There is little disagreement in the literature that a significant number of prisoners' civil rights lawsuits are frivolous. The disagreement is about the most appropriate way to balance pragmatic considerations of overburdened courts with the rights of individual prisoners. Through one lens, the PLRA simply calls for a narrow interpretation of the constitutional protections available to prisoners. Viewed from the perspective of those critical of the PLRA, it is seen as a tool that restricts the ability of prisoners to access courts and then limits the ability of a judge to remedy any injustices that might be exposed. In *Gibson*, where the courts upheld Mr. Gibson's being barred from filing a lawsuit *in forma pauperis*, there is another opportunity to consider what is at stake within this tension.

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Not Mentally Ill, Not Dangerous . . . and Not Discharged?

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Insanity Acquittee Denied Unconditional Release Met Exhaustion Requirements in Missouri State Court and Is Entitled to Federal Review of His Commitment

In *Grass v. Reitz,* 643 F.3d 579 (8th Cir. 2011), the Court of Appeals for the Eighth District considered whether a person committed to the custody of the Missouri Department of Mental Health after an insanity acquittal had exhausted state remedies for petitioning for release and was entitled to a *habeas corpus* review.

Facts of the Case

In 1992, Lloyd Grass stabbed his wife to death and was subsequently charged with first-degree murder. After an examination of his mental state at the time of the crime, his diagnosis was psychotic disorder, not otherwise specified, in partial remission. He was found not guilty by reason of mental disease or defect and committed to the custody of the Missouri Department of Mental Health, pursuant to Mo. Rev. Stat. **§** 552.040.2 (1992).

§ 552.040 stipulates that an individual may petition for release in two ways: under conditional release status or unconditionally from the hospital. To be eligible for conditional release, it must be shown by clear and convincing evidence that the petitioner "is not likely to be dangerous to others while on conditional release" (Mo. Rev. Stat. § 552.040.12(6) (1992)). "A conditional release implies that despite a mental disease or disorder [the committed person is] eligible for limited freedom from a mental health facility, subject to certain conditions" (*Greeno v. State*, 59 S.W.3d 500 (Mo. 2001), p 504). Unconditional release can only be approved if the petitioner shows by the same evidentiary standard 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" (Mo. Rev. Stat. § 552.040.7 (1992)).

A person committed pursuant to the acquittal of first-degree murder must meet additional criteria. For either conditional or unconditional release, the court also must find that the acquittee, "is not now and not likely in the reasonable future to commit a violent crime" and "is aware of the nature of the violent crime committed and possesses the capacity to appreciate the criminality of the violent crime and to conform [his] conduct to the requirements of the law in the future" (Mo. Rev. Stat. § 552.040.20 (1994)).

Mr. Grass unsuccessfully petitioned for release over the first several years of his commitment. In March 1995, he was transferred to a less restrictive unit of St. Louis Hospital. In 1996 he escaped and was later sentenced, served time, and was subsequently paroled back to the Department of Mental Health.

In February 2003, Mr. Grass applied for unconditional release; the Circuit Court of Warren County denied the application. Mr. Grass filed new motions for conditional and unconditional release in 2004. The Warren County court consolidated the petition and entered judgment denying Mr. Grass's petition for unconditional release but granting conditional release. This court found that Mr. Grass was not mentally ill, that he did not pose a danger to himself or others, and that he was not likely at the time or in

the foreseeable future to commit a violent crime because of his mental illness. Both Mr. Grass and the state appealed. As part of the appeal, Mr. Grass argued that the finding that he was not mentally ill and was not likely in the foreseeable future to commit a violent crime supported his claim for unconditional release under Missouri law and the U.S. Supreme Court decision in *Foucha v. Louisiana*, 504 U.S. 71 (1992)). *Foucha* stands for the principle that if there is no mental disorder, continued confinement in a mental hospital is not justified.

The statute in Missouri for unconditional release has additional elements and is quite difficult to satisfy; the petitioner must show "by clear and convincing evidence that [he] . . . does not have and in the foreseeable future is not likely to have a mental disease or defect, rendering [him] dangerous to the safety of others" (*Grass*, p 581). Moreover, the statute says that unconditional release may not be granted unless the person is "aware of the nature of the violent crime committed . . . and presently possesses the capacity to appreciate the criminality of the violent crime . . . and . . . to conform [his] conduct to the requirements of the law in the future" (*Grass*, p 581).

The Missouri Court of Appeals affirmed the denial of unconditional release, finding, in part, that the county court's determination that Mr. Grass would not be likely to commit another violent crime in the future was not supported by the evidence.

In October 2007, he filed a *habeas corpus* petition in federal court, challenging only the denial of unconditional release, asserting that he met the *Foucha* criteria for release. In 2008, a federal magistrate judge ruled that he had exhausted state remedies for unconditional release such that the *habeas* petition was appropriate, but denied the petition, because "the evidence considered by the Missouri appellate court reflected that [Mr. Grass] had a current mental illness and that he was dangerous without monitoring" (*Grass*, p 5823).

Upon review of the recommendations of the magistrate judge, the federal district court dismissed the petition for failure to exhaust state remedies, because the Missouri Court of Appeals had vacated the findings of fact on which Mr. Grass relied for his *Foucha* claim (i.e., his lack of mental illness and dangerousness). Reconsideration of his petition for conditional release was still pending in Warren County Circuit Court. The district court ruled that the *habeas* petition was dependent on future findings concerning his present mental health. Considering this an undecided fact, it concluded that the issue of unconditional release was not exhausted (*Grass v. Reitz*, 699 F. Supp. 2d 1092 (E.D. Mo. 2010).

