IN THE SUPREME COURT OF MISSOURI

No. SC85517

LLOYD GRASS,

Appellant,

vs.

STATE OF MISSOURI,

Respondent.

ON APPEAL FROM THE CIRCUIT COURT OF WARREN COUNTY

Hon. John C. Brackmann, Special Judge

RESPONDENT'S SUBSTITUTE BRIEF

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STATEMENT OF FACTS

On October 14, 1992, Appellant Lloyd Grass stabbed his wife to death. *Grass v. Nixon*, 926 S.W.2d 67, 68 (Mo. App. E.D. 1996). He was arrested and charged in the Circuit Court of Warren County with Murder in the First Degree. (S.L.F. 1)[1] Following his arrest, he was held in the Warren County jail, but on different occasions he was transferred to the Fulton State Hospital for mental evaluations. *Grass*, 926 S.W.2d at 68.

Dr. Richard Gowdy, a psychologist with the Department of Mental Health ("Department"), and currently the Director of Forensic Services (S.L.F. 36), evaluated Grass for his competency to stand trial and to determine his criminal responsibility in November 1993 and July 1994.[2] (Tr. 208, 211-12; S.L.F. 21, 30) His reports provide significant details of Grass's conduct near the time Grass killed his wife. (L.F. 37-48; S.L.F. 21-35) Grass spoke of "evil forces" that were "Satanic in nature" which made him think his wife was Satan. (L.F. 38) He said, "They made me think she was Satan. They tricked me into killing her. I stabbed her to death . . . numerous times . . . it was ritualistic killings." [sic] *Id*. On the night of the killing, Grass believed he was "receiving instructions regarding a 'test' against an 'evil force.' [He] began to follow these commands, turning books around, moving papers and masturbating. [He] described being in the dining room

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[1] *In this Brief, "Tr." refers to the transcript from the hearing of December 18, 2001. "L.F." refers to the Legal File. "S.L.F." refers to the Supplemental Legal File.*

[2] *Dr. Gowdy was not the Department's Director of Forensic Services the time these evaluations were performed; he attained that position in June 1995. (Tr. 206; S.L.F. 36)*

with his wife and urinating, defecating and vomiting." (L.F. 43) He told one of the doctors that he "'defecated, urinated, masturbated and vomited on his wife before stabbing her to death as part of a ritual.'" (S.L.F. 31) Human feces were found on a dining room chair at the crime scene, as were several cultivated marijuana plants. (L.F. 38; S.L.F. 22-23)

Grass told one of his two sons that he stabbed the boy's mother for reasons the son would not understand, but, Grass said, "'[a]s soon as I get my book done in jail, I'll mail you a copy.'" (S.L.F. 23) In the four or five days leading up to the killing, one of the sons reported seeing Grass in a bedroom with the electrical appliances unplugged and candles lit, staring at a plant, and Grass saying to him, "This is how the devil gets to you," through electricity. (L.F. 38; S.L.F. 23) And Grass was walking in his house with a flowerpot on his head because "it prevented evil spirits from entering." *Id*.

Grass told Dr. Gowdy in 1993 that he had experienced auditory hallucinations in September and October 1992. (L.F. 4; S.L.F. 22, 25-28) He also had delusional beliefs that he could communicate with God, that God had a specific plan for him, and that as part of the plan, he was to be tested by evil forces. (L.F. 4; S.L.F. 27) Grass also said he had heard the voice of God or angels. (L.F. 4; S.L.F. 25-27) In 1994, Grass told Dr. Gowdy that he had a "divine revelation from God and that God spoke directly to him." (L.F. 4; S.L.F. 32) He said that at the time of his wife's death, he was being tested by a Satanic force, and he spoke of communicating with spirits and with God. (L.F. 4; S.L.F. 33) And he believed these events were real. (L.F. 4)

During his 1993 and 1994 examinations, Dr. Gowdy observed that Grass continued to suffer from the same symptoms that were evident at the time of his arrest in October 1992. (L.F. 43, 47; S.L.F. 31-34) He diagnosed Grass as suffering from Psychotic Disorder, Not Otherwise Specified, in Partial Remission. (S.L.F. 29, 35) Dr. Jerome Peters, a psychiatrist with the Department, examined Grass in October 1992 and offered a diagnosis of Brief Reactive Psychosis. (Tr. 26; S.L.F. 31-32).

On September 6, 1994, the circuit court found Grass not guilty by reason of mental disease or defect on the charge of murdering his wife, pursuant to § 552.030, RSMo, and he was ordered into the custody of the Department. (S.L.F. 2-3) In March 1995, he was transferred to the St. Louis State Hospital,[3] where, in September, he was transferred to a less restrictive ward. *Grass*, 926 S.W.2d at 68-69. In October 1995 he filed an application for conditional release, pursuant to § 552.040.9, RSMo 1994, with the Probate Division of the Circuit Court of the City of St. Louis.[4] *Id*. He requested a series of passes that would allow him to leave the Hospital grounds for periods that would incrementally increase from eight hours to ninety-six hours, and his parents would supervise him on release. *Id*.; (Tr.

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[3] *Now known as the St. Louis Psychiatric Rehabilitation Center. (Tr. 67, 84)*

[4] *In 1995, applications for conditional release had to be filed in the probate division of the county where the NGRI acquittee was being held. § 552.040.9, RSMo 1994. In 1996, the statute was changed to require that an acquittee who was found not guilty of murder in the first degree to file an application for conditional release in the county of the court that committed him to the custody of the Department. § 552.040.10, RSMo 2000.*

72-73) The trial court granted his application, but the Court of Appeals reversed. *Grass*, 926 S.W.2d at 71.

