No. 08-

In the
SUPREME COURT OF THE UNITED STATES

MARY ATTEBURY,
Chief Operating Officer of the
Northwest Missouri Psychiatric Rehabilitation
Center,
Petitioner,
v.
FREDERICK LEE REVELS,
Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Foucha v. Louisiana, 504 U.S. 71 (1992), held that the Due Process Clause prohibits "the indefinite detention of insanity acquittees who are not mentally ill but who do not prove they would not be dangerous to others." *Id.*, at 83.

A Missouri trial court denied Respondent, an insanity acquittee, release from a state mental health treatment facility after finding that he had a mental disease *and* was dangerous. The Court of Appeals for the Eighth Circuit nonetheless granted 28 U.S.C. §2254 habeas relief. It believed that it had to ignore the state trial court's findings because they were outside of the scope of the certificate of appealability, which addressed only whether the state appellate court, in an unpublished memorandum, had misstated *Foucha*'s requirements. The Eighth Circuit granted habeas relief even though the state appellate court affirmed the state trial court's mental disease and dangerousness findings and cited case law that properly recognized *Foucha*'s holding.

The questions presented are:

1. Does a court of appeals' own framing of a certificate of appealibility (COA) sought by a habeas petitioner preclude that court from affirming a judgment denying habeas relief on a ground that is unquestionably consistent with the Constitution and this Court's decisions but outside the scope of the COA?

2. May a court of appeals grant 28 U.S.C. §2254 habeas relief based on its narrow framing of a COA even though a state court's decision was not contrary to nor involved an unreasonable application of clearly established federal law?

PARTIES TO THE PROCEEDING

Petitioner Mary Attebury (f/k/a Mary Sanders) is the Chief Operating Officer of the Northwest Missouri Psychiatric Rehabilitation Center.

Respondent Frederick Revels is committed to the care of the Missouri Department of Mental Health following acceptance of his plea in Missouri state court of not guilty by reason of mental disease or defect on two counts of first degree murder, one count of second degree murder, and three counts of armed criminal action.

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The opinion of the United States Court of Appeals for the Eighth Circuit granting habeas corpus relief to Respondent under 28 U.S.C. §2254 is reported at 519 F.3d 734 (8th Cir. 2008), and is reproduced in the appendix at A1-A22. The June 5, 2008 order of the court of appeals denying rehearing and rehearing en banc, with four judges dissenting, is published at 531 F.3d 724 (8th Cir. 2008) and is reproduced in the appendix at A55-A60. The district court's unpublished May 23, 2006 decision denying habeas corpus relief is reproduced at A26-A32.

The Missouri trial court's unpublished June 21, 2004 decision denying Respondent's motion for unconditional release is reproduced at A41-A46. The state appellate court's per curiam order affirming the state trial court's decision is published at 172 S.W.3d 461 (Mo. Ct. App. 2005) and is reproduced at A35. The state appellate court's unpublished memorandum supplementing the order affirming judgment is reproduced at A36-A40.

JURISDICTION

The judgment of the court of appeals was entered on March 10, 2008. App. A1. The court of appeals denied rehearing and rehearing en banc on June 5, 2008. *Id.*, at A55. This Court has jurisdiction under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitution of the United States, Amendment XIV, §1:

> … nor shall any State deprive any person of life, liberty or property without due process of law . . . .

28 U.S.C. §2253(c) provides:

> (1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from--
>
> (A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or
>
> (B) the final order in a proceeding under section 2255.
>
> (2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.
>
> (3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

28 U.S.C. §2254(d)(1) provides:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State

> court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim - -
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States ….

28 U.S.C. §2254(e)(1) provides:

> In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

Mo. Rev. Stat. §552.040.5-.9 (2000), Missouri's unconditional release provisions, are reproduced in the appendix at A61-A63.

STATEMENT OF THE CASE

Respondent Frederick L. Revels beat to death his grandmother, sister, and nephew with a pipe wrench on June 22, 1988. App. A37, A41, A47. At the time of the crimes, he was hearing voices and abusing controlled substances and believed that the victims were cannibals trying to harm him. *Id.*, at A47; Tr. 47.[1] He was charged with two counts of first degree murder, one count of second degree murder, and three counts of armed criminal action. App. A47. On August 27, 1992, Revels entered pleas of not guilty by reason of mental disease or defect under Mo. Rev. Stat. §552.030 (1986). *Id.*, at A41-A42. He was committed to the Missouri Department of Mental Health (MDMH) and delivered to the Fulton State Hospital. *Id.*, at A47. Revels was ultimately diagnosed with substance-induced psychotic disorder with hallucinations and polysubstance dependence. Tr. 72-73; Tr. 20-22.

Even though Revels had no access to illicit drugs after 1988, he continued to have hallucinations until at least 1993, and possibly as late as 1994. App. A48; Tr. 28, 44. During the mid-1990s, Revels was twice placed on conditional release, where he was given additional freedom, but remained under MDMH supervision for items such as drug testing. App. A48; *see also* Mo. Rev. Stat. §552.040.9-.13 (1993); Mo. Rev. Stat. §552.040.9-.13 (1994) (setting forth Missouri's then-current conditional release procedures).

Revels received his first conditional release in 1993. During this release, he missed appointments,

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[1] Transcript citations are to the state trial court's June 20, 2003 hearing on Revels' request for unconditional release that is at issue in this case.

failed to follow through with vocational rehabilitation, and tested positive for opiates. Tr. 81. He reported experiencing anxiety, anger, and suspiciousness and was put on antipsychotic medication for a brief period of time. Tr. 43. His release was revoked in 1994 after he spent the night at a girlfriend's house (itself a release violation) and put his hand through a window while arguing with her. App. A48.

Revels received a second conditional release in 1995, but it was revoked in March 1997 because he missed appointments and failed to attend required Alcoholics Anonymous and Narcotics Anonymous meetings. App. A48; Tr. 82-83.

In 1997, Revels applied to the state trial court for unconditional or conditional release pursuant to Mo. Rev. Stat. §552.040.5 (Supp. 1996), and Mo. Rev. Stat. §552.040.10 (Supp. 1996), respectively. App. A47-A48. At the evidentiary hearing (held in December 1997), he dismissed his application for conditional release and proceeded only on the request for unconditional release.[2] App. A48. A staff psychiatrist at the Fulton State Hospital testified that Revels' judgment was "certainly" impaired, and that he would be a danger to others if unconditionally released due to a greater than 90

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[2] Under Missouri law there is a substantial difference between a conditional release and an unconditional release. A conditional release allows MDMH to oversee prescription medicine regimens and to monitor events that might aggravate a mental condition, such as illegal drug use. *See* Mo. Rev. Stat. §552.040.16 (2000). In contrast, with unconditional release, the patient is no longer under any MDMH supervision. *See* Mo. Rev. Stat. §552.040.5-.8 (2000) (reproduced at App. A61-A63).

percent chance of relapse into substance abuse.[3] *Id.*, at 49.

The trial court denied Revels' request for unconditional release. On appeal, Revels argued that *Foucha v. Louisiana*, 504 U.S. 71 (1992), required the trial court to make an express finding of mental disease or defect before denying him unconditional release. App. A51.

In a unanimous opinion authored by then-Judge Benton (now Circuit Judge for the Eighth Circuit Court of Appeals), the Supreme Court of Missouri affirmed the denial of unconditional release. *State v. Revels*, 13 S.W.3d 293 (Mo. 2000) (en banc) (reproduced at App. A47-A54). The court noted that Revels did not request specific fact findings under the Missouri Rules of Civil Procedure. App. A50. The court then examined *Foucha* and recognized that "the holding of *Foucha* prohibits 'the indefinite detention of insanity acquittees who are not mentally ill but who do not prove they would not be dangerous to others.'" *Id.*, at A51, quoting *Foucha*, 504 U.S., at 83. The court concluded that Missouri's statutory standard for denying unconditional release complies with *Foucha* because the statutory "standard … 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." *Id.*, citing *Foucha*, 504 U.S., at 86-90 (O'Connor, J., concurring).

On February 13, 2003, Revels was transferred to the Northwest Missouri Psychiatric Rehabilitation

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[3] The psychiatrist also testified that after Revels returned from the second conditional release, he attended counseling meetings only sporadically and then stopped completely, becoming reclusive and withdrawn from interaction necessary to his recovery. App. A48-A49.

Center in St. Joseph, Missouri. Tr. 40. He applied to the trial court for another unconditional release.[4] App. A42. At the evidentiary hearing on June 20, 2003, Dr. A. E. Daniels, Revels' psychiatric expert, testified that he diagnosed Revels with substance-induced psychotic disorder with delusions and hallucinations, in remission, and with polysubstance dependence, also in remission. App. A43; Tr. 20-22. Dr. Daniels agreed that clinical experience and research showed that persons with prior substance abuse problems such as Revels had a greater chance of relapse than persons who had not experienced the degree of problems that Revels had. Tr. 30. But Dr. Daniels favored unconditional release, opining that "the intervening variable" in Revels' case was the "significant insight and understanding" that Revels had gained regarding the connection between his prior offenses and illicit drug use. Tr. 30-31.

Dr. James B. Reynolds, the Medical Director of the Northwest Missouri Psychiatric Rehabilitation Center and supervisor of Revels' treating doctors, testified that Revels' diagnosis of substance-induced psychotic disorder with hallucinations in remission qualified as a mental disease or defect under Missouri law because the disorder was still active in terms of consideration for the patient's care. Tr. 33-34, 73. He testified that Revels could become psychotic again if he used illegal drugs of any sort or alcohol to excess. Tr. 73.

Dr. Reynolds agreed that Revels had verbalized an understanding of the relationship between

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[4] Missouri law allows repeated applications for unconditional release. *See* Mo. Rev. Stat. §552.040.8 (2000) (orders denying applications for unconditional release "without prejudice" to applications filed one year after denial of last application).

substance abuse and the onset of psychiatric symptoms. Tr. 53. But he noted that in a recent relapse prevention plan, Revels listed a number of relatively minor stresses that he (Revels) believed would lead him either to abuse drugs or crave to abuse drugs, such as "waiting for a phone call," "arguing with a friend or relative," "having an empty tank of gas," or "[his] job." Tr. 86-87. Dr. Reynolds found the list "worrisome," noting that these types of things were "very common stressors in every day life." Tr. 87. Dr. Reynolds also testified that about a month and half before the June 20, 2003 hearing, Revels had become very angry and verbally lashed out in a profane manner at a case manager (who was half his size), saying that he did not need therapy groups and that the groups were a waste of his time. Tr. 61. Dr. Reynolds further testified that Revels could be a candidate for conditional release relatively soon if he continued progressing, noting that Revels recently became eligible for a cottage living unit. Tr. 89. But, under the current circumstances, Dr. Reynolds could not say to a reasonable degree of medical certainty that Revels was not likely to pose a danger to himself or others due to his mental disease or defect. Tr. 78.

The trial court accepted the accuracy of both psychiatrists' testimony, except that it found Dr. Reynolds' testimony more credible than Dr. Daniels' on the issues of dangerousness and relapse. App. A44. After making specific findings that Revels "has a mental disease which is in remission," and that he failed to prove that he would not be dangerous on release, the trial court denied unconditional release. App. A44, A45.

Revels appealed, arguing that he was entitled to unconditional release because he did not currently show any signs of mental disability. *Id.*, at A38. The

Missouri Court of Appeals, Western District, affirmed in a summary order. App. A35.[5]

Pursuant to Rule 84.16(b) of the Missouri Rules of Civil Procedure, the state appellate court included for the information of the parties a memorandum supplementing its summary order. App. A36.[6] In the memorandum, the state appellate court rejected Revels' argument that he was entitled to release based on current lack of symptoms, citing the Missouri Supreme Court's 2000 *Revels* decision, *supra*, and two intermediate state appellate court cases that the court characterized as holding that Missouri's unconditional relief statutes require an acquittee to "prove present absence from mental defect … [and] that he is not likely to suffer from a mental disease or defect in the reasonable future, and … that he will not be a danger to himself or others." *Id.*, at A38.

Later in the memorandum, the appellate court held that the record supported the trial court's findings regarding Revels' present mental disease or defect and dangerousness. *Id.*, at A39-A40.

On November 15, 2005, Revels petitioned the United States District Court for the Western District of Missouri for a writ of habeas corpus under 28 U.S.C. §2254. After responsive pleadings, the district court denied relief, concluding that "the

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[5] *See* Mo. R. Civ. P. 84.16(b) (allowing summary orders where, *inter alia*, all judges agree to affirm and unanimously believe that an opinion would have no precedential value).

[6] Accompanying the memorandum was a standard notice: "THIS STATEMENT DOES NOT CONSTITUTE A FORMAL OPINION OF THIS COURT. IT IS NOT UNIFORMLY AVAILABLE. IT SHALL NOT BE REPORTED, CITED OR OTHERWISE USED IN UNRELATED CASES BEFORE THIS COURT OR ANY OTHER COURT." App. A36.

decisions of the state courts … were not unreasonable applications of federal law … or based on an unreasonable determination of the facts of petitioner's case." App. A30-A31. The district court declined to issue a certificate of appealability (COA). *Id.*, at A23, A24.

Revels requested a COA from the Court of Appeals for the Eighth Circuit. An administrative panel of the court granted his request and framed the appellate issue as:

> "whether the Missouri Court of Appeals' conclusion that Revels was required to show he 'currently does not suffer from mental illness and was not likely to have a mental disease or defect in the reasonable future and that he . . . no long (sic) poses a danger to society,' *State v. Revels*, WD64433 at 3 (Mo. Ct. at Aug. 16, 2005), is reasonably wrong in light of the Supreme Court's decision in *Foucha v. Louisiana*, 504 U.S. 71 (1992)." App. A10-A11.

Following briefing and argument, a panel of the court of appeals reversed the district court's judgment and then went further and actually issued a conditional writ of habeas corpus. In the panel decision, the court held that the state appellate court's decision was "contrary to" *Foucha* within the meaning of the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, Title I, §104(3), 110 Stat. 1214, 1219 (AEDPA), 28 U.S.C. §2254(d)(1), because the state appellate court, in its unpublished memorandum order, misstated the burden of proof – namely, that Revels was required to "prove present absence from mental defect … [and] that he is not likely to suffer from a mental disease or defect in the reasonable future, and …

that he will not be a danger to himself or others." App. A17, A38.

