relied upon by an opposing party, to assist in presenting his case. The Court should

remand the cause with instructions that the trial court order an examination of Mr. Grass at the State's expense by an independent expert.

II.

The trial court erred in failing to make findings of fact on the issue of Lloyd Grass' mental illness or lack thereof, in violation of his right to due process of law, as assured by the Fourteenth Amendment to the United States Constitution and Article I, Section 10 of the Missouri Constitution, and his right to requested findings under Rule 73.01, because the lack of findings on the issue materially interferes with appellate review, since a finding on the issue is dispositive. This Court should remand with instructions that the trial court make findings of fact on the issue of whether Mr. Grass was mentally ill at the time of the hearing.

Missouri Supreme Court Rule 73.01, "Trial Without Jury Or With An Advisory Jury—Procedure" provides, *inter alia*, "The court may, or if requested by a party shall, include in the opinion findings on the controverted fact issues specified by the party." Rule 73.01(c). "Failure of a court to prepare specified findings of fact as requested by counsel is error, and mandates reversal when such failure materially affects the merit of the action or interferes with appellate review." **Legacy Homes Partnership v. General Elec. Corp.**, 10 S.W.3d 161, 162 (Mo. App., E.D. 1999) (*citation omitted*).

A month before the hearing, Mr. Grass filed a request for findings of fact and the pertinent conclusions of law on the issue of whether he suffered from a mental disease or defect, citing Rule 73.01 and this court's decision in **State v.**

Revels, 13 S.W.3d 293 (Mo. banc 2000) (L.F. 57). He reiterated his request before the introduction of evidence at trial (Tr. 18). Mr. Grass made a proper and timely request for findings and conclusions on the issue. As Judge Brackmann said to Mr. Grass at the time, "I think you have an absolute right to that." (Tr. 18).

In **Revels**, the Missouri Supreme Court rejected the petitioner's argument that the United States Supreme Court case **Foucha v. Louisiana**, 504 U.S. 71, 112 S.Ct. 1780, 118 L.Ed.2d 437 (1992), recognized a due process right to specific findings on the issue of the petitioner's mental illness. 13 S.W.3d at 296. The Court stated that no findings of fact are required in release cases unless the petitioner makes a specific and timely request for such findings under Rule 73.01. *Id.* Reasoning that acquittal of the basis of mental disease or defect creates a presumption of dangerousness and mental illness, the trial court is presumed to have been decided in accordance with the judgment. *Id.*

Weeks before the evidentiary hearing on Mr. Grass' petition, this Court again emphasized the requirement of a proper request in **Greeno v. State**, 59 S.W.3d 500 (Mo. banc 2001), a conditional release case presenting the same argument. In **Greeno**, the trial court found that the petitioner was still dangerous but made no findings on his mental state, and the Supreme Court held that the presumption of continuing mental illness supports inference that the trial court that denied the petition found that Greeno was still ill. *Id*.

The lack of findings on the issue requires reversal because Judge Brackmann's dismissal of the issue as "a matter of semantics" shows that he made

no finding on the matter, precluding review by this Court. Because the State cannot continue to confine an insanity acquittee who is no longer mentally ill, the issue is dispositive of the case. **Jones**, *supra*; **Foucha v. Louisiana,** 504 U.S. 71, 112 S.Ct. 1780, 118 L.Ed.2d 437 (1992) (discussed in Point I); *see also*, **State v. Nash**, 972 S.W.2d 479 (Mo. App., W.D. 1998) (petitioner needs only to prove that he is not currently mentally ill to merit release.)

To enable meaningful appellate review of the decision—especially in light of the Missouri Supreme Court's explicit direction to release petitioners that a proper request must be made--this Court should remand for findings on the issue of Mr. Grass' mental illness or lack thereof at the time of the hearing on his petition.

III.