Grass escaped from the Hospital on August 9, 1996, one day after he was granted full unescorted privileges at the Hospital. (L.F. 41) He was indicted in September 1996 in the Circuit Court of the City of St. Louis on the charge of Escape from Commitment. (S.L.F. 4) In January 1997, he was arrested in New York and extradited to Missouri. (L.F. 41, 216) Following a jury trial in December 1998, Grass was found guilty, and on January 7, 1999, the circuit court imposed the maximum sentence of five years incarceration with the Missouri Department of Corrections. (S.L.F. 39-41) The Court of Appeals affirmed the conviction. *State v. Grass*, 14 S.W.3d 656 (Mo. App. E.D. 2000). Following his incarceration, he was granted a parole on March 30, 2000, but he refused it because he was required to return to the custody of the Department of Mental Health. (L.F. 42) On March 30, 2001, he was paroled and delivered to the custody of the Department of Mental Health, where he was placed at the Fulton State Hospital. (L.F. 42) Grass filed in the Circuit Court of Warren County, Applications for Unconditional Release on August 25, 1999 (L.F. 9) and April 12, 2000 (L.F. 16), a Motion for Conditional Release on December 28, 2000 (L.F. 32), and a Motion for Unconditional and Conditional Release on September 28, 2001. (L.F. 49) All four motions were docketed by the Circuit Court under the same file number. (L.F. 1-8) A hearing was held in the Circuit Court on December 18, 2001. (Tr. 2) The court conducted the hearing on the applications for unconditional release. (Tr. 9)

Dr. Gowdy evaluated Grass for purposes of Grass's unconditional release application and he prepared a report concerning that evaluation on July 16, 2001. (Tr. 206-07; L.F. 37-38) The evaluation included an interview that Dr. Gowdy conducted with Grass on May 4, 2001. (L.F. 37) Gowdy concluded that Grass has a diagnosis of Psychotic Disorder, Not Otherwise Specified. (Tr. 208, 214; L.F. 43) It is an Axis I[5] illness and a mental disease or defect pursuant to Chapter 552, RSMo. (Tr. 60, 103-04, 131; L.F. 47) It is an illness Grass will have for the rest of his life and for which there is no cure. (Tr. 140, 214, 235-36, 238)

Dr. Gowdy testified that Grass was not exhibiting symptoms of a mental illness at the time of the December 2001 hearing. (Tr. 240) Even so, he still had the illness at that time. (Tr. 214, 218, 240-41). But, according to Dr. Gowdy, Grass's unwillingness to participate in treatment made it difficult to determine whether his symptoms were active, or whether they were in partial or full remission. (Tr. 225-26, 232-33, 240-41; L.F. 44, 47).

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[5] *This "multiaxial system" is discussed in the American Psychiatric Association,* ***Diagnostic and Statistical Manual of Mental Disorders****, 27-33 (rev. 4th ed. 2000) (****DSM-IV-TR****). The* ***DSM*** *is recognized as an authoritative manual of mental diseases and as being generally accepted and used by individuals in the mental health field.* ***State v. Dewey****, 86 S.W.3d 434, 438 (Mo. App. W.D. 2002). Dr. Jerome Peters referred to the* ***DSM-IV*** *during his testimony. (Tr. 22).*

Dr. Gowdy has also given Grass an Axis II diagnosis of Personality Disorder, Not Otherwise Specified, because of Grass's narcissistic personality traits, his grandiose sense of self-importance, and his perception that he is different from others. (L.F. 43-44) Dr. Peters, who testified for Grass at the unconditional release hearing, agrees that Grass displays traits of a narcissistic personality. (Tr. 53-56) And he notes that those traits can be dangerous because individuals with those traits can be prone to rage and anger when other people demonstrate indifference to them or confront them. (Tr. 55) And, as Dr. Bruce Harry, a psychiatrist who testified for Grass, noted in 1998, "[A]ny dysfunctional personality traits would place Mr. Grass at higher risk for a recurrence of his psychotic episode." (Tr. 134; S.L.F. 20) A dysfunctional personality trait includes the narcissistic traits that Grass exhibits. (Tr. 135)

The doctors who have treated Grass since the time of the killing do not know what caused his illness. (Tr. 68, 131-135, 224; L.F. 47) *Dr. Thomas, one of the doctors who appeared for Grass, testified that it might be "unknowable." (Tr. 167)* And even though none of the doctors detected any active symptoms at or near the time of the hearing, the symptoms can reemerge.[6] (Tr. 64, 90-91, 103-04, 118, 131, 223) But Grass would not know the stressors or triggers to avoid to prevent their reemergence (Tr. 132-33, 224) because he lacks insight in the origins, course and duration of his illness. (L.F. 47, 48) Grass believes he suffered a "panic attack" brought on by the death of his wife, that resulted in a brief reactive psychosis (Tr. 233-34;

[6] *Dr. Thomas testified that it was not possible to say that Grass's symptoms "may never reemerge." (Tr. 176)*

L.F. 48); but this misperception is "inconsistent with the evidence and . . . clinically inaccurate." *Id*.

Ever since his commitment to the Department in 1994, Grass has "not demonstrated a consistent commitment to treatment." (L.F. 48) Dr. Gowdy believes it is significant that Grass escaped one day after gaining unescorted grounds privileges, and that he then refused parole from the Department of Corrections in March 2000, choosing voluntarily to stay in prison rather than return to the custody and care of the Department of Mental Health. (L.F. 48) And, Dr. Gowdy notes, Grass "has steadfastly refused to participate in evaluation and treatment at the Fulton State Hospital" (L.F. 48), and his intent "is not to cooperate with any treatment unless the Treatment Team first agrees to state in writing that he does not need any treatment." (L.F. 45)

Dr. Bruce Harry also noted Grass's refusal to participate in treatment while in the Department's care. (Tr. 131, 142; S.L.F. 7-10, 17-20) Dr. Lisa Thomas, who treated Grass from June through about November 2001 (following Dr. Gowdy's interview with Grass), noted that Grass made a "political statement of choice" to "officially participate" in treatment, but not to "work the level system."[7] (Tr. 162) It was during the "latter part" of