While the panel recognized that the state appellate court affirmed the state trial court's mental disease and dangerousness findings and that under 28 U.S.C. §2254(e)(1) it must presume the correctness of the finding unless rebutted by clear and convincing evidence, the panel concluded that "the [state trial] court's factual findings [were] not before [it]." App. A8, A21. In the panel's view, it had to ignore the full basis of the state court's decision because its "review [was] confined to the issue" as stated in its own formulation of the COA, which was "whether the Missouri Court of Appeals unreasonably applied *Foucha* in determining that the state could continue to hold Revels based on future dangerousness alone." App. A21, A11.

Petitioner moved for rehearing and rehearing en banc. On June 5, 2008, the court of appeals denied the petition over the dissent of Judge Colloton, joined by Chief Judge Loken and Judges Wollman and Gruender. App. A55.[7] In the dissenting judges' view, rehearing en banc could have been warranted based on the panel's declaration that it was unreasonable for "the Supreme Court of Missouri" unanimously to hold that "Missouri's statutes regarding unconditional release of an insanity acquittee … [were] consistent with the holding of *Foucha*…." App. A56-A57.

The dissenters found even "more compelling" the need to rehear the panel's unprecedented ruling "that it was compelled to disregard the state court's finding of present mental disease or defect because

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[7] Judge Benton did not participate in the rehearing decision. App. A55.

an administrative panel of this court granted Revels a [COA] on a different question." *Id.*, at A57-A58. In the dissenters' view, "[t]his novel interpretation of the effect of a [COA] warrants further review" because "we have never held that, if for some reason a [COA] is granted to consider the soundness of a state court's *dicta* or alternative holding, then this court must blind itself to the fact that the state court also justified its decision on an independent ground that is consistent with the Constitution and decisions of the Supreme Court." App. A58. "To give that effect to a [COA]," the dissenters argued, "conflicts with the statutory command that an application for a writ of habeas corpus 'shall not be granted' unless the state court's adjudication resulted in 'a decision' that is contrary to, or involves an unreasonable application of, clearly established federal law, or that is based on an unreasonable determination of the facts. *Id.*, at A58-A59, citing 28 U.S.C. §2254(d).

THE PETITION SHOULD BE GRANTED

The Court should grant the petition. First, the court of appeals' extraordinary view that a court's own formulation of a COA precludes it from examining the soundness of a state court's alternate holding is wholly unsupported by case law or principles of statutory construction and risks impeding accurate resolution of numerous federal habeas appeals. Second, the court of appeals' decision to actually grant Respondent a conditional writ of habeas corpus further magnifies the error and the potential damage of the court of appeals' novel COA precedent. The court granted Respondent a writ based on its view of the scope of the COA and its answer to the question listed in the COA, and not on whether the state court's adjudication of Revels'

claim, on the whole, resulted in a decision that was "contrary to" or involved an "unreasonable application" of *Foucha* within the meaning of 28 U.S.C. §2254. Under the proper standards, Respondent was not entitled to a writ.

I. The court of appeals' extraordinary ruling that it could not affirm the denial of habeas relief on a ground outside the scope of the COA turns established appellate principles on their head and jeopardizes the accurate determination of numerous federal habeas appeals.

In the panel decision, the court of appeals recognized that the state appellate court affirmed the state trial court's findings that Revels had a present mental defect *and* was dangerous. App. A8. It also recognized that under 28 U.S.C. §2254(e)(1) it must presume the correctness of the findings unless rebutted by clear and convincing evidence. App. A21. But the court concluded that it had to ignore the full basis of the state court's decision because its "review [was] confined to the issue" as stated in the COA, which was "whether the Missouri Court of Appeals unreasonably applied *Foucha* in determining that the state could continue to hold Revels based on future dangerousness alone." *Id*.

Judge Colloton had it right: "This novel interpretation of the effect of a [COA] warrants further review." App. A58 (Colloton, J., dissenting). Until this case, neither this Court, nor any other court of appeals, to our knowledge, has held – or even suggested – that "if for some reason a [COA] is granted to consider the soundness of a state court's *dicta* or alternative holding," a federal appeals court "must blind itself to the fact that the state court also

justified its decision on an independent ground that is consistent with the Constitution and decisions of the Supreme Court." *Id.* To give that effect to a COA turns established appellate principles on their head and jeopardizes the accurate resolution of numerous federal habeas appeals.

A. COA requirements are designed to limit frivolous appeals by habeas petitioners, not to give some habeas petitioners a windfall by precluding courts from applying the established rule that judgments can be affirmed for any basis.

The COA requirements of 28 U.S.C. §2253 are rooted in Congress' longstanding concern with frivolous appeals by habeas petitioners. Their origins trace back to 1908, when Congress first established a requirement, later codified in 28 U.S.C. §2253, that a prisoner obtain a certificate of probable cause (CPC) to appeal denial of habeas relief.[8] The requirement was designed "to prevent frivolous appeals from delaying the States' ability to impose sentences…." *Barefoot v. Estelle*, 463 U.S. 880, 892 & 892 n.3 (1983). Section 2253's CPC requirement did not explain the standards for issuance of a CPC, but the Court held in *Barefoot v. Estelle*, 463 U.S. 880 (1983), that it required "a substantial showing of the denial of a federal right." *Id.*, at 893 (internal quotations omitted).

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[8] The 1908 version applied to appeals to this Court. Act of March 10, 1908, 35 Stat. 40. In 1948, Congress expanded the CPC requirement to cover all habeas appeals and codified it at 28 U.S.C. §2253. Act of June 25, 1948, 62 Stat. 967.

When Congress enacted AEDPA in 1996, Congress amended §2253 by adding subection (c), which provides:

> "(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from--
> "(A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; ….
> "(2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right."

In *Slack v. McDaniel*, 529 U.S. 473 (2000), this Court held that "[e]xcept for substituting the word 'constitutional' for the word 'federal,' 28 U.S.C. §2253," as amended by AEDPA, "is a codification of the CPC standard announced in *Barefoot*." *Id.*, at 483.

This Court has consistently interpreted §2253's COA requirements as "a jurisdictional prerequisite" to appeal. *Miller-El v. Cockrell*, 537 U.S. 322, 335-336 (2003). *See also id.* (as "mandated by federal statute, a state prisoner seeking a writ of habeas corpus has no absolute entitlement to appeal a district court's denial of his petition," unless first obtaining a COA); *Slack*, 529 U.S., at 482 ("The COA statute establishes procedural rules and requires a threshold inquiry into whether the circuit court may entertain an appeal.").

But the Court has never indicated that §2253's COA requirements alter the basic principle of appellate review that courts review "judgments, not statements in opinions," *Black v. Cutter*

Laboratories, 351 U.S. 292, 297 (1956), and that courts may affirm a judgment on any basis. Nor has any other federal court, to our knowledge, until the Eighth Circuit's decision here.[9]

The Eighth Circuit's conclusion otherwise is wholly untenable. By requiring petitioners to obtain a COA in order to appeal, Congress was attempting to further limit the filing of frivolous appeals by codifying *Barefoot*'s CPC standard and limiting habeas appeals to those in which there was a substantial showing of the denial of a "constitutional," as opposed to "federal" right. It simply makes no sense to conclude that Congress, in so doing, also meant to alter a fundamental principle of appellate review and give a windfall to the very habeas petitioners whom the requirements were designed to check. As this Court has observed, "Congress … does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions – it does not, one might say, hide elephants in mouseholes." *Whitman v. American Trucking Ass'n*, 531 U.S. 457, 468 (2001).

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[9] Some courts of appeals have held that a person in state custody cannot defend against a State's appeal of an award of habeas relief on grounds for which they have not obtained a COA. *E.g.*, *Grotto v. Herbert*, 316 F.3d 198 (2nd Cir. 2003). But those courts have treated a prisoner's attempt to raise alternate arguments in favor of a judgment as a request for a COA and allow the prisoner to argue those grounds if the COA is granted. *Id.*, at 209-210. This effectively allows courts to affirm a judgment for a habeas petitioner on any basis because logically a prisoner cannot successfully defend the grant of habeas relief on a ground that did not meet the test for issuance of a COA. In stark contrast, the Eighth Circuit's rule, as discussed *infra*, deprives courts of the ability to affirm a judgment for the State on a basis not within the COA as formulated.

B. The Eighth Circuit's novel view of COA requirements will impede accurate rulings in federal habeas appeals in seven States.

The Eighth Circuit and the district courts under it decide hundreds of habeas petitions each year, from seven different States. *See* Duff, The Judicial Business of the United States Courts, Annual Report of the Director, tables B-7 and C-3 (2007). Unless overturned by this Court, the panel's flawed view that a COA can prevent a reviewing court from affirming a denial of habeas relief on a ground not specified in the COA will control how the Eighth Circuit assesses the many habeas appeals that will come before it.

The types of cases that may be affected are common, as state court decisions often rest on alternate holdings. Other examples of cases that could be impacted are those in which a district court issues a COA but the petitioner does not file a timely notice of appeal under Federal Rule of Appellate Procedure 4, or in which a district court rejects a procedural defense, such as default or failure to exhaust, but denies relief on the merits. In the latter situation, the COA would encompass only the merits[10], but the State should not be precluded from supporting the denial of habeas relief on the procedural grounds, which further comity concerns. *See, e.g., Kreutzer v. Bowersox*, 231 F.3d 460, 464 (8th

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[10] *See Slack v. McDaniel*, 529 U.S., at 484 ("Where a district court has rejected the constitutional claims on the merits, the showing required to satisfy §2253(c) is [whether] … reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong.").

Cir. 2000) (district court rejected habeas petition on the merits; court of appeals affirmed on ground that the petition was not timely, even though there was no COA for that question).

In short, this Court's review is necessary to prevent the panel's mistaken views from impeding the accurate determination of habeas cases in which the issue identified in the COA is not controlling.

II. The court of appeals' unprecedented decision to grant §2254 habeas relief based on its novel view of the scope of the COA conflicts with 28 U.S.C. §2254, which should have precluded Respondent from obtaining relief.

This Court's review is also needed to overturn the Eighth Circuit's extraordinary decision to grant habeas relief. The court granted the writ based on its view of the scope of the COA and its answer to the question asked in the COA, and not on whether the state court's adjudication of Revels' claim, on the whole, resulted in a decision that was "contrary to" or an "unreasonable application" of *Foucha* within the meaning of 28 U.S.C. §2254. The Eighth Circuit's view that limitations in its own formulation of a COA can dictate whether habeas relief can be granted compounds the harm that the Eighth Circuit's ruling can wreak upon future habeas appeals.

A. The Eighth Circuit's decision to grant habeas relief based on its novel view of the limitations of a COA conflicts with §2254(d).

As Judge Colloton concluded, the panel's decision to actually grant Revels habeas relief based on its novel view concerning the limitations of a COA "conflicts with the statutory command that an application for a writ of habeas corpus 'shall not be granted' unless the state court's adjudication resulted in '*a decision*' that is contrary to, or involves an unreasonable application of, clearly established federal law, or that is based on an unreasonable determination of the facts." App. A58-A59 (Colloton, J., dissenting), citing 28 U.S.C. §2254(d) (emphasis added).

Under the Eighth Circuit's view, however, all that need occur for habeas relief is for a state court to misstate constitutional law in dicta or in an alternate holding and a COA be issued as to that dicta or alternate holding – no matter that the state court's "decision" also rests on a holding that is fully consistent with federal constitutional requirements. To put it another way, under the Eighth Circuit's rule, habeas relief may be granted even though a state appellate court's use of a purportedly unconstitutional standard did not cause unlawful custody – contrary to the settled principle of habeas law that a complained-of error must have "a substantial and injurious effect" on the determination that the petitioner should remain in state custody. *See Fry v. Pliler*, 127 S. Ct. 2321, 2326-2327 (2007) (on collateral review of state court proceedings, including those subject to AEDPA, federal courts must assess the prejudicial impact of the state court's constitutional error under *Brecht v. Abrahamson*, 507 U.S. 619 (1993)'s "substantial and injurious effect" standard before granting habeas relief).

This result is in obvious conflict with §2254(d)(1)'s federalism concerns and magnifies the harm that

may be caused by the Eighth Circuit's views on the scope of a COA. AEDPA was enacted "to prevent federal habeas 'retrials'" and to ensure that state court judgments "are given effect to the extent possible under law." *Bell v. Cone*, 535 U.S. 685, 693 (2002). Section 2254(d)(1) does not put federal courts in a "tutelary relation to the state courts" in terms of opinion writing. *Hennon v. Cooper*, 109 F.3d 330, 335 (7th Cir. 1997) (Posner, J.) (noting that the AEDPA amendments were designed to avoid such a result); *accord Neal v. Puckett*, 286 F.3d 230, 246 (5th Cir. 2002) (en banc). But under the Eight Circuit's rule, a state court judgment may be made inconsequential simply on the ground that a federal court disapproved of one or more statements in the state court's opinion and limited the COA to encompass only that statement.

B. The Eighth Circuit's erroneous views regarding the effect of a COA caused the court to reach the demonstrably wrong result in this case.

This case highlights the harm that the Eighth Circuit's novel COA views will cause to federal habeas appeals. Under 28 U.S.C. §2254(d)(1), Revels was not entitled to habeas relief unless the state court's decision was "contrary to" or involved an "unreasonable application" of "clearly established federal law." 28 U.S.C. §2254(d)(1). Had the Eighth Circuit applied the proper standards, it could not have awarded him relief.

1. *Foucha v. Louisiana* did not hold that States are precluded from hospitalizing dangerous persons whose mental disease or defect is in remission in a controlled hospital setting.

Under 28 U.S.C. §2254(d)(1), "clearly established Federal law" means "the holdings, as opposed to the dicta, of this Court's decisions as of the time of the relevant state-court decision." *Williams v. Taylor*, 529 U.S. 362, 412 (2000); *Carey v. Musladin*, 127 S. Ct. 649, 653 (2006). In this case, *Foucha v. Louisiana* supplies the "clearly established federal law" for analysis of Revels' claim.