The Circuit Court of Warren County later denied the claim for conditional release in January 2011, after appeals of the *habeas* denial had been filed in the Eighth Circuit Court of Appeals. The Warren County court now decided that Mr. Grass had failed to show that he was not likely to commit another violent crime, based on the testimony of a psychologist who opined that Mr. Grass's symptoms could re-emerge. The Eighth Circuit agreed to hear the appeal.

Ruling and Reasoning

The Eighth Circuit reversed the district court's dismissal of Mr. Grass's petition and remanded for further proceedings. In reaching its decision, the court reviewed the case of *Revels v. Sanders*, 519 F.3d 734 (8th Cir. 2008), a Missouri case that involved a *habeas* petition by an insanity acquittee who sought unconditional release. In *Revels*, the Eight Circuit "held that it was unreasonable to permit continued confinement unless the state court finds '*present*' mental illness" (*Grass*, p 586, italics in original). The court decided that Mr. Grass had already completed a full round of state court appeals and met the requirements for federal review.

In his concurrence, Judge Colloton noted that the Missouri Supreme Court had already held that the unconditional release statute was constitutional and consistent with *Foucha*, and thus the district court had to follow that precedent. However, the Eight Circuit was bound to follow its own precedent in *Revels*, creating an anomaly. Judge Colloton pointed to the concurring opinion of Justice O'Connor in *Foucha*, where she did "not understand the Court to hold that [a State] *may never* confine dangerous insanity acquittees *after they regain mental health*" (*Grass*, p 588, italics in original). Justice O'Connor noted that it might be permissible for the states to detain dangerous individuals who had "regained sanity" if the detention was tailored to meet public safety concerns. Judge Colloton interpreted this to mean that there is no "hard and fast rule" that once a dangerous acquittee has regained mental health the individual should be released.

Discussion

One of the interesting dimensions of *Grass* is that the appeals court ruled that the Warren County court's determination that Mr. Grass was not likely to commit another violent crime in the foreseeable future was not supported by the evidence. The district court reappraised the testimony of a forensic psychologist, Dr. Richard Gowdy, that although Mr. Grass's original symptoms were in remission, they could re-emerge. Thus, the district court disagreed with the county court that there was no potential for future dangerousness based on mental illness. Judge Colloton's concurrence in the Eight Circuit decision noted that the Tenth Circuit had upheld a finding that an acquittee had a present mental illness, even though he was at the time asymptomatic (*United States v. Weed,* 389 F.3d 1060 (10th Cir. 2004)).

The county court granted Mr. Grass conditional release, concluding that he was not likely now or in the foreseeable future to commit another crime. That court made no specific finding about "whether Mr. Grass currently suffers from a mental disease or defect" (*Grass*, p 583). The county court apparently did not appreciate the relationship between the potential re-emergence of symptoms (as per the expert testimony) and potential future dangerousness.

Mr. Grass was unable to advance the *Foucha* argument successfully, in part because the circuit court did not make an explicit finding about the current presence of mental disease or defect in his situation. Even if a finding of no present mental illness had been made and upheld, the concurrence by Judge Colloton suggests that *Foucha* would not necessarily have required release.

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Does Refraining From Using Mental Health Evidence Constitute Ineffective Counsel?

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A Reasonable Professional Decision to Refrain from Using Mental Health Evidence Does Not Violate the Sixth Amendment

In *Dunlap v. Clements*, 476 F. App'x 162 (10th Cir. 2012), the United States Court of Appeals for the Tenth Circuit considered Nathan Dunlap's appeal of a denial of his *habeas corpus* petition by the United States District Court for the District of Colorado. In his appeal, Mr. Dunlap argued that his Sixth Amendment right to counsel was violated because trial counsel terminated the investigation into his possible mental illness.

Facts of the Case

In July 1993, Nathan Dunlap had been fired from his job as a cook at Chuck E. Cheese in Aurora, Colorado, and he wanted to "get even." On the night of December 14, 1993, he hid in a bathroom until the restaurant closed, and after emerging, shot and killed four employees, and shot and injured another.

After Mr. Dunlap began acting strangely in jail and was moved to a mental hospital in February 1994, Forrest Lewis, his attorney, had an independent psychiatrist, Dr. Robert Fairbairn, evaluate Mr. Dunlap to help plan a mental health mitigation case. Dr. Fairbairn determined that Mr. Dunlap was normal or malingering approximately 90 percent of the time and was experiencing psychotic symptoms for only 10 to 20 percent of the time. Mr. Dunlap's treating psychiatrist and psychologist at the state hospital each submitted reports indicating that Mr. Dunlap did not have a major mental illness, that he was abusive and offensive toward staff and other patients, that he showed no remorse and repeatedly bragged about his crime, that he said he would kill again, and that he was malingering.

Mr. Lewis hired a mitigation expert, psychiatrist Dr. Rebecca Barkhorn, in February 1995. She diagnosed narcissistic personality disorder with antisocial traits on the basis of her interview with Mr. Dunlap and reports from his state hospital clinicians, but was not provided the full hospital records. Mr. Lewis feared that the full hospital records would taint Dr. Barkhorn's evaluation of Mr. Dunlap and that the complete hospital would be made available to the prosecution. Mr. Lewis believed that the hospital records were so negative that they could have given the jury additional grounds for a death sentence and instead decided to stop the mental health investigation and focus on Mr. Dunlap's family dysfunction and