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[7] *The level system is used by the Department to assess a patient's ability to make progress through the treatment program and to handle increasing amounts of freedom and responsibilities. (Tr. 191-93) Ultimately the Department's goal is to move qualified individuals to lower security levels (less restrictive environments) within the facilities, and then to release. (Tr. 192-93, 219-20)*

her time with Grass that he decided to more fully participate in treatment and to progress through the level system. (Tr. 162) And Dr. Bruce Wilson, a psychologist with the Department who has worked with Grass from March 2001 through the time of the hearing and is part of Grass's treatment team (Tr. 178-180), described Grass's participation in the relapse prevention program as "variable." (Tr. 181) Dr. Wilson noted that most recently Grass had not completed assignments and he hadn't addressed the topics that were being discussed in the group. (Tr. 182)

Dr. Gowdy believes that should Grass be released, he would not be able to recognize the onset of the signs or symptoms of the illness, (Tr. 220, 223), and even if he recognized them, he would not seek treatment (Tr. 220-21).

Further, Dr. Gowdy could not give an opinion within a reasonable degree of professional certainty that Grass was *not* likely to have a mental disease or defect in the reasonable future that would make him dangerous. (Tr. 222) Neither could he say that Grass is *not* likely to be dangerous to others if he were to be released. (Tr. 222) Dr. Gowdy could not say that Grass is *not* likely now or in the reasonable future to commit another crime as a result of his illness. (Tr. 222) Dr. Gowdy opined that Grass is not aware of the nature of the violent crime he committed. (Tr. 222-23), and he believes that Grass does *not* have the capacity to conform his conduct to the requirements of the law in the future. (Tr. 223)

STANDARD OF REVIEW

The standard of review of the denial of an unconditional release is governed by *Murphy v. Carron*, 536 S.W.2d 30 (Mo. banc 1976). *State v. Revels*, 13 S.W.3d 293, 296, 297 (Mo. banc 2000); *State v. Canchola*, 954 S.W.2d 691, 693 (Mo. App. W.D. 1997). This standard of review applies to all three points raised in Appellant's Substitute Brief and addressed in Respondent's Substitute Brief.

The circuit court's judgment must be affirmed unless there is no substantial evidence to support it, it erroneously declares or applies the law, or is against the weight of the evidence. *Murphy*, 536 S.W.2d at 32. A judgment can be set aside as being against the weight of the evidence only upon "a firm belief that the decree or judgment is wrong." *Id.* "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 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). An appellate court should not substitute its judgment for that of the trial court. *Spradlin v. City of Fulton*, 982 S.W.2d 255, 263 (Mo. banc 1998).

ARGUMENT

I. Grass is not entitled to a second evaluation merely because the State also requested an evaluation, and the evaluation was performed by an employee of the Department of Mental Health.

A. Grass is entitled only to access to a competent professional who will perform an appropriate evaluation and who will render opinions based only on his professional training.

A committed person seeking unconditional release is entitled to an examination by a person of his own choosing only if he pays for it. *§ 552.040.5, RSMo 2000*. If the committed person does not have the funds to pay for an examination by a person of his choosing, then he is only entitled, upon proper application, to access to a competent professional who will conduct an appropriate examination and who can freely render his opinion based only on his professional training. *State ex rel. Hoover v. Bloom*, 461 S.W.2d 841, 844 (Mo. banc 1971); *Ake v. Oklahoma*, 470 U.S. 68, 83 (1985). At the time he filed his application for unconditional release, Grass requested that he be given a mental evaluation. (L.F. 2) At the time the State filed its opposition to Grass's application it also requested a mental evaluation. (L.F. 3) Dr. Richard Gowdy, Director of Forensic Services for the Department of Mental Health, evaluated Grass to determine his suitability for release in May 2001. (Tr. 206-07; L.F. 37) Grass does not question Dr. Gowdy's competence or the appropriateness of his examination. (App.'s Sub. Brief, pp. 24-25) The issue to be determined then is whether Dr. Gowdy's opinion was "independent" in the sense

that the professional performing the examination was able to conduct the examination honestly and competently, despite any prior personal or professional relationship. *Hoover*, 461 S.W.2d at 844.

B. Dr. Gowdy performed an independent examination.

Hoover places the responsibility on the trial court judge to see that the requirement of an independent examination is met. *Id.* *Hoover* also admittedly indicates that the judge should perform that function while selecting the professional who will perform the evaluation. *Id.* That process did not happen in this case, but the judge still made a determination of Dr. Gowdy's independence in his capacity as the finder of fact by evaluating the credibility of Dr. Gowdy and weighing his testimony along with all the other evidence presented at hearing. As will be shown below, the court reached the correct result in finding Dr. Gowdy's evaluation to be independent and in admitting his testimony and report. Any error by the trial court in the procedure it followed would be harmless error and does not mandate reversal.

Trial court judges are presumed to rely only on relevant and admissible evidence in entering judgment in a court-tried case. *W.D.L. v. J.L.*, 829 S.W.2d 574, 576 (Mo. App. W.D. 1992). That presumption extends to the trial court's prerogative to determine the credibility of witnesses, and to accept or reject all, part or none of the testimony. *Kornberg v. Kornberg*, 688 S.W.2d 377, 378 (Mo. App. E.D. 1985). Grass brought his allegations of bias by Dr. Gowdy to the court's attention before evidence was taken. (Tr. 10-12) The court presumably considered those allegations in weighing and evaluating Dr.

Gowdy's testimony, and satisfied itself that Dr. Gowdy's opinions were based on his independent professional judgment and were not the product of bias or outside influence. Substantial evidence exists in the record to support that finding.