In *Foucha*, this Court, in a 5-4 decision authored by Justice White, held that the Due Process Clause was violated by a Louisiana statute that permitted confinement of an insanity acquittee whom the State conceded was no longer suffering from any mental illness. 504 U.S., at 75 & 78, 79 ("In this case, Lousiana does not contend that Foucha was mentally ill….").

In reaching this conclusion, the Court observed that *Jones v. United States*, 463 U.S. 354 (1983), held that when a person charged with a crime is found not guilty by reason of insanity (NGRI), a State may commit that person without separately proving by clear and convincing evidence that the person is mentally ill and dangerous, as required for civil commitments under *Addington v. Texas*, 441 U.S. 418 (1979), because the NGRI verdict establishes that "'the defendant committed an act that constitutes a criminal offense and [that] he committed the act because of mental illness.'" *Foucha*, 504 U.S., at 76, quoting *Jones*, 463 U.S., at 363.

The Court also noted that *Jones* held that "'the committed acquittee is entitled to release when he has recovered his sanity or is no longer dangerous,'" *i.e.*, the acquittee may be held as long as he is both mentally ill and dangerous, but no longer." *Foucha*, 504 U.S., at 77, quoting *Jones*, 468 U.S., at 368.

Because Louisiana did "not contend that Foucha was mentally ill at the time of [his release] hearing," the Court held, "the basis for holding Foucha in a psychiatric facility as an insanity acquittee ha[d] disappeared, and the State [was] no longer entitled to hold him on that basis." *Foucha*, 504 U.S., at 78.

Justice O'Connor, who supplied the critical fifth vote in the case, joined the majority opinion's insofar as it addressed Due Process issues, but she wrote separately "to emphasize that the Court's opinion address[ed] only the specific statutory scheme before [it], which broadly permits indefinite confinement of sane insanity acquittees in psychiatric facilities." *Id.*, at 86-87 (O'Connor, J., concurring). She emphasized that the case did "not require [the Court] to pass judgment on more narrowly drawn laws that provide for detention of insanity acquittees" and that she did "not understand the Court to hold that Louisiana may never confine dangerous insanity acquittees after they regain mental health." *Id.*, at 87 (O'Connor, J. concurring).

Justice O'Connor also drew attention to the *Jones* Court's observation that "'the only certain thing that can be said about the present state of knowledge and therapy regarding mental disease is that science has not reached a finality of judgment.'" *Id.*, at 87 (O'Connor, J., concurring), quoting *Jones*, 463 U.S., at 365 n.13. And she drew attention to the *Jones* Court's observation that "[g]iven this uncertainty, 'courts should pay particular deference to reasonable legislative judgments' about the relationship

between dangerous behavior and mental illness." *Id.*, at 87 (O'Connor, J., concurring), quoting *Jones*, 463 U.S., at 365 n.13.

2. Since *Foucha*, many state and federal courts have upheld the continued hospitalization of dangerous insanity acquittees with a mental disease or defect in remission.

Since *Foucha* was decided, many state and federal courts have upheld the continued hospitalization of dangerous insanity acquittees who, like Revels, suffer from mental diseases or defects that are in remission in a hospital setting. For example, in *State v. Klein*, 124 P.3d 644 (Wash. 2005), the Supreme Court of Washington affirmed the denial of a petition for full release filed by an insanity acquittee diagnosed with polysubstance dependence in remission and a personality disorder. The court specifically rejected the patient's argument that a mental condition that is in remission is not a disease or defect. The court noted that under "the DSM, [the Diagnostic and Statistical Manual for Mental Disorders,] a diagnosis 'in full remission' is appropriate for those individuals who no longer demonstrate any symptoms or signs of a disorder, but for which there is still clinical relevance in noting the disorder." 124 P.3d, at 652. The court concluded that a "finding that a mental disease or defect is in remission does not preclude a finding that the person continues to suffer from the condition and requires further detention." *Id.*

The Supreme Judicial Court of Maine reached the same conclusion in *Green v. Commissioner of Mental Health and Mental Retardation*, 750 A.2d 1265 (Me. 2000), when it affirmed the denial of a release

petition filed by an insanity acquittee diagnosed with bipolar disorder and polysubstance abuse, but who was asymptomatic while being monitored by doctors. The court stated:

> "Although demonstrating that a mental illness is asymptomatic or that the insanity acquittee is no longer in the same state as existed at the time of the acquittee's crime may indicate that there is little likelihood of dangerousness, it does not mean that the mental 'disease or defect' no longer exists. … Otherwise, an acquittee would be statutorily entitled to release as soon as his or her condition was brought under control by medication." 750 A.2d, at 1274 (emphasis omitted).

In *State v. Woods*, 945 P.2d 918 (Mont. 1997), the Supreme Court of Montana likewise concluded that "the fact that a mental condition is in remission does not preclude a finding that the person continues to suffer from the condition and is in need of further detention." *Id.*, at 923. The court further noted that "[i]n fact, a finding that a mental condition is in remission supports an inference that it still exists":

> ""The term remission means the abatement of the symptoms or signs of a disorder or disease. The abatement may be partial or complete. Physicians use the expression remission to denote amelioration, which even if complete for the time being does not necessarily imply permanent cure; in fact, the term carries the idea that the amelioration of the symptoms is temporary."" *Id.*, quoting *Doe v. Harris*, 495 F. Supp. 1161, 1170 n.36 (S.D.N.Y. 1980).

Similarly, the Court of Appeals for the Ninth Circuit observed in *United States v. Murdoch*, 98 F.3d 472 (9th Cir. 1996):

> "Simply because [the patient] is not in a situation in which he will react dangerously does not mean that he no longer suffers from a mental disease which causes his dangerous propensities." *Id.*, at 476.[11]

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[11] Many other court decisions are in accord with the decisions above. *See, e.g., State v. Jacob*, 798 A.2d 974, 987-988 (Conn. Ct. App. 2002) (affirming denial of discharge of insanity acquittee diagnosed with depressive disorder in remission and polysubstance dependence in remission where patient's progress due in part to his having been confined, supervised, and receiving treatment); *In re Hayes*, 564 S.E.2d 305, 308-313 (N.C. Ct. App. 2002) (insanity acquittee with alcohol and cannabis dependence in full sustained remission and personality disorder properly recommitted where patient likely to relapse into substance abuse if released); *State v. Simants*, 537 N.W.2d 346, 352 (Neb. 1995) (affirming continued confinement of insanity acquittee with schizophrenia and alcoholism in remission where patient was potentially dangerous if taken out of structured environment); *Mental Hygiene Legal Serv. ex rel. James "U" v. Rhodes*, 195 A.D.2d 160, 606 N.Y.S.2d 834, 836 (N.Y. Sup. Ct. App. Div. 1994) (insanity acquittee who suffered from bipolar disorder in remission not entitled to release where patient's lack of insight and poor judgment would cause him to stop taking medication and would place him at risk for becoming pysychotic and violent); *Bahrenfus v. Psychiatric Security Review Bd.*, 862 P.2d 553, 554 (Or. Ct. App. 1993) (affirming denial of conditional release to insanity acquittee suffering from psychosis in remission where patient was predisposed to drug use and drug use would probably cause pyschosis to become active); *State v. Johnson*, 753 P.2d 154, 157 (Ariz. 1988) (reversing, as unsupported by record, trial court's finding that insanity acquittee no longer suffered from a mental disease or defect where evidence was "uncontradicted that [patient] still had schizophrenia, although it was in remission by reason of

3. The Missouri court's decision was not "contrary to" *Foucha*.

A state court decision is "contrary to" clearly established federal law if "the state court applies a rule that contradicts the governing law set forth in [this Court's] cases," or if it "confronts a set of facts that are materially indistinguishable from a decision of this Court and nevertheless arrives at a result different from [this Court's] precedent." *Williams*, 529 U.S., at 405-406.

The Missouri court's adjudication of Revels' claim in this case was not "contrary to" *Foucha* in either respect. Both the state trial and appellate courts' decisions cited Missouri case law that properly recognized *Foucha*'s holding. Both courts cited the Missouri Supreme Court's 2000 decision, *State v. Revels*, 13 S.W.3d 293 (Mo. 2000) (en banc) (reproduced at App. A47-A54), which examined *Foucha* and recognized that "the holding of *Foucha* prohibits 'the indefinite detention of insanity acquittees who are not mentally ill but who do not prove they would not be dangerous to others.'" *Id.*, at A51, quoting *Foucha*, 504 U.S., at 83. *See* App. A38 (state appellate court memorandum); *id.,* at A44 (state trial court opinion).

Both courts also cited two intermediate state appellate court decisions – *State v. Weekly*, 107 S.W.3d 340 (Mo. Ct. App. 2003), and *State v. Gratts*, 112 S.W.3d 12 (Mo. Ct. App. 2003) – that also recognize that continued confinement of an

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treatment"); *In re Malm*, 375 N.W.2d 888, 891 (Minn. Ct. App. 1985) (affirming continued confinement of insanity acquittee whose bipolar disorder was in remission when he "complies with medication regime and abstains from alcohol" when patient was likely to "stop taking his medication and return to using alcohol when free to do so").

insanity acquittee must be based on showings concerning mental disease or defect and dangerousness. App. A38 (state appellate court memorandum); *id.,* at A44-A45 (state trial court opinion). These cases hold that a dangerous insanity acquittee who is not currently symptomatic is not entitled to unconditional release under Missouri law in the narrow "circumstances in which a mental disease remains in remission while the acquittee is in a mental health facility and has no access to mind-altering drugs but, while released, is likely either to cease taking medication that prevents pyschosis or to take drugs causing a pyschosis." *Weekly*, 107 S.W.3d, at 349-350.

Thus, none of the Missouri cases on which the trial and appellate court relied in denying Revels' application for unconditional release contradicts *Foucha*. But the state appellate court's unpublished memorandum supplementing its order of affirmance misstates the rule applied in those cases. That memorandum states that Missouri precedent holds that:

> "it [is] not enough to prove present absence from mental defect, but the person seeking unconditional release must show that he is not likely to suffer from a mental disease or defect in the reasonable future, *and also* establish by clear and convincing evidence … that he will not be a danger to himself or others." App. A38 (emphasis added).

But this misstatement of Missouri precedent in the appellate court's unpublished memorandum – that an insanity acquittee must demonstrate both lack of mental illness and lack of dangerousness – does not make the state court's decision denying

Revels unconditional release "contrary to" *Foucha* within the meaning of §2254(d)(1).

First, the state court's decision is not "contrary to" *Foucha* in the sense of "appl[ying] a rule that contradicts the governing law set forth in [this Court's] cases," *Williams*, 529 U.S., at 405, because the state court did not affirm the denial of Revels' application for unconditional release on the ground that he did not prove lack of mental illness and lack of dangerousness. As the appellate court held, the record supported the state trial court's findings that Revels continued to have a mental disease or defect *and* that he remained potentially dangerous to himself and others due to his drug and alcohol dependence. App. A39-A40. Therefore, the state appellate court did not "apply" its misstated "rule" in any meaningful sense because it did not affirm the denial of Revels' release petition on the ground that he failed to prove lack of mental illness *and* failed to prove lack of dangerousness. Because Revels failed to prove either, the end result in the case was not affected by the incorrect summary of Missouri case law.

Second, the state appellate court's decision is not "contrary to" *Foucha* in the sense of "confront[ing] a set of facts that are materially indistinguishable from a decision of this Court and nevertheless arriv[ing] at a result different from [this Court's] precedent." *Williams*, 529 U.S., at 406. Because Revels was found both to be suffering from a mental disease or defect and dangerous, this case has facts that are materially different from those confronted by the Court in *Foucha*, where "according to the testimony given at the hearing in the trial court, Foucha [was] not suffering from a mental disease or illness." *Foucha*, 504 U.S., at 79.

4. The Missouri court's decision was not an "unreasonable application" of *Foucha*.

A state court decision involves "an unreasonable application" of clearly established federal law within the meaning of §2254(d)(1) if the state court applies the correct legal principle to the facts of a particular case in an objectively unreasonable (as opposed to merely erroneous) manner. *Williams*, 529 U.S., at 409-410; *Bell*, 535 U.S. at 694.

Here, the Missouri court's rejection of Revels' claim was eminently reasonable in light of the evidence presented at the state evidentiary hearing on June 20, 2003. As noted *supra*, both Revels' and the State's experts agreed that Revels suffered from substance-induced psychotic disorder with delusions and hallucinations in remission and with polysubstance dependence in remission. App. A43; Tr. 20-22, 73. The contested issues revolved around whether those problems qualified as mental diseases or defects under Missouri law and whether Revels was likely to return to drug abuse – which could lead to active psychosis – upon his release.

Revels' expert, Dr. Daniels, testified that he did not believe that any of Revels' problems qualified as a mental disease or defect and opined that Revels would not be likely to use drugs again given the "significant insight and understanding" that Revels had gained regarding the connection between his prior offenses and illicit drug use. Tr. 24, 30-31.

In contrast, Dr. Reynolds, the State's expert, testified that Revels' diagnosis of substance-induced psychotic disorder with hallucinations in remission qualified as a mental disease or defect under Missouri law because the disorder was still active in terms of consideration for the patient's care. Tr. 73.

Dr. Reynolds' conclusion is consistent with the many state and federal cases discussed in Part II.B.2, *supra*, that recognize that a mental disease or defect in remission can still qualify as a mental disease or defect.

Dr. Reynolds' testimony on dangerousness also effectively undermined Dr. Daniels' credibility and showed that Revels was likely to be dangerous as a result of his mental disease or defect. Dr. Reynolds testified that Revels could become psychotic again if he took any illicit drugs or abused alcohol to excess, and that Revels was more likely than not to relapse into drug abuse – points that Dr. Daniels did not dispute. Tr. 73, 76. Dr. Reynolds also testified that in a recent relapse prevention plan, Revels listed a number of relatively minor stresses that would be common in everyday life outside of a mental health facility that Revels believed would lead him either to abuse drugs or crave to abuse drugs, such as "waiting for a phone call," "arguing with a friend or relative," "having an empty tank of gas," or "[his] job." Tr. 86-87. Dr. Reynolds further pointed out that about a month and half before the June 20, 2003 hearing, Revels had become very angry and verbally lashed out in a profane manner at a case manager (who was half his size), saying that he did not need therapy groups and that the groups were a waste of his time. Tr. 61.

