IN THE
MISSOURI SUPREME COURT

LLOYD GRASS,	)	
	)	
Appellant,	)	
	)	
vs.	)	No. SC85517
	)	
	)	
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 REPLY BRIEF

Irene Karns, MoBar #36588
Attorney for Appellant
3402 Buttonwood
Columbia, Missouri 65201-3722
Telephone (573) 882-9855
FAX (573) 875-2594
irene.karns@mspd.mo.gov

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JURISDICTIONAL STATEMENT

The jurisdictional statement on page 5 of Mr. Grass' opening brief is incorporated herein by reference.

STATEMENT OF FACTS

The statement of facts appearing on pages 6 through 14 of Mr. Grass' opening brief is incorporated herein by reference.

I. An indigent release petitioner is entitled to an examination by a court-appointed mental health expert in addition to and separate from the one on which the opposing parties are relying to testify against his release.

Respondent reads **State ex rel. Hoover v. Bloom**, 461 S.W.2d 841 (Mo. banc 1971), to hold that an indigent petitioner must merely have access to a competent professional who will render an examination based only on his professional training (Resp. Br. 16). This interpretation supports Respondent's conclusion that, as long as the evaluation is based only on the professional's training, it does not matter if he is the State's witness opposing release (Resp. Br. 20-21).

Judge Brackmann recognized Dr. Gowdy as the State's witness when he addressed Mr. Grass about the evaluation "You're certainly disavowing [the evaluation], so I would say that it must be the State's then." (Tr. 18). Respondent does not attempt to harmonize its interpretation with language from the Court that the Constitution requires more: "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 (emphasis added.)

Mr. Grass did not argue on appeal that he was entitled to an examination by a professional not affiliated with the Department of Mental Health. While he advocated for such an appointment in letters to the court before the hearing, when

Judge Brackmann said "I'm not going to order some private psychiatrist to examine you." Mr. Grass said he understood that (Tr. 16). Dr. Peters, a Department of Mental Health psychiatrist, was Mr. Grass' primary witness. Dr. Peters testified that in his opinion Mr. Grass is neither mentally ill nor dangerous (Tr. 58). However, he could not offer an opinion about his suitability for unconditional release because he had not been ordered to do an evaluation for that purpose (Tr. 59). An evaluation by Dr. Peters would have been adequate for Mr. Grass' purpose.

Respondent glosses over **Hoover's** assignment to the trial court the responsibility for assuring that the appointed professional will furnish an independent evaluation. "The judge, thereof should convince himself that the court-appointed psychiatrist, despite any prior personal or professional relationship, can function in such a capacity." 461 S.W.2d at 844. Judge Brackmann did not appoint Dr. Gowdy (see App. Br. 20); the evaluation was performed several months after the court made a docket sheet entry BEG[GING] THE STATE TO TAKE CARE OF THIS (L.F. 4, Tr. 14-15). Respondent argues that Judge Brackmann effectively found Dr. Gowdy's examination to be an independent one because the judge apparently believed him in denying the petition (Resp. Br. 17). But there was no other evaluation addressing the specific issue of Mr. Grass' suitability for release in evidence.

Respondent accuses Mr. Grass of expecting the trial court to appoint an expert as his advocate (Resp. Br. 20). That misstates the argument. As the Court

noted in **Hoover**, an appointed expert, like one who is retained, can do no more than offer his informed professional opinion: "All that money could have obtained would have been an 'independent' examination, and relator, by virtue of the equal protection clause, is entitled to have an examination that is professionally independent of any influence by those having custodial control." 461 S.W.2d at 844.

Mr. Grass framed the question: "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?" (App. Br. 31). Echoing language from **Ake v. Oklahoma**, 470 U.S. 68, 105 S.Ct. 1087, 84 L.Ed.2d 453 (1985), Mr. Grass argues only that he be given access to a competent expert who will conduct an appropriate examination and assist in the evaluation, preparation, and presentation of his case (App.Br. 28) (*citation omitted*). The result of that evaluation may not support the petitioner's bid for release, in which case the expert's assistance may be in the form of advice to defer pursuing the release for the time being. A petitioner may reject that advice, and proceed without any support, but he will at least have had an opportunity to contest the opinion of those who think he should remain in custody.

Section 552.040.5 sets out procedure for the parties to follow in a release case. Just as it does not explicitly afford an indigent petitioner appointment of a competent expert, the subsection does not address representation, but the trial

courts routinely appoint Public Defenders for these cases. **Hoover** wryly noted the relative value of such assistance " . . . where an indigent confined in a mental hospital seeks habeas corpus it is more important to provide him with an independent psychiatric examination than to give him independent counsel." 461 S.W.2d at 843 (*citation omitted*). If an indigent petitioner has no access to a professional other than the one who is testifying, consistent with the position of the Department or the prosecutor who represents the Public Safety interest, that he should not be released, none of the procedural safeguards in the statute are meaningful.

II. This Court should not infer a finding of mental illness from the Judgment in this case because to do so would defeat the purpose of Rule 73.01(c) and render meaningless the Court's previous explicit direction that a release petitioner must request findings under the Rule.

In his opening brief, Mr. Grass noted this Court's direction that acquittee petitioners must request findings of fact pursuant to Rule 73.01 in order to be entitled to them.[1] Respondent argues that the Court should disregard Judge Brackmann's failure to respond to Mr. Grass' specific and timely request on the issue of whether he is mentally ill, reasoning that a finding that he is mentally ill can be inferred from the Judge's cryptic comment thereon ("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)) in the context of other findings and evidence in the case.