Dr. Gowdy is a psychologist who has been licensed to practice in Missouri since 1990. (S.L.F. 38) His work has included, among other things, the performance of several hundred forensic examinations after he was certified by the Department to conduct such examinations in 1990. (Tr. 206) He has served as the Department's Director of Forensic Services since June 1995. (S.L.F. 36) In addition to his professional responsibilities as a psychologist, he has served as an Adjunct Assistant Professor in the Department of Psychology at the University of Missouri - Columbia (S.L.F. 38), and from 1991 to the present he has served as a Clinical Assistant Professor in the Department of Psychiatry with the University of Missouri Health Sciences Center (S.L.F. 37). With respect to Grass, Dr. Gowdy performed pre-trial mental evaluations in November 1993 and July 1994. (Tr. 208; S.L.F. 21-35) In 1995, he reviewed the Department's records concerning Grass and testified at the conditional release hearing. (Tr. 208); *Grass*, 926 S.W.2d at 69. And, as Dr. Peters noted, a psychologist can make psychiatric mental health diagnoses. (Tr. 51-50).

Dr. Gowdy's qualifications (S.L.F. 36-38), his testimony (Tr. 205-248), and his report (L.F. 37-48) all demonstrate that his opinions were freely presented and based on his professional training. Merely because he is the Department's Director of Forensic Services and even though he testified in 1995 that Grass should not be conditionally

released, his opinion is not ipso facto suspect or biased in any way. As this court has recognized, "the fact remains that psychiatrists are physicians, not advocates; nevertheless, when they express views which are not in accord with those harbored by the confined patient or his counsel, there is a partisan tendency to regard such an expert as adversary." *Hoover*, 461 S.W.2d at 843-44 quoting *Proctor v. Harris*, 413 F.2d 383 (D.C. Cir. 1969). Dr. Gowdy's evaluation findings are consistent with the opinions that he has offered concerning Grass since the time of Grass's earliest evaluations beginning in 1993 (S.L.F. 21-35), and is a full clinical understanding of Grass's psychosis, the treatments offered to him by the Department, and Grass's behavior since 1993. And, Grass offered no evidence of bias or prejudice during the hearing. The trial court was able to observe Dr. Gowdy's testimony and to weigh his credibility in addition to weighing the significance of the report he prepared and submitted to the court. As this Court in *Hoover* had "no reason to doubt the professional integrity of all psychiatrists that may be working" for the Department of Mental Health, and "[a]bsent a showing to the contrary, one would assume both honesty and competency," it should likewise consider Dr. Gowdy's evidence in a similar light. *Hoover*, 461 S.W.2d at 844.

C. Grass is not entitled to a professional who will serve as his advocate.

Grass goes on to contend that where both he and the State have requested an evaluation, then two evaluations should be performed, one for him and one for the State. *Ake* states that a defendant is entitled to "access to a competent psychiatrist who will conduct an appropriate examination and assist in evaluation, preparation, and presentation

of the defense. *Ake*, 470 U.S. at 83. Grass seems to take the statement as meaning he is entitled to a psychiatrist who is appointed for the specific purpose of serving as his advocate. That conflicts with this Court's recognition that psychiatrists and other treating professionals do not serve as advocates. *Hoover*, 461 S.W.2d at 843. The United States Supreme Court emphasized in *Ake* that the defendant is not entitled to a psychiatrist of his own choosing or the funds to hire one. *Ake*, 470 U.S. at 83. It also noted without disagreement the decision in *United States ex rel. Smith v. Baldi*, which found no need for an appointed psychiatrist where neutral psychiatrists had examined the defendant and testified at trial. *Id.* at 85 citing *United States ex rel. Smith v. Baldi*, 344 U.S. 561, 568 (1953). All that *Ake* requires is access to a psychiatric examination, to the testimony of the psychiatrist, and to assistance in preparation of the defense. *Ake*, 470 U.S. at 84. *Ake* leaves to the states the decision on how to implement the right. *Id.* at 83.

Missouri has chosen to implement the right through the scheme set out in § 552.040.5, which permits the committed person to request that an independent examination be performed. The idea behind an independent examination is that neither side will be able to predict its conclusions, and that the report as well as the examining professional will be equally available to both sides to make whatever use of it they wish. That is all that *Ake* requires.

D. Grass waived his objection to Gowdy's testimony by refusing the court's offer of additional time for the performance of another evaluation.

Grass's point should also be denied because the court offered to give him additional time to have a different evaluation performed, but he declined the offer. Before the presentation of evidence, Grass objected to the report prepared by Dr. Gowdy and filed with the court prior to the hearing. (Tr. 13-16) Grass told the court that he asked for an independent evaluation and that the "independent part focus on someone other than a DMH employee." (Tr. 16) The court told Grass that it would not order a private psychiatrist to examine him, that Grass could hire anyone that he wished, "[a]nd I would certainly give you the time if we need. . . ." Grass responded, "No, sir. No, sir. I just pointed that out as an aside. . . ." (Tr. 16) As already discussed, Grass is wrong: Section 552.040.5 does not require the court to appoint someone other than a Department employee to perform the evaluation, unless Grass is prepared to pay the cost of the evaluation. Because Grass did not offer to pay for a different evaluation nor accept the court's offer to give him additional time to get another examination, his point should be denied.

II. The trial court found that Grass has a mental illness, but even if this Court concludes that it did not, that omission does not materially affect the merits of the action as the record of the proceedings below supports the judgment and affords appellate review.

Grass requested that the trial court make findings on the contested issues before the presentation of evidence, and the trial court acknowledged that he was entitled to have them. (Tr. 18-19) see *Mo. R. Civ. P. 73.01*. On the issue of whether Grass has or in the reasonable future is likely to have a mental illness that makes him dangerous, the trial court made the following entry in its order: "Whether [Grass] still has a mental disease or defect is a semantic issue. He will always be more susceptible to psychotic episodes." (L.F. 58) This finding satisfies Rule 73.01.