All of this evidence pointed to Revels having a mental disease in remission in a hospital setting and Revels abusing drugs if released, causing him to become actively psychotic in the same manner as he had been when he killed his grandmother, sister, and nephew. In light of the record developed in the state courts, the state court's rejection of Revels' application for release was a reasonable application of *Foucha*. *See also* 28 U.S.C. §2254(e)(1) (state court

fact determinations "shall be presumed to be correct" unless rebutted by clear and convincing evidence).

* * *

This Court's review is therefore needed because the Eighth Circuit improperly awarded habeas relief in this case – and may improperly award habeas relief in future cases – because of its extraordinary and demonstrably wrong views regarding the limitations associated with the scope of a COA.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for writ of certiorari.

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September 2008

No. 08-

In the
SUPREME COURT OF THE UNITED STATES

MARY ATTEBURY,
Chief Operating Officer of the
Northwest Missouri Psychiatric Rehabilitation
Center,
Petitioner,
v.
FREDERICK LEE REVELS,
Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Eighth Circuit

APPENDIX

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United States Court of Appeals
for the Eighth Circuit

No. 06-3052

Frederick Lee Revels,	*
	*
Petitioner-Appellant,	*
	*
v.	*
	*
Mary Sanders,	*
	*
Respondent-Appellee.	*

Submitted: November 15, 2007
Filed: March 10, 2008

Before MELLOY, BRIGHT, and SHEPHERD, Circuit Judges.

SHEPHERD, Circuit Judge.

Petitioner Frederick Lee Revels, an insanity acquittee, appeals from the district court's order denying his petition for a writ of habeas corpus under 28 U.S.C. §2254. In his petition, Revels challenges the Missouri Court of Appeals's denial of his application for unconditional release. Because we conclude that the court violated Revels's due process rights by imposing on him an evidentiary burden contrary to Supreme Court precedent, we

reverse the judgment of the district court and grant a conditional writ of habeas corpus.

I.

Revels is involuntarily committed as a psychiatric patient at the Northwest Missouri Psychiatric Rehabilitation Center ("NMPRC") in St. Joseph, Missouri. On June 22, 1988, Revels killed three members of his family; at that time, Revels was hearing voices and abusing a controlled substance. On July 22, 1988, a grant jury indicted Revels on two counts of first-degree murder, one count of second-degree murder, and three counts of armed criminal action. On August 27, 1992, Revels entered a plea of not guilty by reason of insanity on all counts in the Circuit Court of Jackson County, Missouri. The circuit court accepted Revels's plea, found him not guilty by reason of mental disease or defect excluding responsibility,[12] and committed him to the care and custody of the Missouri Department of Mental Health.[13]

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[12] "A person is not responsible for criminal conduct if, at the time of such conduct, as a result of mental disease or defect such person was incapable of knowing and appreciating the nature, quality, or wrongfulness of such person's conduct." Mo. Rev. Stat. §552.030(1).

[13] "When an accused is tried and acquitted on the ground of mental disease or defect excluding responsibility, the court shall order such person committed to the director of the department of mental health for custody." *Id.* §552.040.2.

In 1993, Revels applied to the Jackson County Circuit Court for a conditional release.[14] Pursuant to Missouri laws, Revels, as the party who sought the conditional release, bore the burden of proving, by clear and convincing evidence, that he was "not likely to be dangerous to others while on conditional release." Mo. Rev. Stat. §552.040.12(6). In addition, because Revels's insanity acquittal was based, in part, on the crime of first-degree murder, he was ineligible for conditional or unconditional release absent a finding by the court that:

> (1) [Revels] is not now and is not likely in the reasonable future to commit another violent crime against another person because of [Revels's] mental

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[14] An insanity acquittee or "the head of the facility where the person is committed may file an application in the court [that committed the person] for a hearing to determine whether the committed person shall be released conditionally." *Id.* §552.040.10. "The application shall specify the conditions and duration of the proposed release." *Id.* §552.040.10(3). While on conditional release, one must abide by the conditions specified in his application, *id.*, and the Missouri Department of Health is able to monitor compliance with such conditions through "reviews and visits with the client at least monthly, or more frequently as set out in the release plan" as well as ensure that the acquittee "is receiving care, treatment, habilitation or rehabilitation consistent with his needs, condition and public safety." *Id.* §552.040.16. Further, conditional release may be revoked in the event that the director of the department of mental health "has reasonable cause to believe that the person has violated the conditions of such release," *id.* §552.040.17, and, "[a]t any time during the period of a conditional release or trial release, the court which ordered the release may issue a notice to the released person to appear to answer a charge of a violation of the terms of the release and the court may issue a warrant of arrest for the violation." *Id.* §552.040.18.

> illness; and (2) [Revels] 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 [Revels's] conduct to the requirements of law in the future.

Id. §552.040.20. Finally, in considering an application for either conditional or unconditional release, Missouri law requires that the court consider a six-part test for weighing the impact of the applicant's release on public safety.[15]

The circuit court granted Revels's application for conditional release; however, it was revoked in 1994 when he missed appointments, broke a

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[15] The six-part statutory test addresses the following:

> (1) The nature of the offense for which the committed person was committed; (2) The person's behavior while confined in a mental health facility; (3) The elapsed time between the hearing and the last reported unlawful or dangerous act; (4) The nature of the person's proposed release plan; (5) The presence or absence in the community of family or others willing to take responsibility to help the defendant adhere to the conditions of the release; and (6) Whether the person has had previous conditional releases without incident.

Id. §552.040.12.

window, and tested positive for a prescribed painkiller which he was no longer authorized to use. Sometime in 1995, Revels received a second conditional release, which was revoked on March 1, 1997, partly because he failed to attend Alcoholics Anonymous and Narcotics Anonymous meetings as required by the terms of his conditional release.

On October 31, 1997, Revels, for the first time, applied to the Jackson County Circuit Court for an unconditional release. In order to obtain an unconditional release, Missouri law requires that Revels show, 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." Mo. Rev. Stat. §§552.040.7(6), .9. In addition, based on the nature of the offense for which Revels was acquitted, the court had to find that:

> (1) [Revels] is not now and is not likely in the reasonable future to commit another violent crime against another person because of [Revels's] mental illness; and (2) [Revels] 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 [Revels's] conduct to the requirements of law in the future.

Id. §552.040.20. The circuit court denied Revels's application, and its decision was affirmed by the

Missouri Supreme Court, *State v. Revels*, 13 S.W.3d 293 (Mo. 2000) (en banc).

On June 19, 2003, Revels again applied to the Jackson County Circuit Court for unconditional release, which the Missouri Department of Health opposed. Revels also challenged the constitutionality of Chapter 552 of the Revised Statutes of the State of Missouri with regard to release. The circuit court conducted a hearing on the matter on June 20, 2003. The evidence at the hearing consisted of Revels's medical records and the testimony of two psychiatrists, Dr. A. E. Daniel and Dr. James Bradley Reynolds, the Medical Director of NMPRC. Dr. Daniel, who had met with Revels several times beginning in 2000, testified that Revels had been diagnosed with (1) a substance-induced psychotic disorder in remission and (2) poly-substance dependence in full remission. Dr. Reynolds, who was the supervisor of individuals working directly with Revels and had examined Revels, did not disagree with Dr. Daniel's testimony with regard to Revels's diagnoses; however, Dr. Reynolds stated that a mental condition in remission is one that still exists and may become a problem again.

With regard to Revels's then current mental condition, the February 13, 2003 medical and psychiatric assessment performed by Dr. Arnaldo Berges, provided that: (1) "there are no reports of [Revels exhibiting] active psychotic symptoms since mid-1992" and (2) Revels's "active symptoms of psychosis seem [] to be in full remission at this time which indicates no acute need for antipsychotic treatment." Dr. Daniel stated that Revels showed no present symptoms of any mental disorder. Dr.

Reynolds agreed that Revels displayed no signs of a present mental disorder. While Dr. Daniel opined that the unconditional release should be granted, Dr. Reynolds observed that he could not state that Revels was not likely to be dangerous due to: (1) Revels's prior unsuccessful conditional releases; (2) Revels's likely relapse and use of illegal drugs; and (3) the fact that Revels, who has a history of drug-induced delusions, was more likely to have such delusions in the event of subsequent drug use than someone without a history of delusions.

The Jackson County Circuit Court accepted the accuracy of both psychiatrists' testimony, except that the court found Dr. Reynolds's testimony more credible than Dr. Daniel's as to Revels's dangerousness and the likelihood that Revels would relapse. On June 21, 2004, the circuit court denied Revels's application for unconditional release because (1) Revels has a mental disease which is in remission and (2) Revels had not carried his burden under Missouri law to show, by clear and convincing evidence, that he was not likely to be dangerous to himself or others if released because Dr. Reynolds could not state to a reasonable degree of certainty that Revels would not be dangerous. With regard to the statutory "safety" factors, the circuit court found the following: (1) Revels committed three murders (factor one); (2) Revels's recent behavior in the Department of Mental Health was acceptable (factor two); (3) Revels's last dangerous act was during his first conditional release when he, out of anger, broke a window with his hand (factor 3); and (6) Revels had failed to complete two conditional releases (factor 6). The court concluded that the factors did not warrant Revels's unconditional release. The court also held that Revels's constitutional challenge

to Chapter 552 of the Revised Statutes of the State of Missouri failed. The Missouri Court of Appeals summarily upheld the denial of release on August 16, 2005. *State v. Revels*, 172 S.W.3d 461 (Mo. Ct. App. 2005) (per curiam).

The Missouri Court of Appeals issued a memorandum supplementing order articulating its reasoning for the denial. *State v. Revels*, Memorandum Supplementing Order, Aug. 16, 2005 (Mo. Ct. App. 2005) (unpublished). The court of appeals found that the record supported the trial court's finding that Revels had failed to show, by clear and convincing evidence, that he did not then have a present mental disease or defect and that he was not then potentially dangerous to himself and others, with the court noting specifically that the danger was "due to his drug and alcohol dependence and prior abuse of drugs and alcohol." *Id.* at 4. With regard to Revels's claim that he was entitled to unconditional release because (1) both psychiatrists agreed that he currently showed no signs of mental disability and (2) as a result, his future dangerousness was irrelevant, the court of appeals stated that "it [is] not enough to prove present absence from mental defect, but the person seeking unconditional release must show that he is not likely to suffer from a mental disease or defect in the reasonable future, and also establish by clear and convincing evidence the mandate of Section 552.040 that he will not be a danger to himself or others." *Id.* at 3 (*citing State v. Gratts*, 112 S.W.3d 12, 19 (Mo. Ct. App. 2003).

The court of appeals also rejected Revels's contention that he was entitled to release because he passed the six-part statutory "safety" test, finding

specifically that (1) "the offense for which he was committed was egregious having killed three family members" (factor one); (2) "Revels also exhibited aggressive behavior while confined (verbally lashing out at a department case manager and using profanity)" (factor three); and (3) "he has failed two conditional releases" (factor six). *Id*. at 4. Thus, the Missouri Court of Appeals denied all of Revels's claims. *Id*. Revels's application for transfer to the Missouri Supreme Court was denied on October 4, 2005. *Revels*, 172 S.W.3d at 461.

On November 15, 2005, Revels filed a petition for a writ of habeas corpus in the United States District Court for the Western District of Missouri. In his petition, Revels asserted that: (1) he should be released from confinement because he no longer suffered from a mental disorder, had not done so since 1992, and had not required anti-psychotic medication since 1997; (2) on April 23, 2005, Dr. Reynolds assessed Revels to be recovered and not likely spontaneously to suffer a psychotic disorder in the absence of drug use;[16] and (3) the dictates of Missouri law as to what an insanity acquittee must show in order to obtain release violate the due process standard set forth by the United States Supreme Court in *Foucha v. Louisiana*, 504 U.S. 71 (1992). The respondent Mary Sanders, the Chief Operating Officer of NMPRC and Revels's custodian, contended that Revels's petition was untimely filed

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[16] We reject Revels's attempt to rely on a psychiatric assessment which was not before the circuit court at the time that it denied his application for unconditional release. *Von Kahl v. United States*, 242 F.3d 783, 788 (2001) (stating that generally "the appellate record is limited to the record made below").

under 28 U.S.C. §2244(d)(1) because more than a year passed between the date that petitioner's judgment became final, August 27, 1992, and the date he filed his federal petition, November 15, 2005.

The district court, assuming without deciding that Revels's petition was timely as from the Jackson County Circuit Court's June 21, 2004 denial of Revels's 2003 application for unconditional release, "conclude[d] that the decisions of the state courts that petitioner should not be unconditionally released . . . were not unreasonable applications of federal law . . . or based on an unreasonable determination of the facts of petitioner's case." *Revels v. Sanders*, No. 05-1140-CV-W-NKL-P (W.D. Mo. May 23, 2006) (unpublished). Accordingly, the district court dismissed Revels's petition for a writ of habeas corpus with prejudice.

This court granted a certificate of appealability as to Revels's

> claim [that] his due process rights [were] violated when his June 2003 amended application for release from confinement was denied; more specifically, whether the Missouri Court of Appeals' conclusion that Revels was required to show he 'currently does not suffer from mental illness and was not likely to have a mental disease or defect in the reasonable future and that he . . . no long . . . poses a danger to society,' *State v. Revels*, WD64433, at 3 (MO Ct. App. Aug. 16, 2005), is reasonably

> wrong in light of the Supreme Court's decision in *Foucha v. Louisiana*, 504 U.S. 71 (1992).

Revels v. Sanders, No. 06-3052 (8th Cir. March 28, 2007) (unpublished) (internal quotations omitted).

II.