The trial court erred in denying Lloyd Grass' petition for unconditional release from the Department of Mental Health, in violation of his right to due process of law as assured by the Fourteenth Amendment to the United States Constitution and Article I, Section 10 of the Missouri Constitution, because the decision was against the weight of the evidence in that Mr. Grass proved by clear and convincing evidence that he was not dangerous due to mental illness since the only evidence to the contrary lacked probative value in that it was from an expert with a conflict of interest. This Court should reverse the trial court and order Mr. Grass' unconditional discharge from the custody of the Department of Mental Health.

Commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection. **Jones v. United States**, 463 U.S. 354, 361, 103 S.Ct. 3043, 3048, 77 L.Ed.2d 694 (1983) (*citation omitted*). Section 552.040 requires an insanity acquittee who petitions for an unconditional release from the custody of the Department of Mental Health to prove 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. **State v. Tooley**, 875 S.W.2d 110, 114 (Mo. banc 1994); Section 552.040.7.(6). Subsection 20 of the statute imposes an enhanced substantive standard for those whose underlying offense was a violent one, as in the case of

Mr. Grass.

Several years ago, the Western District of this Court held that an insanity acquittee has to prove only that he is not mentally ill at the time his petition is ruled. **State v. Nash**, 972 S.W.2d 479 (Mo. App., W.D. 1998). The court relied on the holding of **Foucha v. Louisiana**, 504 U.S. 71, 112 S.Ct. 1780, 118 L.Ed.2d 437 (1992), in concluding that an insanity acquitee must be released from custody if he proves himself to be free of mental illness at the time he petitions for release. **Nash**, 972 S.W.2d at 482.

In reviewing the denial of a petition for release from the custody from the Department of Mental Health, the judgment of the trial court will be upheld unless there is no substantial evidence to support it, it is against the weight of the evidence, or it erroneously declares or applies the law. **Nash**, 972 S.W.2d at 481, (*citing* **Murphy v. Carron**, 536 S.W.2d 30, 32 (Mo. banc 1976)). The appellate court accepts as true evidence favorable to the trial court's judgment, and all reasonable inferences therefrom, and disregards evidence to the contrary. **Nash**, *id*. "Clear and convincing evidence" is evidence that "instantly tilts the scales in the affirmative when weighed against the evidence in opposition." **State v. Marsh**, 942 S.W.2d 385, 390 (Mo. App., W.D. 1997).

Judge Brackmann did not make findings and conclusions on the issue of Mr. Grass' mental illness or lack thereof at the time of the hearing. He wrote "Whether movant still has a mental disease or defect is a matter of semantics. He will always be more susceptible to psychotic episodes." (L.F. 58, A1). Assuming

without conceding that the decision to deny the petition necessarily implies a finding that Mr. Grass is currently mentally ill,[11] the ruling should be reversed because the evidence that Mr. Grass currently has a mental illness was presented by an expert with a conflict of interest and was so equivocal that it has relatively little probative value. The concept of "weight of the evidence" refers to its probative value, not the quantity. **Hanebrink v. Parker**, 506 S.W.2d 455, 458 (Mo. App., St. L.D. 1974).

Dr, Gowdy has been the Director of Forensic Services in the Department of Mental Health since 1995 (Supp. L.F. 36). He testified on behalf of the Department in opposing the conditional release granted in 1995, then rescinded by the Court of Appeals. *See* **Grass v. Nixon**, 926 S.W.2d 67, 69 (Mo. App., E.D. 1996). The Department filed a notice opposing Mr. Grass' release in April 2001, only months before Dr. Gowdy examined him in July, and another objection again on the day of the hearing (L.F. 5, 53-55).