The trial court weighed all of the evidence and the fair interpretation of the language of that finding is that the court concluded that Grass has a mental disease or defect and because of that he is more susceptible to psychotic episodes. The evidence from Dr. Gowdy supports this conclusion.

Further, this finding, read in conjunction with the rest of the court's findings, conclusions and judgment, leads to the conclusion that the court found, as required by statute, that Grass has a mental illness that makes him dangerous and which in the reasonable future is likely to make him dangerous. *§ 552.040.9, RSMo 2000*. The court noted, for instance, that Grass committed a violent act (murder) while experiencing a psychotic episode, and that persons who experience a psychotic episode are statistically

much more likely to have another episode than the population as a whole. (L.F. 58-59) The court also took note of the fact that Grass refuses to participate in therapy sessions in which the patient is to learn the warning signs of an upcoming episode so that the episode can be treated before a problem occurs. (L.F. 59)

Should this Court conclude, however, that the trial court did not make the requisite finding, reversal is not mandated. *Lattier v. Lattier*, 857 S.W.2d 548, 549 (Mo. App. E.D. 1993) (reversal not always mandated when trial does not make mandatory findings pursuant to Rule 73.01). When the record "is sufficient to support the judgment and affords appellate review," reversal is not required. *Legacy Homes Partnership v. General Elec. Corp.*, 10 S.W.3d 161, 162 (Mo. App. E.D. 1999). This Court's rules state, "No appellate court shall reverse any judgment, unless it finds that error was committed by the trial court against the appellant materially affecting the merits of the action." *Mo. R. Civ. P. 84.13(b)*. In *Hahn v. Hahn*, the court noted that in light of Rule 84.13(b), a trial court's failure to include findings of fact required by Rule 73.01 was not a sufficient basis for reversal when that error did not materially affect the merits of the action. *Hahn v. Hahn*, 569 S.W.2d 775, 778 (Mo. App. St. L. 1974).

The record supports the finding that Grass alleges the trial court was required to make in writing. The State's arguments in Point III, *infra*, demonstrate that the trial court's judgment is supported by the record. Should this Court find that the trial court omitted a finding on the issue of mental illness, however, that omission does not materially affect the merits of the case, nor does it interfere with appellate review, thus reversal is not mandated.

See Eagleton v. Eagleton, 767 S.W.2d 582, 586 (Mo. App. E.D. 1988). "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*, 847 S.W.2d at 782.

Because the substantial evidence supports the court's judgment, it is consistent with the weight of the evidence, and the trial court did not misapply or wrongly declare the law, the judgment must be affirmed. *Murphy*, 536 S.W.2d at 32. If the Court believes that on this point the trial court erred, however, the proper relief is to remand the case to the trial court with instructions to make such a finding.

III. Grass failed to establish by clear and convincing evidence, which is his burden, that he is entitled to an unconditional release.

The trial court did not err when it denied Grass's application for unconditional release because Grass failed to meet his burden to establish by clear and convincing evidence that he is entitled to such a release. He must show that he no longer has "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. *§ 552.040.7* see also *§ 552.040.9*. 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." *Canchola*, 954 S.W.2d at 694. 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. Ct. App. 1995) (citations omitted). In evaluating the sufficiency of the evidence in an unconditional release case, the court must bear in mind the intent behind the statute to "assure with some degree of certainty that applicants are no longer a danger to society before granting them their unconditional releases." *Canchola*, 954 S.W.2d at 697. Grass's evidence did not meet the standard for obtaining an unconditional release.

A. Grass did not establish that he does not have a mental disease or defect that makes him dangerous to himself or others.

Dr. Gowdy opined that Grass suffers from Psychotic Disorder, Not Otherwise Specified, a mental illness[8] that makes him dangerous to himself or others. (Tr. 208, 216; L.F. 48) Chapter 552 defines a mental disease or defect to 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. The terms "mental disease or defect" do not include alcoholism without psychosis or drug abuse without psychosis or an abnormality manifested only by criminal sexual psychopathy as defined in section 202.700, RSMo. . . .

§ 552.010, RSMo 2000.

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[8] *Throughout this brief, the terms "mental illness" and "mental disease or defect" will be used interchangeably. Respondent recognizes that mental illness has another definition under other Missouri statutes. § 630.005(23), RSMo 2000. But 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 (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 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." Id.*

Dr. Gowdy's diagnosis is based on his observations that Grass's symptoms became apparent in September or October 1992, and, while beginning to remit, were still present in November 1993 and July 1994, some twenty months after the initial onset. (Tr. 208-14; L.F. 43; S.L.F. 32-33) The symptoms included "compelling auditory hallucinations and delusional beliefs."[9] (L.F. 43)

Dr. Peters reached a different conclusion. A psychiatrist who works for the Department and who testified for Grass (Tr. 20-21), Dr. Peters evaluated Grass in October 1992, shortly after the killing. (Tr. 26) He concluded that Grass experienced a brief reactive psychosis, which is a psychosis that lasts more than one day but less than one month, although he was uncertain of its origin. (Tr. 26, 36, 38) The next time he saw Grass was in June 2001 to perform an evaluation to determine whether Grass could be moved within the Fulton State Hospital. (Tr. 40-41) Thus unlike Dr. Gowdy, he did not see Grass in November 1993 nor July 1994.