"We review for clear error the district court's factual findings and review de novo its legal conclusions." *Bell-Bey v. Roper*, 499 F.3d 752, 755 (8th Cir. 2007), *pet. for cert. filed* (U.S. Jan. 17, 2008) (No. 07-8894). Our review of this appeal is governed by the provisions of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) which "limits the availability of habeas relief." *Id.* Accordingly, we may not grant Revels habeas relief "unless [the Missouri Court of Appeals's] adjudication of [Revels's] claim resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," 28 U.S.C. §2254(d)(1), or "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." *Id.* §2254(d)(2). Because the certificate of appealability refers only to section 2254(d)(1), the "unreasonable application" prong, we limit our review of Revels's habeas petition to that provision. *See* 28 U.S.C. §2253(c)(3) (on habeas review, a federal court of appeals considers only the "specific issue or issues" listed in the certificate of appealability); *see also Scott v. United States*, 473 F.3d 1262, 1263 (8th Cir.), *cert. denied*, 127 S.Ct. 2443 (2007) ("Our 'appellate review is limited to the issues specified in the

certificate of appealability.'") (*quoting Carter v. Hopkins*, 151 F.3d 872, 874 (8th Cir. 1998)).

The Supreme Court has identified two ways in which a state court decision may meet the requirements imposed by the "unreasonable application" prong of section 2254(d)(1). This court may grant the writ if the state court: (1) "applie[d] a rule that contradicts the governing law set forth in [Supreme Court] cases" or (2) "confront[ed] a set of facts that are materially indistinguishable from a decision of this Court and nevertheless arrive[d] at a result different from our precedent." *Penry v. Johnson*, 532 U.S. 782, 792 (2001) (*quoting Williams v. Taylor*, 529 U.S. 362, 405-06 (2000)); *see Bell-Bey v. Roper*, 499 F.3d at 756. "Avoiding these pitfalls does not require citation of [Supreme Court] cases-indeed, it does not even require awareness of [the Court's] cases, so long as neither the reasoning nor the result of the state-court decision contradicts them." *Early v. Packer*, 537 U.S. 3, 8 (2002) (per curiam). Therefore, we note that the Missouri Court of Appeals's failure to identify controlling Supreme Court precedent with regard to the confinement of insanity acquittees does not, by itself, render the decision contrary to clearly established federal law. *See id.*

III.

A.

We first address the respondent's contention that Revels's habeas petition was untimely because more than a year passed between the date that the judgment in Revels's initial criminal case became final, and the date Revels filed his petition. Revels

responds that his habeas petition timely challenges the circuit court's 2003 judgment that, under Missouri law, he must remain in custody despite his request for release. Revels acknowledges that, at the time of the 1992 commitment order, he clearly met the criteria for confinement; however, he points out that the issue here is continued confinement, which he may challenge under Missouri law,[17] and that he no longer meets the constitutional criteria for commitment.

In this case, Revels is not challenging his conviction or initial commitment. Rather, he is challenging his continued commitment through his application for unconditional release, as Missouri law allows. *See* Mo. Rev. Stat. §552.040.5, 13. Under AEDPA, "Congress established a 1-year statute of limitations for seeking federal habeas corpus relief from a state-court judgment, 28 U.S.C. §2244(d), and further provided that the limitations period is tolled while 'an application for State post-conviction or other collateral review' 'is pending.'" *Lawrence v. Florida*, 127 S.Ct. 1079, 1081 (2007) (*quoting* 28 U.S.C. §2244(d)(2)). The circuit court denied Revels's application for unconditional release on June 21, 2004. Revels filed his notice of appeal with the Missouri Court of Appeals on September 1, 2004, and the court affirmed the denial of release on

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[17] "An order denying the application shall be without prejudice to the filing of another application after the expiration of one year from the denial of the last application." Mo. Rev. Stat. §552.040.13. "[A]ny person who has been denied an application for a conditional release pursuant to subsection 13 of this section shall not be eligible to file for an unconditional release until the expiration of one year from such denial." Mo. Rev. Stat. §552.040.5.

August 16, 2005. On October 4, 2005, the court of appeals denied Revels's application for transfer to the Missouri Supreme Court. Revels filed his habeas petition on November 15, 2005. Thus, 512 days passed from the circuit court's denial of Revels's application for release and his habeas petition. However, pursuant to 28 U.S.C. §2244(d)(2), the habeas statute of limitations was tolled while Revels's claim was pending before the Missouri Court of Appeals. Thus, from September 1, 2004 to October 4, 2005, the statute of limitations was tolled. This means that 399 days are excluded from the 512-day period such that only 113 countable days passed from the circuit court's judgment to the filing of Revels's petition. Revels was allowed one year, *see* 28 U.S.C. §2244(d)(1), and, therefore, the petition was timely filed.

B.

"[C]ommitment for any purpose constitutes a significant deprivation of liberty that requires due process protection." *Jones v. United States*, 463 U.S. 354, 361 (1983) (*quoting Addington v. Texas*, 441 U.S. 418, 425 (1979)). The Supreme Court outlined the substantive protections of the Due Process Clause for the continued confinement of insanity acquittees in *Foucha v. Louisiana*, 504 U.S. 71 (1992). The petitioner in *Foucha* challenged Louisiana's statutory release provision which provided that the state could continue to confine indefinitely an acquittee in a mental facility who, although not mentally ill, might be dangerous to himself or to others if released. *Id*. at 73. The *Foucha* Court held that the statute violated due process because such an "acquittee may be held as long as he is both mentally ill and dangerous, but no

longer." *Id.* at 77. Thus, an application for release of an insanity acquittee has two components: (a) a preset mental illness and (b) dangerousness stemming from that illness. *Id.*; *see United States v. Bilyk*, 29 F.3d 459, 462 & 462 n.3 (8th Cir. 1994) (per curiam) (recognizing that future dangerousness alone is not a proper basis for the continued confinement of an insanity acquittee) (*citing Foucha*, 504 U.S. at 77-79); *see also United States v. Wattleton*, 296 F.3d 1184, 1202 n.35 (11th Cir. 2002) ("[T]he holding of *Foucha* provides that a defendant's dangerous propensities alone may not serve as a continued basis for confinement following an insanity verdict . . . ."); *Parrish v. Colorado*, 78 F.3d 1473, 1477 (10th Cir. 1996) ("[T]he real significance of the [*Foucha]* holding is that unless an acquittee has an identifiable mental condition, he cannot be held by the state merely because he is dangerous.").

Both the Missouri Supreme Court and the Missouri Court of Appeals have recognized *Foucha*'s effect. *See Greeno v. State*, 59 S.W.3d 500, 503 (Mo. 2001) (en banc) ("A state may only confine someone found not guilty by reason of insanity if the confined person is both suffering from a mental disease or disorder and might be dangerous to himself or others if released.") (*citing Foucha*, 504 U.S. at 86); *State v. Nash*, 972 S.W.2d 479, 482 (Mo. Ct. App. 1998) ("The due process rights of a person are violated if the state holds a person in a psychiatric facility when the person is no longer suffering from a mental disease or defect.") (*citing Foucha*, 504 U.S. at 79-80). In *Nash*, the court of appeals found that the trial court erred where, after determining that Nash, an insanity acquittee, provided that he did not presently suffer from a mental illness, it then

required him to also prove that he would not be dangerous in the reasonable future. 972 S.W.2d at 482-83 (*citing Foucha*, 504 U.S. at 77-79). The *Nash* Court went onto hold that "[o]nce the trial court found that [Nash] [did] not presently have a mental disease or defect, the trial court was bound to release [Nash]." *Id*. at 482.[18]

However, in affirming the denial of Revels's application for unconditional release, the Missouri Court of Appeals stated:

> [I]t [is] not enough to prove present absence from mental defect, . . . the person seeking unconditional release must show that he is not likely to suffer from a mental disease or defect in the reasonable future, and also establish by clear and convincing evidence . . . that he will not be a danger to himself or others.

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[18] We note that other Missouri Court of Appeals cases have reached contrary results. *See State v. Gratts*, 112 S.W.3d 12, 19-20 (Mo. Ct. App. 2003) (reversing circuit court judgment granting insanity acquittee an unconditional release because he demonstrated that he no longer suffered from a mental illness and remanding to the circuit court for it to determine whether he met his burden of establishing, by clear and convincing evidence, "that [he was] not in the reasonable future likely to have a mental disease or defect rendering him dangerous to the safety of himself or other"); *State v. Weekly*, 107 S.W.3d 340, 346-47 (Mo. Ct. App. 2003) (reversing circuit court judgment granting insanity acquittee an unconditional release because he demonstrated that he no longer suffered from a mental illness in light of the governing statute which required an additional "find[ing] that in the reasonable future [he] was not likely to have a mental disease or defect rendering him dangerous to the safety of himself or others").

Revels, No. WD64433 at 3. Thus, the Missouri Court of Appeals expressly based its affirmance of the circuit court's denial of unconditional release on its finding that, under Missouri law, an insanity acquittee seeking release must show, by clear and convincing evidence, that (1) he is not presently mentally ill; (2) he is not dangerous; (3) he is not likely to suffer a mental disease; and (4) he is not likely to become dangerous in the reasonable future. Requiring an insanity acquittee to prove both a lack of present mental illness and dangerousness, is clearly contrary to *Foucha*, and violates the substantive protections of the Due Process Clause as defined by the Supreme Court. *See* 504 U.S. at 77. Here, the Missouri Court of Appeals went even further, requiring Revels to also show the absence of a probability of a future mental illness and future dangerousness, stepping even further over the line drawn by the Supreme Court in *Foucha*.

The respondent contends that *Foucha* is inapplicable in two ways: (1) *Foucha* involved a conditional release such that the state of Louisiana continued to have some control over the acquittee in contrast to this case whereas here, if Revels is unconditionally released, the Missouri Department of Health would have no control over him and (2) in terms of procedure, in *Foucha*, only the state health department could initiate applications for release but, under the Missouri system, both the confined individual and the Missouri Department of Health can do so.

First, the State's attempt to distinguish this unconditional release case from *Foucha*, a conditional release case, is precluded by the *Foucha*

Court's reasoning.[19] The *Foucha* Court stated that "according to the testimony given at the hearing in the trial court, Foucha is not suffering from a mental disease or illness. If he is to be held, he should not be held as a mentally ill person." 504 U.S. at 79. The *Foucha* Court went on to explain that

> A State, pursuant to its police power, may of course imprison convicted criminals for the purposes of deterrence and retribution . . . . Here, the State has no such punitive interest. As Foucha was not convicted, he may not be punished. Here, Louisiana has by reason of his acquittal exempted Foucha from criminal responsibility. . . .

Id. at 80. Thus, the rule urged by the respondent, that a state may continue to hold an insanity acquittee who seeks unconditional release even if he

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[19] However, Missouri courts have accepted the State's rationale. *See Weekley*, 107 S.W.3d at 348-50 (distinguishing *Foucha* based on the differences between conditional and unconditional release such that the State could require an insanity acquittee seeking unconditional release to show both that he "(1) has no mental disease, *and* (2) in the reasonable future is not likely to have a mental disease rendering the applicant dangerous" without violating *Foucha*) (*citing Foucha*, 504 U.S. at 74, 82); *see also State v. Revels*, 13 S.W.3d 293, 296 (Mo. 2000) (en banc) (requiring an insanity acquittee seeking unconditional release to demonstrate that he lacks a present mental illness and that "in the reasonable future [he] is [not] likely to have, a mental disease or defect rendering the person dangerous to self or others . . . meets the holding of *Foucha*") (*citing Foucha*, 504 U.S. at 86-90); *Gratts*, 112 S.W.3d at 18 (noting the distinction between *Foucha* and unconditional release cases).

is not presently mentally ill, must be rejected. Rather, once an insanity acquittee has shown the absence of a present mental illness, his continued confinement constitutes "punishment," which *Foucha* expressly rejected as a proper basis for the confinement of one who is not criminally responsible for his criminal actions. *Id.* Moreover, the Supreme Court has recognized that "a federal court [may] grant habeas relief based on the application of a governing legal principle to a set of facts different from those of the case in which the principle was announced." *Lockyer v. Andrade*, 538 U.S. 63, 76 (2003) (*citing Williams*, 529 U.S. at 407). Here, the distinction between conditional and unconditional release is not material in light of *Foucha*'s "governing legal principle," constricting a state's ability to continue to confine an insanity acquittee.

Second, we see no reason for *Foucha* to be inapplicable simply because, pursuant to Missouri law, Revels can challenge his continued confinement whereas Foucha could not under the Louisiana procedure; *Foucha* sets forth the standard that must be satisfied regardless of who makes the application for release. In sum, this case is "materially indistinguishable" from *Foucha*. *See Brown v. Payton*, 544 U.S. 133, 141 (2005) ("A state-court decision is contrary to this Court's clearly established precedents . . . if it confronts a set of facts that is *materially indistinguishable* from a decision of this Court but reaches a different result.") (emphasis added).

The respondent next contends that, even if *Foucha* applies, the Missouri Court of Appeals did not violate *Foucha* because: (1) both the Jackson County Circuit Court and the Missouri Court of

Appeals found that Revels had a present mental defect whereas in *Foucha* the lower courts did not find a present mental disease or defect and (2) even assuming there was no finding of a present mental disease, a finding of a reasonable probability that a mental disease would reappear in the future combined with a finding of future dangerousness warrants continued confinement under *Foucha* because the potential for a future mental disease was not present or discussed in *Foucha*.

Whatever we think about the evidence concerning Revels's present mental state, the circuit court found that he suffered from a mental disorder. Were this opinion we were reviewing, we would assume the correctness of the finding and only reverse if Revels presented clear and convincing evidence that this was not the case. *See* 28 U.S.C. §2254(e)(1) (providing that, under AEDPA, federal habeas courts presume the correctness of state courts' factual findings unless applicants rebut this presumption with clear and convincing evidence). However, the circuit court's factual findings are not before us. Rather, under the certificate of appealability, our review is confined to the issue of whether the Missouri Court of Appeals unreasonably applied *Foucha* in determining that the state could continue to hold Revels based on future dangerousness alone. *See* 28 U.S.C. §2253(c)(3); *see also Scott*, 473 F.3d at 1263; *Carter*, 151 F.3d at 874. We see no way to construe the court of appeals's assertion other than in direct contradiction of *Foucha*. Furthermore, the respondent's second contention, that the Missouri Court of Appeals did not violate *Foucha* due to the likelihood that Revels's mental illness would return, is plainly incorrect because *Foucha* required the

finding of a *present* mental illness for the continued confinement of an insanity acquittee. 504 U.S. at 77; *see Wattleton*, 296 F.3d at 1199; *Parrish*, 78 F.3d at 1477; *Greeno*, 59 S.W.3d at 503; *Nash*, 972 S.W.2d at 482-83.