The prosecutor relied on Dr. Gowdy's evaluation in deciding to accept Mr. Grass' plea of not guilty by reason of mental disease or defect in 1994 (Tr. 11, 211, L.F. 40). At the evidentiary hearing on this petition for unconditional release, Dr. Gowdy said that he considered his initial diagnosis of Mr. Grass' illness, a psychotic disorder not otherwise specified, which was based on examinations he

[11] Mr. Grass made a proper and timely request for findings on the issue of his mental state under Rule 73.01. See Point II.

performed in 1993 and 1994, to be accurate currently as well (Tr. 208, 211, L.F. 40). Dr. Gowdy explained that the fact that Mr. Grass exhibited psychotic symptoms over a period of twenty months caused him (Dr. Gowdy) to disagree with the judgments of Dr. Peters (Tr. 56, 58) and Dr. Thomas (Tr. 172) that Mr. Grass is not currently mentally ill (Tr. 208). He was very concerned with Mr. Grass' lack of insight into his mental illness (Tr. 219) and his deceitfulness as shown by the escape from St. Louis State Hospital in 1996 (Tr. 221).

Although Dr. Gowdy opined that Mr. Grass is mentally ill, his most forceful statement was that he could not say with a reasonable degree of professional certainty that Mr. Grass is not currently dangerous because of his mental illness (Tr. 222). Moreover, he spoke of the disorder "returning":

> Q. Sure. And let me ask it this way. Is a person with a personality disorder NOS—I'm sorry, psychotic disorder NOS, is that person likely to have the—the signs of symptoms of the mental illness or the psychosis reemerge, if they're not currently exhibiting signs or symptoms of the illness?
>
> A. Given this particular disorder, with all of the clinical factors there, I think—I think, yes, you need to assume that that disorder at some point could return.

(Tr. 218).

None of the other witnesses testified that Mr. Grass was mentally ill at the time of the hearing. Dr. Peters and Dr. Thomas testified that Mr. Grass did not

have a mental illness (Tr. 53, 58, 172). Dr. Gesmundo testified that she knew nothing about Mr. Grass' current medical status (Tr. 99), but she had testified at the hearing on the conditional release in 1995 that Mr. Grass' mental illness was in remission. **Grass**, 926 S.W.2d at 69. Dr. DeRosear and Dr. Carrera, who also testified at the 1995 hearing that his illness was in remission, admitted they had not worked with Mr. Grass since 1996 and 1995, respectively, and offered no opinion on whether he was currently mentally ill (Tr. 77, 90).[12] Dr. Mandracchia offered no opinion as to Mr. Grass' current mental state, but said that Mr. Grass did not have a mental illness when he examined him in 1997 (Tr. 115).

Dr. Harry, who spent many hours with Mr. Grass in 1997 and 1998 after he was returned from New York, did not observe Mr. Grass to be psychotic at any time (Tr. 121-122). Dr. Harry read from a report he prepared in 1998, in which he wrote about Mr. Grass' mental illness in the past tense:

> A. Thus I—Okay. Here it is. Thus I told him that while I do not see any symptoms of a mental disease or defect at this time, I could confidently say that he—such, I mean I could confidently say he would not become mentally ill in the future or could not confidently say that he would not become violent as a result.
>
> Q. So at that time—at that time your—your opinion based on, within a

[12] Dr. DeRosear told Mr. Grass at the hearing "There isn't a medication for what you have." (Tr. 72).

reasonable degree of medical certainly, was you could not give an opinion.

A. Right.

Q. --as to whether or not the mental illness would return.

A. Yes.

(Tr. 130).

There was some discussion of the "level-system," a type of cognitive behavioral program (Tr. 190-193). Reports of Mr. Grass' participation in therapy varied greatly among the witnesses (Tr. 139, 144, 162-164, 182, 225). Dr. Gowdy testified that Mr. Grass has been openly resistive to treatment (Tr. 215). Dr. Thomas, who was Mr. Grass' assigned psychiatrist until a month before the hearing (Tr. 160), testified that Mr. Grass had worked the cognitive behavioral program to the satisfaction of the treatment team (Tr. 165). The team recommended his transfer to a less restrictive placement several times, but the recommendation was rejected without explanation (Tr. 165). The recommendation that Mr. Grass be transferred to a less secure unit at Fulton State Hospital, made by Dr. Peters in his June 2001 report was also disregarded (Tr. 42).