Dr. Peters agreed that if the symptoms of a psychotic disorder in a patient extend beyond one month, that the illness is not a brief reactive psychosis; rather an appropriate diagnosis "for that time" could be psychotic disorder, not otherwise specified. (Tr. 61) Thus Dr. Peters did not entirely disagree with the diagnosis provided by Dr. Gowdy.[10] (Tr. 61-64) And, Dr. Peters admitted, it would be possible for a professional to make such a

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[9] *The symptoms are discussed in more detail in the Statement of Facts, supra, at pages 6-8.*

[10] *Presumably Dr. Peters would require that a "qualifier" such as "in remission" or "by history" be added to Dr. Gowdy's diagnosis. (Tr. 63)*

diagnosis based on the review of a patient's records and with an interview of one and one-half hours. (Tr. 56-57) Dr. Gowdy's evaluation in May 2001 included an interview with Grass that lasted a little more than two hours, and a review of Grass's treatment records maintained by the Department. (Tr. 207-08; L.F. 37) Thus Dr. Peters's testimony supports, in part, Dr. Gowdy's opinion of Grass's mental illness.

Along with Dr. Peters, Dr. Thomas testified that she did not observe any signs or symptoms of mental illness in Grass. (Tr. 161-62) She had been treating Grass from June through November 2001. (Tr. 160, 163) Her professional experience, however, is not as lengthy or broad as Dr. Gowdy's. She passed her board examination for forensic examinations in April 2001, and she had performed only two or three such examinations at the time of the hearing. (Tr. 174) Her work with Grass was not related to a forensic examination. (Tr. 174) Dr. Gowdy, on the other hand, has been licensed since 1990, has been certified to conduct forensic examinations since 1990, and has performed "several hundred" of them.[11] (Tr. 206; S.L.F. 38)

The trial court weighed the evidence and determined that Grass has a mental illness in spite of the testimony from Drs. Peters and Thomas. Dr. Gowdy conducted a thorough mental evaluation that was close in time to the hearing, and his opinion is entitled to the great weight given it by the trial court.

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[11] *See Point I, supra.*

Dr. Gowdy disagrees with Dr. Peter's diagnosis that Grass suffered from a brief reactive psychosis in 1992. (Tr. 213-14; L.F. 47) Grass's own questioning of Dr. Peters underscores, however, Grass's false belief that he suffered a brief reactive psychosis as a result of his wife's death – not that he suffered an illness that led to the killing. In discussing the possible stressors or triggers that caused the psychosis diagnosed by Dr. Peters (Tr. 36-40), Dr. Peters opined that a psychological stressor was the likely cause (Tr. 37), and Grass suggested that the loss of his spouse was "probably . . . the trigger for my brief reactive psychosis." (Tr. 37-38) Dr. Peters responded that it was possible, but he would have to ascertain more information, including historical background, to define Grass's psychotic behavior. (Tr. 38-39) Dr. DeRosear,[12] however, firmly disagreed with Grass's supposition. When Grass asked if his wife's death could have triggered his psychosis, Dr. DeRosear responded: "It was apparent to me, in my review of the your records that you had to have been sick at the time of the crime, because your behavior that was described during the time of the crime was psychotic. . . . I don't think you got sick afterwards. I think you got sick before. . . . I don't know why though." (Tr. 68) Grass's confusion on this point only underscores Dr. Gowdy's opinion that Grass does not have insight into his mental illness. (L.F. 47, 48)

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[12] *Dr. Lori DeRosear is a psychiatrist and the Medical Director of the St. Louis Psychiatric Rehabilitation Center. (Tr. 66-67) Grass called her to testify as his witness.*

Another point on which Dr. Gowdy's opinion concurs with the other doctors who testified is on the doctors' inability to identify the stressors or triggers that caused Grass's illness in the first place. Drs. Peters (Tr. 37-39), DeRosear (Tr. 75-76), and Harry (Tr. 131-35) testified that the cause of Grass's illness was not known to them.

Dr. Gowdy's opinions about Grass were consistent from the time of his first evaluation in 1993 to the present. His evaluation and report were both thorough and professional. There was, however, disagreement among the doctors who testified for Grass on certain points. For example, Dr. DeRosear, the Medical Director of the St. Louis Psychiatric Rehabilitation Center, disagreed with Dr. Peters's conclusion that Grass's "thought flow was goal directed, organized, and logical, insight and judgment was good to his present situation, as well as future issues." (Tr. 69-70)

Given the explicit findings and analysis in the judgment (L.F. 58-59), the trial court weighed the evidence and found Dr. Gowdy credible and his evidence probative on the relevant issues. Given his familiarity with Grass's mental history and his thorough evaluation for this release application, the trial court was justified in concluding that Grass should not be released. The "weight of the evidence is not the quantity or amount thereof. Rather it is the weight in probative value; its effect in inducing belief." *Hanebrink v. Parker*, 506 S.W.2d 455, 458 (Mo. App. St. L. 1974).

B. Grass did not meet his burden to establish by clear and convincing evidence that he satisfies all of the criteria of § 552.040.7, RSMo.

An insanity acquittee like Grass must establish by clear and convincing evidence not only that he no longer has, and in the reasonable future is not likely to have, a mental disease or defect rendering him dangerous, but he must also establish by clear and convincing evidence his suitability for release based on the enumerated criteria in § 552.040.7. The trial court must consider all of those elements "in addition to any other relevant evidence." *§ 552.040.7, RSMo 2000* see also *State v. Dudley*, 903 S.W.2d 581, 584-85 (Mo. App. W.D. 1995) and *Jensen v. State*, 926 S.W.2d 925, 928 (Mo. App. E.D. 1996).

The substantial evidence concerning each of the criteria set forth in Section 552.040.7, RSMo, supports the trial court's conclusion that Grass should not be released, and it highlights the need for keeping him in the Department's custody.

Whether Grass has a mental disease or defect (§552.040.7(1)). Grass has a mental disease or defect: Psychotic Disorder, Not Otherwise Specified.