IV.

Because the Missouri Court of Appeals violated Revels's due process rights by applying a standard for unconditional release contrary to Supreme Court precedent, we reverse the judgment of the district court and remand the case with instructions that the district court order that Revels be released from state custody unless the State of Missouri affords Revels a new hearing within a reasonable time as set by the district court.[20]

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[20]Below and before this court, Revels challenges the constitutionality of Chapter 552 of the Revised Statutes of the State of Missouri governing release; however, we, constrained by the certificate of appealability, cannot reach this issue. *See Carter v. Hopkins*, 151 F.3d 872, 874 (8th Cir. 1998) (rejecting petitioner's contention that this court's "review is not limited to those issues identified in the district court's certificate of appealability and that [it] [is] free to consider any and all issues so long as a certificate has been issued").

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI WESTERN DIVISION

FREDERICK LEE REVELS,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 05-1140-CV-W-NKL-P
	)	
MARY SANDERS,	)	
	)	
Respondent.	)	

ORDER DENYING PETITIONER'S MOTIONS AND DENYING PETITIONER A CERTIFICATE OF APPEALABILITY AND LEAVE TO PROCEED IN FORMA PAUPERIS ON APPEAL

On May 23, 2006, an Order was entered denying petitioner's application for writ of habeas corpus, and Judgment was entered pursuant thereto. On May 30, 2006, petitioner filed the first of four (4) motions to set aside the May 23, 2006, Judgment. For the reasons set forth in respondent's response thereto (Doc. No. 49), petitioner's motions to set aside the judgment in this case will be denied. On July 12, 2006, petitioner filed a notice of appeal as to the May 23, 2006, Order and Judgment and an application for a certificate of appealability.

Under 28 U.S.C. § 1915, an appeal *in forma pauperis* may be permitted if an affidavit including a statement of all assets possessed and a certified copy of the inmate account statement for the preceding six months are submitted and if the appeal is taken

in good faith. *See* Fed. R. App. P. 24(a). Good faith requires that petitioner's argument on appeal must not be frivolous. *Coppedge v. United States*, 369 U.S. 438, 445 (1962).

Further, an appeal may not be taken to the court of appeals from the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a state court unless a district judge or a circuit judge issues a certificate of appealability. Fed. R. App. P. 22(b). A certificate of appealability will be issued only if the applicant has made a substantial showing of the denial of a constitutional right and will indicate which specific issue or issues satisfy the showing required. 28 U.S.C. § 2253(c)(2) and (3). For the reasons set forth in the May 23, 2006, Order, this case presents issues which are not deserving of appellate review under the above standards.

Accordingly, it is **ORDERED** that:

(1) petitioner's motions to set aside the May 23, 2006, Order and Judgment (Doc. Nos. 41, 42, 44, and 45) are denied for the reasons set forth in respondent's response (Doc. No. 49);

(2) petitioner's motion for order (Doc. No. 47) is denied as moot; and

(3) a certificate of appealability and leave to proceed *in forma pauperis* on appeal are denied.

/s/ Nanette K. Laughrey

NANETTE K. LAUGHREY
UNITED STATES DISTRICT JUDGE

Jefferson City, Missouri,

Dated: 8/2/06 .

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI WESTERN DIVISION

FREDERICK LEE REVELS,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 05-1140-
	)	CV-W-NKL-P
	)	
MARY SANDERS,[21]	)	
	)	
Respondent.	)	

OPINION AND ORDER DENYING PETITION FOR WRIT OF HABEAS CORPUS

Petitioner is committed to the care of the Missouri Department of Mental Health (MDMH) at the Northwest Missouri Psychiatric Rehabilitation Center in St. Joseph, Missouri. Petitioner filed this federal petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 to challenge his continued confinement pursuant to his 1992 pleas of not guilty by reason of mental disease or defect to the charges of two counts of first degree murder, one count of second degree murder, and three counts of armed criminal action, which were entered in the Circuit

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[21] Mary Sanders, Chief Operating Officer of the Northwest Missouri Psychiatric Rehabilitation Center, is petitioner's custodian and will be substituted for the Missouri Department of Mental Health as the sole proper party respondent in this case.

Court of Jackson County, Missouri.[22] Petitioner raises four (4) grounds for relief: (1) he is no longer insane and has not been insane for years (since 1992), has not required anti-psychotic medication since 1997, and should be released from confinement; (2) on April 23, 2005, Dr. James Bradley Reynolds, M.D., assessed petitioner to be recovered and not likely spontaneously to suffer a psychotic disorder in the absence of drug use; (3) Mo. Rev. Stat. § § 552.040.7 and 552.040.9 do not meet the due process standard set forth by the Supreme Court in *Foucha v. Louisiana*, 504 U.S. 71 (1992); and (4) here, petitioner sets forth a procedural history of the facts of petitioner's progress through the state courts. Doc. No. 1, pp. 5-9.

Respondent contends that the petition was untimely filed under 28 U.S.C. § 2244(d)(1) and (2) because more than a year passed between the date that petitioner's judgment became final on August 27, 1992, and the date that this federal petition was filed on November 15, 2005. Because petitioner consistently has alleged in his state court proceedings that he has been free from psychosis and has not required anti-psychotic medication for years, see *State v. Revels*, 13 S.W.3d 293, 294 (Mo. banc 2000), respondent argues that petitioner knew about Grounds 1 and 2 for more than a decade before he filed the present petition. Doc. No. 11, pp. 2-3. Respondent also contends that Ground 3 has

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[22] As to the underlying state court judgment of not guilty by reasons of mental disease or defect, petitioner did not file a direct appeal or a post-conviction motion, but he twice was granted conditional releases in 1993 and 1994, both of which were revoked. *State v. Revels*, 13 S.W.3d 293, 295 (Mo. banc 2000).

been known to petitioner since the Jackson County Circuit Court entered its January 5, 1998, Order and that Ground 4 is not a claim, but merely a procedural history. Doc. No. 11, pp. 2-4.

"A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from . . . the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence." 28 U.S.C. § 2244(d)(1)(D). 28 U.S.C. §2244(d)(2) provides that the time during which a properly filed application for state post-conviction or collateral review is pending shall not be counted toward any period of limitation under Section 2244(d).

Because respondent has not provided any of the usual details regarding petitioner's exhaustion of state court remedies and their impact on the running/tolling of the one-year statute of limitations in their responses (Doc. Nos. 11 and 35), the Court will refer to the details provided in a response to a previous federal habeas corpus petition, Case No. 01-0717-CV-W-NKL-P, which was dismissed, without prejudice, on December 11, 2001. In that case, respondent claimed that: (1) petitioner had failed to exhaust state court remedies as to his claim that trial counsel was ineffective; (2) all of petitioner's grounds for relief were without merit; and (3) that federal petition for writ of habeas corpus was untimely filed by seven (7) days. Doc. No. 8 in Case No. 01-0717-CV-W-NKLP, pp. 5-10.

As to petitioner's exhaustion of state court remedies, respondent herein argues that, because

Mo. Rev. Stat. § 552.040 (2000) is neither a "state post-conviction or other collateral review with respect to the pertinent judgment or claim," 28 U.S.C. § 2244(d)(2), petitioner is not entitled to tolling for the dates during which his Section 552.040 proceedings were pending in state court. Doc. No. 35, p. 4. In the previous federal habeas proceeding, however, respondent conceded that the United States Court of Appeals for the Eighth Circuit has held that a person confined in a hospital in Missouri must exhaust state court remedies by completing the following steps at least once: (1) apply for release under Section 552.040; (2) appeal to first the Missouri Court of Appeals; and (3) if unsuccessful in the Missouri Court of Appeals, apply for transfer to the Missouri Supreme Court. *Kolocotronis v. Holcomb*, 925 F.2d 278, 279 (8th Cir. 1991). Doc. No. 8 in Case No. 01-0717-CV-W-NKL-P, pp. 4-5.

Liberally construing petitioner's petition, this Court concludes that petitioner's postjudgment challenges qualify as collateral review of the state courts' January 5, 1998, and June 21, 2004, Judgments and Orders denying unconditional release, see *Morgan v. Lacy*, No. 4:05CV263HEA/MLM, 2005 WL 2290578, at *4 (E.D. Mo. Sept. 20, 2005), and that federal habeas corpus is available to challenge the legality of those state court orders continuing petitioner's state civil commitment. *See, e.g., Duncan v. Walker*, 533 U.S. 167, 176-77 (2001); *Francois v. Henderson*, 850 F.2d 231 (5th Cir. 1988).

The Missouri Supreme Court issued its decision affirming the January 5, 1998, decision denying the petition for unconditional or conditional

release in the state circuit court on March 21, 2000. That decision became final on June 21, 2000, upon the expiration of time to seek certiorari review. Mo. Sup. Ct. R. 13.1. Because petitioner's previous federal habeas, Case No. 01- 0717-CVW- NKL-P, did not toll the running of the one-year statute of limitations, *Duncan v. Walker*, 533 U.S. 167 (2001), all of the time between June 21, 2000, when petitioner's previous round of state court petitions became final and March 31, 2003, when petitioner filed his most recent round of state court petitions, counted toward the running of the statute of limitations and amounted to more than one year (in fact, almost three years) during which no tolling applied. To the extent that petitioner challenges the state court's January 5, 1998, denial of unconditional release, this federal petition was untimely filed pursuant to 28 U.S.C. § 2244(d)(1) and (2) by more than two (2) years.

Assuming without deciding that the instant petition is timely filed as to the June 21, 2004, Judgment and Order denying unconditional release, see Respondent's Exhibits C-G, this Court concludes that the decisions of the state courts that petitioner should not be unconditionally released pursuant to Section 552.040, *see, e.g., State v. Revels*, 13 S. W. 3d 293 (Mo. banc 2000), were not unreasonable applications of federal law, *cf. United States v. Weed*, 389 F.3d 1060, 1073-74 (10th Cir. 2004) (continued confinement under 18 U.S.C. § 4243(d) for further observation and treatment did not violate due process or equal protection) or based on an unreasonable determination of the facts of petitioner's case. 28 U.S.C. § 2254(1) and (2).

Accordingly, it is ORDERED that:

(1) Mary Sanders is substituted for the Missouri Department of Mental Health as the proper party respondent in this case; and

(2) this petition for writ of habeas corpus is dismissed with prejudice either as barred by the statute of limitations set forth in 28 U.S.C. § 2244(d)(1) and (2) or as without merit.

/s/ Nanette K. Laughrey
NANETTE K. LAUGHREY
UNITED STATES
DISTRICT JUDGE

Jefferson City, Missouri,

Dated: 5/23/06.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

JUDGMENT IN A CIVIL CASE

FREDERICK LEE REVELS,

Petitioner

V. Case No. 05-1140-CV-W-NKL-P

MARY SANDERS,

Respondent

☐ **JURY VERDICT.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

√ **DECISION OF THE COURT**. This action came for consideration before the Court. The issues have been considered and a decision has been rendered.

IT IS ORDERED AND ADJUDGED:
this petition for writ of habeas corpus is dismissed with prejudice either as barred by the statute of limitations set forth in 28 U.S.C. § 2244(d)(1) and (2) or as without merit.
(NKL)(dw)

Entered on: 5/23/06

P.L. BRUNE
CLERK OF COURT

D.M. WEINZERL
(By) Deputy Clerk

MISSOURI COURT OF APPEALS
WESTERN DISTRICT

STATE OF MISSOURI,	**)**	
Respondent,	**)**	
	)	**WD64433**
v.	**)**	**ORDER FILED:**
	)	**AUGUST 16, 2005**
FREDERICK L. REVELS,	**)**	
Appellant.	**)**	

Appeal from the Circuit Court of Jackson County, Missouri
Honorable Kenneth P. Dean, II, Judge

Before: Newton, P.J., Lowenstein and Breckenridge, JJ.

ORDER

PER CURIAM

Appellant-acquittee sought a second unconditional release from a mental health facility, pursuant to Section 552.040, RSMo 2000. Affirmed. Rule 84.16(b).

MISSOURI COURT OF APPEALS
WESTERN DISTRICT

STATE OF MISSOURI,	**)**	
Respondent,	**)**	
	)	**WD64433**
v.	**)**	**ORDER FILED:**
	)	**AUGUST 16, 2005**
FREDERICK L. REVELS,	**)**	
Appellant.	**)**	

MEMORANDUM SUPPLEMENTING ORDER AFFIRMING JUDGMENT PURSUANT TO RULE 84.16(b)

This memorandum is for the information of the parties and sets forth the reasons for the order affirming the judgment.

> THIS STATEMENT DOES NOT CONSTITUTE A FORMAL OPINION OF THIS COURT. IT IS NOT UNIFORMLY AVAILABLE. IT SHALL NOT BE REPORTED, CITED OR OTHERWISE USED IN UNRELATED CASES BEFORE THIS COURT OR ANY OTHER COURT. IN THE EVENT OF THE FILING OF A MOTION TO REHEAR OR TRANSFER TO THE SUPREME COURT, A COPY OF THIS MEMORANDUM SHALL BE ATTACHED TO ANY SUCH MOTION.

Frederick Revels is an insanity acquittee who seeks an unconditional release. His petition filed under Section 552.040, RSMo 2000, was denied in circuit court. He raises two points on appeal.

Review is pursuant to Rule 73.01 and *Murphy v. Carron*, 536 S.W.2d 30, 32 (Mo. banc 1976). The burden of persuasion is on Revels 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 the person dangerous to himself or others". Section 552.040.7 and .9.