The Western District of the Court of Appeals clearly rejected Respondent's position in two recent release cases. In **State v. Weekly**, the court wrote "Failure to make required findings is grounds for reversal." 107 S.W.3d 340, 347 (Mo. App., W.D. 2003) (*citing* **State v. Revels**, 13 S.W.3d 293, 296 (Mo banc 2000) and Rule 73.01.) *See also* **State v. Gratts**, 112 S.W.3d 12, 19 (Mo. App., W.D.

[1] App. Br. 37, citing **Revels**, *supra*, and **Greeno v. State**, 59 S.W.3d 500 (Mo. banc 2001.)

2003) (reversed because the circuit court failed to make the statutorily mandated finding and therefore misapplied the law.)

While Mr. Grass' written motion for findings pursuant to Rule 73.01 did not specify findings on the statutory factors listed in Section 552.040.7 (L.F. 57), his request included the first factor listed in that section: Whether or not the committed person presently has a mental disease or defect. Moreover, the Office of the Attorney General filed a Motion to Correct, Amend, or Modify Judgment urging the trial court to make more complete findings, and recognizing Mr. Grass' request for finding on the statutory factors (L.F. 60-62). There was no ruling on the motion.

To hold that the Judgment in this case satisfies Mr. Grass' request under Rule 73.01 would significantly impair the efficacy of the Rule. A trial court would no longer be required to perform the difficult task of entering findings on a disputed, material fact or facts, instead relying on the reviewing court to infer the finding in the context of a deferential standard of review.

III. This Court should order Mr. Grass' unconditional release from the custody of the Department of Mental Health because the evidence shows that his is not mentally ill and the Due Process Clause of the Fourteenth Amendment requires his release if he is not both currently mentally ill and dangerous.

If Judge Brackmann found Mr. Grass to be mentally ill—and Mr. Grass contends that he did not make that finding—it was against the weight of the evidence, and this Court should reverse. In its preface titled "Standard of Review," Respondent urges that review of the issue on appeal be restricted to "view[ing] the evidence and concomitant inferences in a manner favorable to [Respondent] while disregarding all contradictory evidence," cautioning that the Court must not substitute its opinion for that of the trial court (Resp. Br. 15). These principles are generally valid, but do not apply when the reviewing court firmly believes that the judgment is wrong. **Murphy v. Carron**, 536 S.W.2d 30, 32 (Mo. banc 1976), in which case it "weigh[s] the evidence, including, of necessity, evidence and all reasonable inferences drawn therefrom, which is contrary to the judgment."

The history of this case offers an excellent illustration. In 1995, the Circuit Court of St. Louis County granted Mr. Grass a conditional release, and the Attorney General went to the Court of Appeals to ask that it be rescinded. **Grass v. Nixon**, 926 S.W.2d 67 (Mo. App., E.D. 1996). The Court of Appeals

unapologetically reweighed the evidence and substituted its judgment for that of the trial court, concluding that the evidence did not satisfy two of the statutory criteria. **Grass**, 926 S.W.2d at 71.

The deference normally due to the trial court on findings of fact does not come into play on the issue of whether Mr. Grass was mentally ill at the time of the judgment. Respondent claims "The trial court weighed the evidence and determined that Grass has a mental illness in spite of the testimony from Drs. Peters and Thomas." (Resp. Br. 29). Judge Brackmann weighed the evidence and avoided the issue.

It is elementary that a reviewing court cannot form a firm conviction that a judgment is wrong because it is against the weight of the evidence without first weighing the evidence, however informal the process may be. Respondent seems to understand that implicitly, as shown by its lengthy review of Dr. Gowdy's testimony and arguments against the value of testimony to the contrary. Mr. Grass will not repeat here his review of the evidence in Point III of appellant's substitute brief, with one exception. In Respondent's suggested findings of fact on the statutory factors, it notes Mr. Grass' refusal to participate in treatment, citing Dr. Gowdy's evaluation (Resp. Br. 16). Even if the Court chooses to disregard the testimony of other witnesses that Mr. Grass' participation was variable over the years, (Tr. 139, 144, 182), it should not overlook the significance of Dr. Thomas' testimony about Mr. Grass' efforts to work through the release procedures. Dr. Thomas, who was the head of Mr. Grass' treatment team until she was transferred

to another facility a month before the hearing, testified that Mr. Grass had participated in the prescribed cognitive behavioral program to the satisfaction of his treatment team, but the team's recommendation that he be transferred to a less secure unit was repeatedly ignored without explanation (Tr. 160, 164-166).

Mr. Grass contends that the evidence shows he does not currently have a mental illness, and this Court should order his unconditional release from the custody of the Department of Mental Health according to principles articulated in **United States v. Jones** and **Foucha v. Louisiana**, as argued fully in Point III of his opening brief. Mr. Grass is aware that the Court has rejected his interpretation in *dicta* in **State v. Revels**, 13 S.W.3d 293, 296 (Mo. banc 2000), but asks for a ruling on the question in order that he might present the question to a federal court in the future.

CONCLUSION

Because he showed by clear and convincing evidence that he is no longer mentally ill, 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, 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 criteria for release set out in Section 552.040.7, including whether he currently has a mental illness.

Respectfully submitted,

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Irene Karns, MoBar #36588
Attorney for Appellant
3402 Buttonwood
Columbia, Missouri 65201-3722
Telephone (573) 882-9855
FAX 573-875-2594

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 2002, in Times New Roman size 13 point font, and includes the information required by Rule 55.03. Excluding the cover page, the signature block, this certificate of compliance and service, and appendix if any, the brief contains 2,397 words, which does not exceed the number of words allowed for an appellant's substitute reply 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 November 26, 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 were hand delivered this 1st day of December, 2003, to the office of Daniel McPherson, Assistant Attorney General, 221 High Street, Jefferson City, Missouri 65102.

_____

Irene Karns