The nature of the offense for which Grass was committed (§552.040.7(2)). Grass was found NGRI on the charge of Murder in the First Degree. (S.L.F. 1) The events surrounding the murder are chronicled in the reports that were admitted into evidence at the hearing. (S.L.F. 11-17, 21-28, 31-34) The offense of murder "demonstrates a mental illness that poses a risk to public safety of the highest order." *Grass*, 926 S.W.2d at 71.

Grass's behavior while confined in a mental health facility (§552.040.7(3)). Following his commitment to the Department he was able to persuade a circuit court that

he should get a conditional release in December 1995; the Court of Appeals reversed that release, however. *Id.*

Resorting to self-help, Grass eloped from the Hospital in 1996. The day before his escape, he was granted passes that allowed him to move about the facility grounds unescorted. (L.F. 41) He remained at large until he was captured in New York and extradited to Missouri. (Tr. 216) He was charged with escape from commitment, tried, found guilty and sentenced to five years in prison. (S.L.F. 40) The trial court noted Grass's elopement in its consideration of whether he should be released. (L.F. 58).

Dr. Gowdy also noted that since Grass's return to Fulton following his release from prison, Grass has refused to participate in treatment, thus making it impossible to determine whether the symptoms of his illness are still active, or in full or partial remission. (L.F. 44, 48)

Dr. DeRosear worked with Grass while he was the St. Louis State Hospital in 1994 to 1996. She described Grass's "amazing ability to spin whatever story and stay consistent with whatever story" he comes up with. (Tr. 80) She recalled that prior to his elopement, she and Grass had numerous discussions about his frustration with being in Department facilities, and that Grass told her he would not elope. (Tr. 78) Grass also told Drs. Carrera and Gesmundo, two of his treating psychiatrists at the Hospital in 1995 and 1996 (Tr. 84-85), more than once that he would not elope. (Tr. 93-94, 100-02) Based in part on those assurances, Dr. Gesmundo supported Grass's request for a conditional release in 1995. (Tr. 100)

Grass told Dr. Harry in 1998, while awaiting trial on the charge of escape from commitment, that he would "try to elope given the opportunity" if he did not get recourse from the courts on his petition for release. (Tr. 136, S.L.F. 18)

The elapsed time between the unconditional release hearing and the last reported unlawful or dangerous act (§552.040.7(4)). The unconditional release hearing was convened in December 2001. Grass eloped from St. Louis State Hospital in August 1996, and he remained at large until his capture in January 1997. He was imprisoned from January 1999 to March 2001. In March 2001, he was returned to the custody of the Department and he has remained at the Fulton State Hospital since that time.

Whether Grass had conditional releases without incident (§552.040.7(5)). Grass had only one conditional release, granted in December 1995. The State appealed that order. After the Court of Appeals stayed the release order, Grass was returned to the hospital. Grass presented no evidence concerning his conduct during his brief 1995 release.

Whether Grass would be dangerous to himself or others is dependent on his taking medication (§ 552.040.7(6)). Grass does not take medication to treat his mental illness because doctors have been unable to identify a medication that might help his condition. (Tr. 72, 162)

In essence what Grass wants to do is to move from Fulton State Hospital directly into the community with no limitations or conditions on his conduct. Dr. Gowdy is not alone in saying that Grass should not be unconditionally released. Even doctors called as witnesses by Grass agree that it is not in Grass's best interest to be unconditionally

released. (Tr. 75, 80, 87-88, 142, 153, 174-75) see *State v. Thomaston*, 726 S.W.2d 448, 453 (Mo. App. W.D. 1987) (affirming denial of unconditional release where psychiatrist and psychologist called as witnesses by acquittee testified they did not support unconditional release). According to Dr. DeRosear, he should not "jump from maximum security to an unconditional release." (Tr. 75) He needs to follow the processes set out by the Department. (Tr. 80, 219-20) Dr. Harry (Tr. 148-153) and Dr. Thomas (Tr. 174-75) offered similar opinions.

C. Grass did not establish that he did not and in the reasonable future was not likely to have a mental illness that makes him dangerous.

Grass must establish that he no longer has, and in the reasonable future is not likely to have, a mental disease or defect rendering him dangerous. *§ 552.040.9*. This Court has noted, "In Missouri, the standard for denying an unconditional release is whether the insanity acquittee has, and in the reasonable future is likely to have, a mental disease or defect rendering the person dangerous to self or others," and this "statutory standard meets the holding of *Foucha*." *Revels*, 13 S.W.3d at 296 (emphasis added). Thus, Grass's assertion that he "has to prove only that he is not mentally ill at the time his petition is ruled," is incorrect. (App.'s Sub. Brief, p. 41) The Western District of the Court of Appeals recently rejected an argument similar to the one Grass is making. *State v. Weekly*, 107 S.W.3d 340, 351 (Mo. App. W.D. 2003).

The court in *Weekly* analyzed the cases Grass cites, *State v. Nash*, 972 S.W.2d 479 (Mo. App. W.D. 1998), and *Foucha v. Louisiana*, 504 U.S. 71 (1992), and determined they do not require the release of an acquittee whose mental disease is in remission, but who fails to provide clear and convincing evidence that he is not likely in the reasonable future to have a mental disease or defect rendering him dangerous to his own safety or that of others. *Id.* The court noted that *Nash* is applicable to cases in which the mental patient, due to past misdiagnosis, was erroneously believed to have suffered from a mental illness. *Id.* at 347. *Nash* did not involve a situation where the mental disease or defect was in remission or was currently asymptomatic. *Id.* at 348 quoting *Nash*, 972 S.W.2d at 483.

Grass is not arguing that he never suffered from a mental disease or defect, but is instead focusing on whether he is currently displaying symptoms of that illness. Therefore, *Nash* does not help him.