In 1992, Revels beat to death his grandmother, his sister, and his sister's son. After his plea, he was found not guilty by reason of insanity, based on a determination he had a psychosis induced by alcohol and several controlled substances. Section 552.030.2, RSMo 2000. In 1993 he was granted a conditional release, but this was revoked after a year because he became violent and broke a window with his hand and also tested positive for opiates. In 1995 he was again granted a conditional release, but this too was revoked in early 1997 for failure to attend alcoholics and narcotics anonymous meetings. He has been confined in a Department of Mental Health facility ever since. During this period of time he has been cited for aggressive behavior toward his case manager. Revels also sought an unconditional release in 1998, the denial of which was affirmed in *Revels v. State*, 13 S.W.3d 293 (Mo. banc 2000).

Two psychiatrists testified. Dr. Daniel for Revels, and Dr. Reynolds from the Department of Mental Health. Daniel stated Revels showed no present symptoms of a mental disorder, but had a psychotic disorder in remission and substance dependence in full remission, and opined that the unconditional release should be granted. The trial court, however, found Dr. Reynolds' testimony more

credible, which was: a person who had drug-induced delusions is more likely to have such delusions later, and is more likely to relapse and use illegal drugs. He was concerned with the failed attempts on conditional release, but could not say that even with no present signs of mental disorder, that Revels would be unlikely to be dangerous.

Revels contends he is entitled to an unconditional release based on the fact that he currently shows no signs of mental disability and any concern as to future dangerousness is irrelevant. This point is answered by Revels' earlier appeal to the Supreme Court, and in this court's more recent cases which cite *Revels*. In *State v. Weekly*, 107 S.W.3d 340, 346-47 (Mo. App. 2003), where this court said both Section 552.040.7 and .9 clearly require that the acquittee currently does not suffer from mental illness and was not likely to have a mental disease or defect in the reasonable future and that he or she no longed poses a danger to society. Again in *State v. Gratts*, 112 S.W.3d 12, 19 (Mo. App. 2003), this court said it was not enough to prove present absence from mental defect, but the person seeking unconditional release must show that he is not likely to suffer from a mental disease or defect in the reasonable future, and also establish by clear and convincing evidence the mandate of Section 552.040 that he will not be a danger to himself or others. Point denied.

Revels next claims that even in Missouri's statutory scheme which requires that a committed individual be found not to be dangerous as a condition of his release, that he passes the six-part test for weighing public safety as prescribed by Section 552.040.7. Subsection seven provides:

> At a hearing to determine if the committed person should be "unconditionally release, the court shall consider the following factors in addition to any other relevant evidence:
>
> (1) Whether or not the committed person presently has a mental disease or defect;
> (2) The nature of the offense for which the committed person was committed;
> (3) The committed person's behavior while confined in a mental health facility;
> (4) The elapsed time between the hearing and the last reported unlawful or dangerous act;
> (5) Whether the person has had conditional releases without incident; and
> (6) Whether the determination that the committed person is not dangerous to himself or others is dependent on the person's taking drugs, medicine or narcotics.

In this case, the record supports the trial court's respective findings that Revels did not prove by clear and convincing evidence that (1) he does not presently have a mental disease or defect (factor one above), (2) the offense for which he was committed was egregious having killed three family members (factor two), (3) he has failed two conditional releases (factor five), and (4) he remains potentially dangerous to himself and others due to his drug and

alcohol dependence and prior abuse of drugs and alcohol (factor six). Additionally, Revels also exhibited aggressive behavior while confined (verbally lashing out at a department case manager and using profanity), which causes factor three to also weigh against him. As a result, this point is denied.

Affirmed. Rule 84.16(b).

IN THE CIRCUIT COURT OF JACKSON COUNTY, MISSOURI AT KANSAS CITY
Division 15

STATE OF MISSOURI,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	Case No.CR88-3050
	)	
FREDERICK L. REVELS,	)	
	)	
Defendant.	)	

JUDGMENT

Defendant has filed pro se a Motion for Unconditional Release in Accordance with §552.040 RSMo. For the reasons stated below, the motion is **DENIED.**

FINDINGS OF FACT

1. June 22, 1988 defendant, with a pipe wrench, killed his grandmother, his sister and her daughter.

2. He was charged with 3 counts of murder 2nd degree and 3 counts of armed criminal action.

3. On August 27, 1992, defendant entered a plea of Not Guilty by Reason of Mental Disease or Defect Excluding Responsibility (NGRI).

4. The plea was accepted and defendant committed to the Department of Mental Health.

5. Defendant has sought unconditional release before. On January 5, 1998, Judge Gray of Division 18 of this Court denied the defendant's request after hearing.

6. That denial was affirmed by the Mo. Sp. Ct. March 21, 2000. 13 SW3d 293.

7. An Amended Application for Release from Confinement in the Mo. Dept. of Mental Health was filed by counsel June 19, 2003.

8. A hearing was held on that application June 20, 2003.

9. Defendant was present in person with counsel Randy Schlegel, Assistant Public Defender.

10. The Department of Mental Health opposed the request for relief and was represented by Assistant General Counsel, Elizabeth Malench-Shine.

11. Two psychiatrists testified: Dr. A. E. Daniel and Dr. James Bradley Reynolds. Dr. Daniel was retained by defendant and has met with him several times beginning in 2000. Dr. Reynolds is an employee of the Dept. of Mental Health. At the time of the hearing, he was the Medical Director of the Northwest Mo. Psychiatric Rehabilitation Center (NMPR) in St. Joseph, MO. He is the Supervisor of the people working directly with defendant. He has examined defendant.

12. Dr. Daniel testified he diagnosed defendant as having a substance-induced psychotic disorder in remission. Defendant also has poly-substance dependence in full remission.

13. Dr. Reynolds testified: A condition in remission is one that still exists and can become a problem again.

14. The doctors agree defendant does not exhibit symptoms of a mental disease or defect at this time.

15. Dr. Reynolds testified a person with drug-induced delusions is more likely to have such delusions after drug use than a person who has not had delusions.

16. Dr. Reynolds testified that defendant is more likely than not to relapse and use illegal drugs.

17. Dr. Reynolds testified defendant might be dangerous and possibly could be dangerous. He cannot say defendant is likely to be dangerous. However, he is also unable to say that it is not likely defendant will be dangerous.

18. Dr. Reynolds opposes unconditional release based on his concerns about defendant being dangerous and because, on two prior conditional releases, defendant has not been successful.

19. The first conditional release was in 1994 and was terminated when defendant missed

appointments, was involved in a violent incident in which he broke a window, and tested positive for use of a prescribed painkiller after he was allowed to use it.

20. The second conditional release was in 1995, and it was terminated in 1997, partly because he failed to attend AA and NA meetings. *State v. Revels*, supra at 295.

21. Defendant has an anti-social personality disorder, but that is not a basis for denying relief.

22. I accept the testimony of Dr. Reynolds as more credible than that of Dr. Daniel as to dangerousness and relapse. I accept everything else above as true.

23. The evidence requires that defendant not be released because he has not shown he is not likely to be dangerous.

CONCLUSIONS OF LAW

24. Defendant invites me to hold that the sections of Chapter 552 of the Revised Statutes of the State of Missouri regarding release are unconstitutional. For me to so hold, defendant invites me to say the Missouri Supreme Court was wrong in interpreting the rulings of the US Sp. Ct. in *State v. Revels, supra.* He also invites me to hold that *State v. Weekly***,** 107 SW3d 340 (Mo.App.W.D.2003) and *State v. Gratts*, 112 SW3d 12 (WD Mo.App.2003) misstate the law.

25. Even if I had the authority to accept defendant's invitation, I would not do so. I conclude that the Missouri statutes regarding release are constitutional as stated in *Revels*, *Weekly* and *Gratts*.

26. It is defendant's burden to convince the trier of fact by clear and convincing evidence that he has met all statutory mandates. *State v. Gratts, supra.*

27. In resolving a case of this nature, the Court is to use great caution because the risks are immense if an error is made. *Marsh v. State*, 942 SW2d 385 (Mo.App.W.D. 1997)

28. Dr. Reynolds' testimony that he cannot state to a reasonable degree of certainty that defendant is **not** likely to be dangerous to himself or others if released defeats defendant's request. §556.040.7(6)RSMo

29. Defendant has not met his burden.

30. The evidence on the other parts of §552.040.7 is as follows:

    1) defendant has a mental disease which is in remission;

    2) defendant committed three murders;

    3) defendant's recent conduct in the Department of Mental Health is acceptable;

4) defendant's last dangerous act was during his first conditional release, when in anger, he broke a window with his hand;

5) defendant has failed to complete two conditional releases.

31. These factors do not justify defendant's release.

CONCLUSION

Defendant's Motion for Unconditional Release is **DENIED**. No costs will be assessed.

Dated: 6-21-04 /s/ Preston Dean
PRESTON DEAN, Judge

Copies mailed to:

Mike Hunt, APA
Randy Schlegel, APD
Elizabeth Malench-Shine, Mo. Dept. of Mental Health
CRIM REC

CAROL TUCKER, J.A.A.

Supreme Court of Missouri,
En Banc.
STATE of Missouri, Respondent,
v.
Frederick L. REVELS, Appellant.

No. SC 81694.

March 21, 2000.

DUANE BENTON, Judge.

Frederick Lee Revels, an insanity acquittee, applied for an unconditional release. The circuit court denied the release. After opinion by the court of appeals, this Court granted transfer. Mo. Const. art. V, sec 10. Affirmed.

I.

On June 22, 1988, Revels killed his grandmother, sister, and nephew. At the time of the crimes, he was hearing voices and abusing a controlled substance. On July 22, 1988, a grand jury indicted Revels on two counts of first degree murder, one count of second degree murder, and three counts of armed criminal action.

On August 27, 1992, Revels was found not guilty by reason of mental disease or defect excluding responsibility. Section 552.030 RSMo 1986. He was committed to the Department of Mental Health and delivered to Fulton State Hospital.

On October 31, 1997, Revels applied to the circuit court for unconditional or conditional release,

under sections 552.040.5 and 552.040.10.[23] On December 18, 1997, at the beginning of his hearing, Revels dismissed his application for conditional release and proceeded only on the request for unconditional release.

Revels testified that he committed the crimes for which he was charged. He acknowledged hearing voices then, but claimed he stopped hearing them sometime in 1993 or 1994. He explained that, although he was abusing a controlled substance at the time of the murders, he would not "do drugs" if released from custody. He also stated that he would not harm anyone if released.

Revels testified that while committed, he was granted two conditional releases. The first conditional release, in 1993, was revoked in 1994 when he spent the night at a girlfriend's house (itself a release violation) and put his hand through a window while arguing with her. Sometime in 1995, Revels received a second conditional release, which was revoked on March 1, 1997, partly because he failed to attend (required) Alcoholics and Narcotics Anonymous meetings.

Dr. David Hunter, staff psychiatrist at Fulton State Hospital, testified that he diagnosed Revels as having poly-substance dependence, specifically alcohol and cocaine, and anti-social personality disorder. He emphasized that upon returning from the second conditional release, Revels attended counseling meetings only sporadically, but now

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[23] All citations are to RSMo Supp.1996 unless otherwise noted.

refused to participate in group meetings, as a protest. According to Dr. Hunter, Revels was reclusive and withdrew from the interaction necessary to his recovery.

Dr. Hunter also testified that in July 1997, he examined Revels and found no evidence of a psychotic or mood disorder. In September 1997, Dr. Hunter found no evidence of thought disturbances, hallucinations, delusions, paranoia, or defects in memory. Also in September 1997, Dr. Hunter wrote that Revels' insight and judgment appeared to be reasonably intact.

At the time of the hearing on December 18, 1997, Dr. Hunter testified, however, that Revels' judgment or insight was no longer intact, and was "certainly" impaired. He testified that Revels would be a danger to others if unconditionally released, due to a greater than 90 percent chance of relapse into substance abuse. Dr. Hunter was not specifically asked whether Revels was suffering from a mental disease or defect at the time of hearing. Dr. Hunter did recommend that an unconditional release be denied.

On January 5, 1998, the trial court denied an unconditional release.

II.

Revels argues that the trial court erred by denying an unconditional release without making specific findings whether or not he had a mental disease or defect.

Revels seeks an unconditional release under subsections 5 through 9, and 20 of section 552.040. These subsections require that the court "enter an order," section 552.040.8, and make specific determinations and findings when granting an unconditional release, section 552.040.9, .20. Subsections 5 through 9, and 20 of section 552.040 do not require specific findings if the court is *denying* an unconditional release.

This Court last addressed an application for unconditional release in *State v. Tooley*, 875 S.W.2d 110 (Mo. banc 1994). This Court noted:

> Because neither party requested specific findings of fact prior to final submission of the case, we consider all factual issues as being decided in accordance with the result reached by the trial court. *Rule 73.01(a)(3).*

Id. at 111 n. 1; cf. *Jensen v. State*, 926 S.W.2d 925, 928[5] (Mo.App.1996). Rule 73.01(a)(3) is now Rule 73.01(c), which requires the request for specific findings to be made on the record "before the introduction of evidence at trial or at such later time as the court may allow." Rule 73.01(c) (2000). In this case, Revels never requested specific findings of fact.

Revels relies on *Styles v. State*, 838 S.W.2d 10, 11 (Mo.App.1992) (*Styles I*), which holds:

> Under *Foucha*, it is necessary for a court to make a finding that an insanity acquittee is suffering from a mental illness or defect before it can order that

> such person shall remain in a mental institution.

See also *Stallworth v. State*, 895 S.W.2d 656, 658[3] (Mo.App.1995); *McKee v. State*, 923 S.W.2d 525, 527[5] (Mo.App.1996); *Marsh v. State*, 942 S.W.2d 385, 388[2] (Mo.App.1997); *Viers v. State*, 956 S.W.2d 465, 466-67[4] (Mo.App.1997); *Rawlings v. State*, 1999 WL 988094, *5 [3] (Mo.App.1999). The *Styles I* opinion does not control Revels' case because it addressed a conditional release, which is governed by subsections 10 through 18, and 20 of section 552.040.