In its opinion rescinding Mr. Grass' conditional release in 1996, the Court of Appeals expressed concern about the meaning of the medical term "remission." **Grass**, *supra*, 926 S.W.2d at 69, fn. 3. At this hearing, Dr. Peters said that when a person's illness is remission, as in Mr. Grass' case, he can no longer be said to suffer from the illness (Tr. 30-32). Dr. Harry explained that the qualifier "in remission" following a diagnosis does not mean it is cured, then analogized to

physical disease (Tr. 140-141). Dr. Gowdy opined that the fact that a mental illness is in remission does not mean it is cured, that the disappearance of overt symptoms does not signify that the disorder has disappeared (Tr. 214-215). Dr. Mandracchia, who evaluated Mr. Grass in 1997 and found that he did not have a mental illness at that time, may have made the most insightful statement:

> It's tricky. I didn't—I don't have more details of what Dr. Peters said, but that's the kind of thing that I think if it comes back, then the answer is it doesn't mean its gone. And if it never does, it means it does mean it's gone. . . [D]ifferent clinicians will have different opinions.

(Tr. 108-109).

The weight of the evidence notwithstanding, the Eastern District made it clear in **Grass v. Nixon** that release of an insanity acquittee is a legal decision, not a medical one. 926 S.W.2d at 70. The evidence shows that Mr. Grass does not have a mental illness. The State can confine an insanity acquittee only as long as he is both mentally ill and dangerous. **Jones**, *supra*, 463 U.S. at 368, 103 S.Ct. at 3058; **Foucha**, *supra*, 504 U.S. at 82, 112 S.Ct at 1787. This Court should reverse the denial of Mr. Grass' petition and order that he be unconditionally discharged from the custody of the Department of Mental Health.

CONCLUSION

For reasons set out in Point III, Mr. Grass respectfully requests this Court to reverse the trial court's denial of his petition and order that he be unconditionally released from the custody of the Department of Mental Health. Alternatively, corresponding to Points I and II, Mr. Grass asks this Court to remand the cause with instructions that the trial court appoint an independent examiner, at State expense, to evaluate his suitability for release, and reopen the evidence for testimony from that expert, then enter findings of fact on the issue of whether he remains mentally ill.

Respectfully submitted,

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Certificate of Compliance and Service

I, Irene Karns, hereby certify as follows:

- ✓ The attached brief complies with the limitations contained in Rule 84.06(b). The brief was completed using Microsoft Word, Office2000, in Times New Roman size 13 point font. Excluding the cover page, the signature block, this certificate of compliance and service, and appendix if any, the brief contains 10,102 words, which does not exceed the number of words allowed for an appellant's brief.
- ✓ The floppy disk filed with this brief contains a complete copy of this brief. It has been scanned for viruses using a McAfee VirusScan program, which was updated on October 15, 2003. According to that program, the disks provided to this Court and to the Attorney General are virus-free.
- ✓ Two true and correct copies of the attached brief and a floppy disk containing a copy of this brief was hand-delivered this 20th day of October, 2003, to the office of Greg Perry, Assistant Attorney General, at 221 West High Street, Jefferson City, Missouri 65101.

_____

Irene Karns

IN THE
MISSOURI SUPREME COURT

LLOYD GRASS,	)	
	)	
Appellant,	)	
	)	
vs.	)	No. 85517
	)	
STATE OF MISSOURI,	)	
	)	
Respondent.	)	

APPEAL TO THE MISSOURI SUPREME COURT
FROM THE CIRCUIT COURT OF WARREN COUNTY, MISSOURI
TWELFTH JUDICIAL CIRCUIT, DIVISION I
THE HONORABLE JOHN C. BRACKMANN, SPECIAL JUDGE

APPENDIX TO APPELLANT'S SUBSTITUTE BRIEF

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