Weekly also distinguished *Foucha*, stating that the United States Supreme Court's holding in *Foucha* does not apply to a case where the issue is whether a mental illness currently in remission is likely to return once the acquittee is no longer under supervision. *Weekly*, 107 S.W.3d at 349. The court also noted that *Foucha* involved a conditional release while *Weekly*, like this case, involved an unconditional release. *Id.* Conditional and unconditional releases serve different purposes, as reflected in the differing statutory requirements for obtaining a conditional as opposed to an unconditional release. *Id.* A less stringent standard for release is appropriate in conditional release cases because the potential danger posed by the release is offset by the continuing supervision of the acquittee. *Id.* Because the lack of supervision increases the danger stemming from an unconditional release, the Missouri statute satisfies due process by denying an unconditional release where the acquittee fails to meet his burden of showing he is not likely to be dangerous in the reasonable future. *Id.* at 351. Grass failed to meet his burden on this issue, and the trial court properly denied his petition.

D. Grass failed to meet his burden of proof that he satisfied § 552.040.20, RSMo.

Because Grass was charged with murder in the first degree, he has an additional burden in order to gain his release. He must establish by clear and convincing evidence that 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 that 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 the law in the future," *§ 552.040.20, RSMo 2000* see *Marsh v. State*, 942 S.W.2d 385, 392 (Mo. App. W.D. 1997).

On all of these points, Dr. Gowdy testified that he could not say within a reasonable degree of professional certainty that Grass was *not* likely:

- to have a mental disease or defect that renders him dangerous to his safety or the safety of others (Tr. 222);
- to be dangerous to others if he were to be released (Tr. 222); and,
- was not likely now or in the reasonable future to commit another violent crime against another person because of his mental illness. (Tr. 222)

And, Dr. Gowdy believes, not only does Grass not have the capacity to conform his conduct to the requirements of the law in the future, but neither is he aware of the nature of the violent crime he committed. (Tr. 222-23)

Grass's failure to adduce clear and convincing evidence on these points mandated that the circuit court not release him. "Notwithstanding any other provision of law to the

contrary, *no* person committed to the department of mental health who has been tried and acquitted by reason of mental disease or defect as provided in section 552.030 shall be . . . unconditionally released unless the procedures set out in this section are followed." *§ 552.040.3* (emphasis added). Before a release can be granted, the court must evaluate the candidate's suitability for release under the non-exclusive criteria set out in §§ 552.040.7, .9, and .20. The trial court followed all of the statutory mandates and its judgment should be affirmed. *Dudley*, 903 S.W.2d at 584-85 (trial court's judgment will be reversed where trial court failed to follow statutory mandate to consider all relevant factors and evidence); see also *Jensen*, 926 S.W.2d at 928.

Moreover, in connection with release requests from insanity acquittees, courts 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." *Dudley*, 903 S.W.2d at 587; see also *Marsh*, 942 S.W.2d at 390. 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. The evidence that Grass has a mental illness that makes him dangerous, in addition to the other evidence concerning his conduct, reviewed with the appropriate level of caution, supports the trial court's denial of his release application because the judgment 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 . . . release." *Id.* at 71-72.

And even if this Court were to conclude that Grass's evidence is uncertain at best, that uncertainty in the record on evidence needed to determine his suitability for release is detrimental to Grass's cause. Uncertainty on these issues mandates the affirmation of the trial court's judgment. *Marsh,* 942 S.W.2d at 389-90 (upheld denial of conditional release because medical evidence was uncertain). Because Grass failed to present clear and convincing evidence that he should be released, he "must bear the burden where less certainty exists." *Grass,* 926 S.W.2d at 72.

Grass went to the Court of Appeals in 1995 asking it to allow him to be conditionally released into the community. *Id.* at 68. The court soundly rejected his request. *Id.* at 72. Now he asks to be unconditionally released when the evidence demonstrates that he has a mental illness and the trial court found that he would be dangerous, and his treating physicians are no closer to knowing or understanding the triggers that caused him to kill his wife as a result of his illness today than they were in 1995. *Id.* at 71. "Consequently, Grass is equally ignorant of the stressors to avoid and the methods of treatment and prevention." *Id*. And Grass has himself to blame for this ignorance as a result of his long-standing refusal to submit to, and now his sporadic participation in, treatment.

Weighing all of this evidence, the trial court reached the conclusion that Grass failed to adduce clear and convincing evidence that he should be unconditionally released. Because the substantial evidence supports the court's judgment, it is consistent with the weight of the evidence, and it does not reflect a misapplication or erroneous declaration of

the law, the judgment must be affirmed. *Murphy*, 536 S.W.2d at 32. In the alternative, should this Court determine that reversal is warranted, Grass should not be discharged outright from the Department. The appropriate remedy, instead, is to remand the case to the circuit court with instructions to hold a hearing to determine whether he meets the criteria for release.

CONCLUSION

Because the trial court followed all of the statutory requirements before denying Grass's unconditional release pursuant to § 552.040, RSMo, and its judgment is supported by the weight of the evidence, and for all of the reasons stated above, this Court should affirm the trial court's judgment. In the alternative, if the Court finds that reversal is necessary, the case should be remanded with specific instructions and/or to hold a hearing to determine whether Grass's presently meets the criteria for release pursuant to § 552.040, RSMo.

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CERTIFICATE OF COMPLIANCE WITH RULE 84.06

The undersigned hereby certifies that this Brief complies with the limitations set forth in Rule 84.06(b) and contains 9,553 words as calculated pursuant to the requirements of Rule 84.06(b)(2); and that a copy of the brief has been supplied to the Court in diskette form on a diskette that has been scanned and found to be virus free.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that one copy of the foregoing brief and a diskette containing a copy of the foregoing brief were served by first class mail, postage prepaid, this 14th day of November, 2003 on Irene Karns, 3402 Buttonwood, Columbia, MO 65201-3722, Attorney for Appellant.

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