More importantly, Revels invokes the United States Supreme Court case of *Foucha v. Louisiana*, 504 U.S. 71, 112 S.Ct. 1780, 118 L.Ed.2d 437 (1992). Revels argues that *Foucha* requires, as a matter of due process, that the trial court make an express finding of a mental disease or defect before denying unconditional release to an insanity acquittee. In fact, no such holding appears in *Foucha*.

Most importantly, the holding of *Foucha* prohibits "the indefinite detention of insanity acquittees who are not mentally ill but who do not prove they would not be dangerous to others." *Foucha*, 504 U.S. at 83, 112 S.Ct. 1780. 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. *Sections 552.040.7 and 552.040.9.* This statutory standard meets the holding of *Foucha*. See *Foucha*, 504 U.S. at 86-90, 112 S.Ct. 1780 (O'Connor, J. concurring).

There is no requirement that before denying an unconditional release, the circuit court make specific findings that an insanity acquittee is suffering from a mental disease or defect, unless findings are requested in accordance with Rule 73.01(c). To the extent contrary, *State v. Dudley*, 903 S.W.2d 581, 583[2] (Mo.App.1995), should no longer be followed.

The circuit court was not required to make specific findings in this case, and thus did not erroneously declare or apply the law. See *Murphy v. Carron*, 536 S.W.2d 30, 32 (Mo. banc 1976).

III.

Second, *Revels* argues that the trial court erred by denying his application for unconditional release without considering the statutory factors in section 552.040.7:

At a hearing to determine if the committed person should be unconditionally released, the court shall consider the following factors in addition to any other relevant evidence: (1) whether or not the committed person presently has a mental disease or defect; (2) the nature of the offense for which the committed person was committed; (3) the committed person's behavior while confined in a mental health facility; (4) the elapsed time between the hearing and the last reported unlawful or dangerous act; (5) whether the person has had conditional releases without incident; and (6) whether the determination that the committed person is not dangerous to himself or others is dependent on the person's taking drugs, medicine or narcotics.

Revels asserts, in particular, that no substantial evidence supported a finding that he suffers from a mental disease or defect, or that such a finding is against the weight of the evidence.

Where the trial court makes no specific findings of fact, the reviewing court must assume that all facts were found in accordance with the result reached. *Tooley*, 875 S.W.2d at 111 n. 1. The judgment will be reversed if no substantial evidence supports it, or it is against the weight of evidence. *Murphy*, 536 S.W.2d at 32.

Revels stresses the equivocal evidence that he presently has a mental disease or defect, the first factor under section 552.040.7(1). *Revels* ignores that it is his burden to prove that he no longer has a mental disease or defect rendering him dangerous to himself and others. *Tooley*, 875 S.W.2d at 113.

> [W]hen a criminal defendant establishes by a preponderance of the evidence that he is not guilty of a crime by reason of insanity, the Constitution permits the Government, on the basis of the insanity judgment, to confine him in a mental institution until such time as he has regained his sanity or is no longer a danger to himself or society.

Id. at 112 (quoting *Jones v. United States*, 463 U.S. 354, 370, 103 S.Ct. 3043, 77 L.Ed.2d 694 (1983)); cf. *Styles v. State*, 877 S.W.2d 113, 115 (Mo. banc 1994) (*Styles II*).

Revels failed in his burden of proof to rebut this presumption of continuing mental illness following

an acquittal by reason of mental disease or defect. Because Revels failed to prove an issue on which he has the burden, the issue is resolved against him.

Finally, Revels claims that as to the other factors in section 552.040.7, there is no substantial evidence, or the judgment is against the weight of the evidence. In fact, Revels all but concedes that the evidence supports the trial court's denial on factors 2 (the crime) and 6 (drug dependence). As for factors 3 (behavior while confined) and 5 (no-incident conditional release), Revels says the evidence is "divided." He does contend that factor 4 (time elapsed since last unlawful or dangerous act) and the "other relevant evidence" weigh in favor of release.

Revels requests this Court to re-weigh the evidence. "Appellate courts should exercise the power to set aside a decree or judgment on the ground that it is against the weight of the evidence with caution and with a firm belief that the decree of judgment is wrong." *Murphy*, 536 S.W.2d at 32. This 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).

Because the judgment is supported by substantial evidence, and is not against the weight of the evidence, the circuit court properly denied an unconditional release.

IV.

The judgment of the circuit court is affirmed.

All concur.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 06-3052
Frederick Lee Revels,
Appellant
v.
Mary Sanders,
Appellee

Appeal from U.S. District Court for the Western District of Missouri - Kansas City
(4:05-CV-01140-NKL)

ORDER

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied. Judge Duane Benton took no part in the consideration or decision of this matter.

COLLOTON, Circuit Judge, with whom LOKEN, Chief Judge, WOLLMAN and GRUENDER, Circuit Judges, join, dissenting from denial of rehearing en banc.

I would grant rehearing to consider the panel's conclusion that Frederick Revels, an insanity acquittee who killed his grandmother, sister, and nephew with a pipe wrench in 1988, should be granted an unconditional release from state custody. *See Revels v. Sanders*, 519 F.3d 734 (8th Cir. 2008). The panel held that the Missouri Court of Appeals unreasonably applied *Foucha v. Louisiana*, 504 U.S. 71 (1992), when it stated a requirement that "'a

person seeking unconditional release must show that he is not likely to suffer from a mental disease or defect in the reasonable future,'" 519 F.3d at 738 (quoting *State v. Revels*, No. WD64433, slip op. at 3 (Mo. Ct. App. Aug. 16, 2005)), as opposed to a rule that the person must show only that he is presently free from mental disease or defect. *Id.* at 742-43. The panel thus declared unreasonable the unanimous decision of the Supreme Court of Missouri that the Missouri statutes regarding unconditional release of an insanity acquittee, Mo. Rev. Stat. §§ 552.040.7(6), 552.040.9, are consistent with the holding of *Foucha*, and particularly Justice O'Connor's controlling concurrence. *See State v. Revels*, 13 S.W.3d 293, 296 (Mo. 2000) (*citing Foucha*, 504 U.S. at 86-90 (O'Connor, J., concurring in part and in judgment)).[24]

The panel's conclusion that the Missouri statutes are unconstitutional, standing alone, may well present a question of exceptional importance sufficient to justify en banc consideration. But the more compelling reason for rehearing in this case is that the state court decisions denying Revels unconditional release do not even hinge on a requirement that he demonstrate no likelihood of

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[24] Justice O'Connor wrote in *Foucha* that she did "not understand the Court to hold that Louisiana may never confine dangerous insanity acquittees after they regain mental health," that given the uncertainty surrounding mental disease, "courts should pay particular deference to reasonable legislative judgments about the relationship between dangerous behavior and mental illness," and that it might be permissible for a State "to confine an insanity acquittee who has regained sanity if . . . the nature and duration of detention were tailored to reflect pressing public safety concerns related to the acquittee's continuing dangerousness." 504 U.S. at 87 (O'Connor, J., concurring in part and in judgment) (internal quotation omitted).

future mental disease or defect. The state courts ruled that Revels failed to show that he does not *presently* suffer from a mental disease or defect. The Jackson County Circuit Court found that Revels "has a mental disease which is in remission." *State v. Revels*, No. CR88-3050, slip op. at 6 (Mo. Cir. Ct. Aug. 30, 2004) (emphasis added). The Missouri Court of Appeals held that "the record supports the trial court's . . . finding[ ] that Revels did not prove by clear and convincing evidence that . . . he does not *presently have a mental disease or defect*." *Revels*, No. WD64433, slip op. at 4 (emphasis added). The matter of future mental disease or defect was unnecessary to the state court decisions.

The panel did not dispute that a reasonable application of *Foucha* permits a State to deny unconditional release based on a finding of present mental disease or defect, together with a finding of dangerousness, even if the acquittee presently shows no symptoms of the mental disease. *See United States v. Weed*, 389 F.3d 1060, 1073 (10th Cir. 2004); *United States v. Murdoch*, 98 F.3d 472, 476 (9th Cir. 1996); *State v. Huss*, 666 N.W.2d 152, 160 (Iowa 2003); *see also State v. Nash*, 972 S.W.2d 479, 483 (Mo. Ct. App. 1998) (ordering release of acquittee, but emphasizing that "this is not a case where the mental disease or defect was in remission or was currently asymptomatic"). Nonetheless, the panel ruled that it was compelled to disregard the state court's finding of present mental disease or defect, because an administrative panel of this court granted Revels a certificate of appealability on a different question. *Revels*, 519 F.3d at 743. The certificate asked whether the Missouri Court of Appeals unreasonably applied *Foucha* by concluding that Revels must also show he was not likely to have

a mental disease or defect in the future, *id*. at 739, and the panel held that the state court's finding of present mental disease was thus not before this court. *Id*. at 743.

This novel interpretation of the effect of a certificate of appealability warrants further review. To be sure, we have held that a habeas petitioner may not seek relief in the court of appeals based on an issue that is not encompassed within a certificate of appealability. *Carter v. Hopkins*, 151 F.3d 872, 874 (8th Cir. 1998); *Ramsey v. Bowersox*, 149 F.3d 749, 759-60 (8th Cir. 1998). These decisions enforce the statutory limitation on when "an appeal may . . . be taken" in a habeas corpus proceeding. 28 U.S.C. § 2253(c). But we have never held that, if for some reason a certificate of appealability is granted to consider the soundness of a state court's *dicta* or alternative holding, then this court must blind itself to the fact that the state court also justified its decision on an independent ground that is consistent with the Constitution and decisions of the Supreme Court. To give that effect to a certificate of appealability conflicts with the statutory command that an application for a writ of habeas corpus "shall not be granted" unless the state court's adjudication resulted in "a decision" that is contrary to, or involves an unreasonable application of, clearly established federal law, or that is based on an unreasonable determination of the facts. 28 U.S.C. § 2254(d).[25]

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[25] In this case, moreover, the "claim" identified by the certificate of appealability was whether Revels's "due process rights [were] violated" when "his June 2003 amended application for release from confinement was denied." *Revels*, 519 F.3d at 739. The state court's finding of present mental disease is highly relevant to that claim.

In his response to the petition for rehearing, Revels does not defend the panel's rationale. Revels argues instead that he should be granted unconditional release because the Missouri courts did not find that he is dangerous. On the question of dangerousness, the state circuit court found that "[t]he evidence requires that defendant not be released because he has not shown he is not likely to be dangerous." *Revels*, No. CR88-3050, slip op. at 5. The state court of appeals held that the record supports the trial court's finding that Revels "remains potentially dangerous to himself and others due to his drug and alcohol dependence and prior abuse of drugs and alcohol." *Revels*, No. WD64433, slip op. at 4. The court of appeals further observed that Revels "exhibited aggressive behavior while confined (verbally lashing out at a department case manager and using profanity)." *Id*. The panel did not question the State's contention that Revels is dangerous. If alleged lack of dangerousness is the only potential ground on which to order the unconditional release of a triple killer who was acquitted based on mental disease or defect, then the decision of the state courts on dangerousness should be considered directly by this court before such a significant writ of habeas corpus is granted.

For these reasons, I respectfully dissent from the order denying the petition for rehearing en banc.

June 05, 2008

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit

_____

/s/ Michael E. Gans

Mo. Rev. Stat. §552.040 (2000) provides in pertinent part:

5. The committed person or the head of the facility where the person is committed may file an application in the court that committed the person seeking an order releasing the committed person unconditionally; except that any person who has been denied an application for a conditional release pursuant to subsection 13 of this section shall not be eligible to file for an unconditional release until the expiration of one year from such denial. In the case of a person who was immediately conditionally released after being committed to the department of mental health, the released person or the director of the department of mental health, or the director's designee, may file an application in the same court that released the committed person seeking an order releasing the committed person unconditionally. Copies of the application shall be served personally or by certified mail upon the head of the facility unless the head of the facility files the application, the committed person unless the committed person files the application, or unless the committed person was immediately conditionally released, the director of the department of mental health, and the prosecutor of the jurisdiction where the committed person was tried and acquitted. Any party objecting to the proposed release must do so in writing within thirty days after service. Within a reasonable period of time after any written objection is filed, which period shall not exceed sixty days unless otherwise agreed upon by the parties, the court shall hold a hearing upon notice to the committed person, the head of the facility, if necessary, the director of the department of mental health, and the prosecutor of the jurisdiction where the person was tried. 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, as defined in section 632.005, RSMo, or a physician with a minimum of one year training or experience in providing treatment or services to mentally retarded or mentally ill individuals of its own choosing and at its expense. The report of the mental condition of the committed person shall accompany the application. By agreement of all parties to the proceeding any report of the mental condition of the committed person which may accompany the application for release or which is filed in objection thereto may be received by evidence, but the party contesting any opinion therein shall have the right to summon and to cross-examine the examiner who rendered such opinion and to offer evidence upon the issue.

6. By agreement of all the parties and leave of court, the hearing may be waived, in which case an order granting an unconditional release shall be entered in accordance with subsection 8 of this section.

7. At a hearing to determine if the committed person should be unconditionally released, the court shall consider the following factors in addition to any other relevant evidence:

(1) Whether or not the committed person presently has a mental disease or defect;

(2) The nature of the offense for which the committed person was committed;

(3) The committed person's behavior while confined in a mental health facility;

(4) The elapsed time between the hearing and the last reported unlawful or dangerous act;

(5) Whether the person has had conditional releases without incident; and

(6) Whether the determination that the committed person is not dangerous to himself or others is dependent on the person's taking drugs, medicine or narcotics.

The burden of persuasion for any person committed to a mental health facility under the provisions of this section upon acquittal on the grounds of mental disease or defect excluding responsibility shall be on the party seeking unconditional release to prove by clear and convincing evidence that the person for whom unconditional release is sought does not have, and in the reasonable future is not likely to have, a mental disease or defect rendering the person dangerous to the safety of himself or others.

8. The court shall enter an order either denying the application for unconditional release or granting an unconditional release. An order denying the application shall be without prejudice to the filing of another application after the expiration of one year from the denial of the last application.

9. No committed person shall be unconditionally released unless it is determined through the procedures in this section that the person does not have, and in the reasonable future is not likely to have, a mental disease or defect

rendering the person dangerous to the safety of himself or others.