No.

IN THE SUPREME COURT OF THE UNITED STATES

ARTHUR ABRAHAM,

Petitioner,

v.

STATE OF CALIFORNIA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE CALIFORNIA COURT OF APPEAL,
FIRST DISTRICT

PETITION FOR WRIT OF CERTIORARI

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March, 2019

QUESTION PRESENTED

Petitioner was found not guilty by reason of insanity of the murder and sexual assault of his unfaithful common law wife, and he was committed to a mental institution.

That was in 1986.

Petitioner's diagnosis of insanity was abandoned more than 30 years ago, and he has not been involved in any acts of violence since he was hospitalized. Nevertheless, he is still being confined on the basis of the old insanity verdicts. He is currently diagnosed with narcissistic and antisocial "traits" that do meet the criteria for any specific personality disorder. Those traits include arrogance, exaggerating his achievements and talents, uncooperativeness, demanding excessive attention, and being deceitful about his sexual history.

Petitioner applied to the court for release into a conditional release program that provides outpatient supervision and treatment in the community. However, a California statute, Penal Code § 1026.2(e), says that for an insanity acquittee to be released, he has a burden to prove by a preponderance that he "will not be a danger to the health and safety of others, due to mental defect, disease, or disorder, while under supervision and treatment in the community." Petitioner's application was denied.

The California Court of Appeal affirmed, stating there was "nothing unusual about placing the burden of proof on the defendant."

The first question presented is whether the Due Process Clause permits the State to continue to confine an insanity acquittee after he has recovered his sanity, as long as he has undesirable personality "traits."

The second question is whether the Due Process Clause permits the State to place the burden of proof an the insanity acquittee who is no longer insane to prove he is entitled to release.

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Arthur Abraham, a criminal defendant who was committed to a mental institution more than 30 years ago following two verdicts of not guilty by reason of insanity, respectfully petitions for a writ of certiorari to the California Court of Appeal. He asks that the Court review the state court decision affirming the denial of his placement into a conditional community release program.

OPINION BELOW

The opinion of the California Court of Appeal appears as Appendix A, and is unreported. The order of the Court of Appeal denying rehearing appears as Appendix B, and is unreported. The order of the California Supreme Court denying discretionary review appears as Appendix C, and is unreported.

JURISDICTION

The judgment of the California Court of Appeal was entered on September 28, 2018. The Court of Appeal denied a timely petition for rehearing on October 18, 2018. The California Supreme Court denied discretionary review on

December 19, 2018. This petition is filed within 90 days of the California Supreme Court's order, and is timely pursuant to Rule 13.1 of this Court.

The jurisdiction of this court is invoked pursuant to 28 U.S.C. §1257(a), as a petition for a writ of certiorari to review the judgment of the highest court of a State.

CONSTITUTIONAL PROVISIONS INVOLVED

Section 1 of the Fourteenth Amendment to the United States Constitution provides, in pertinent part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; n*or shall any State deprive any person of life, liberty, or property, without due process of law*; nor deny to any person within its jurisdiction the equal protection of the laws. [Emphasis added.]

CALIFORNIA STATUTE INVOLVED

California Penal Code § 1026.2 provides, in pertinent part:

> **§ 1026.2. Restoration to sanity; application for release of person who has been committed to state hospital or other treatment facility; requisites for and conduct of hearing; conditional release program and placement**.
>
> (a) An application for the release of a person who has been committed to a state hospital or other treatment facility, as provided in Section 1026, upon the ground that sanity has been restored, may be made to the superior court of the county from which the commitment was made, either by the person, or by the medical director of the state hospital or other treatment facility to which the person is committed or by the community program director where the person is on outpatient status under Title 15 (commencing with Section 1600). The court shall give notice of the hearing date to the prosecuting attorney, the community program director or a designee, and the medical director or person in charge of the facility providing treatment to the committed person at least 15 judicial days in advance of the hearing date.

* * *

(d) No hearing upon the application shall be allowed until the person committed has been confined or placed on outpatient status for a period of not less than 180 days from the date of the order of commitment.

(e) The court shall hold a hearing to determine whether the person applying for restoration of sanity would be a danger to the health and safety of others, due to mental defect, disease, or disorder, if under supervision and treatment in the community. If the court at the hearing determines the applicant will not be a danger to the health and safety of others, due to mental defect, disease, or disorder, while under supervision and treatment in the community, the court shall order the applicant placed with an appropriate forensic conditional release program for one year. All or a substantial portion of the program shall include outpatient supervision and treatment. The court shall retain jurisdiction. The court at the end of the one year, shall have a trial to determine if sanity has been restored, which means the applicant is no longer a danger to the health and safety of others, due to mental defect, disease, or disorder. The court shall not determine whether the applicant has been restored to sanity until the applicant has completed the one year in the appropriate forensic conditional release program, unless the community program director sooner makes a recommendation for restoration of sanity and unconditional release as described in subdivision (h). The court shall notify the persons required to be notified in subdivision (a) of the hearing date.

* * *

(k) In any hearing authorized by this section, the applicant shall have the burden of proof by a preponderance of the evidence.

STATEMENT OF THE CASE

More than thirty years ago Arthur Abraham, in two separate cases, was found not guilty by reason of insanity (NGI) of the second degree murder and sexual assault of his common law wife. He was committed to a state mental institution, and has been confined in mental institutions ever since.

Mr. Abraham applied to the court, pursuant to California Penal Code § 1026.2, for placement in a conditional release program (CONREP) which would provide outpatient supervision and treatment for a year, after which he could apply for unconditional release. The statute permits an insanity acquittee to apply for conditional release after he has been committed for 180 days, Calif. Penal Code § 1026.2(d), and if the court finds "the applicant will not be a danger to the health and safety of others, due to mental defect, disease, or disorder, while under supervision and treatment in the community, the court shall order the applicant placed with an appropriate conditional release program." Calif. Penal Code § 1026.2(e).

A hearing was held May 2, 2016. Two physciatrists familiar with petitioner testified at the hearing.

Mr. Abraham is not currently insane.[1] He is currently diagnosed with narcissistic and antisocial "traits" that do not meet the criteria for any specific personality disorder. Dr. Owen diagnosed petitioner with "other specified personality disorder with obsessive-compulsive and narcissistic traits." (RT 13.)[2] Dr. Thuma agreed with the diagnosis, except he currently believes that petitioner is "featuring" two personality disorders, anti-social and narcissistic, but "he doesn't meet criteria -- full criteria for any single personality disorder." It's an "unusual diagnosis." (RT 48.)

Dr. Owen testified he thought it would be a good time for petitioner to transition back into the community. (RT 16.) Dr. Thuma, on the other hand, believed Mr. Abraham would pose "some danger" if released into the program. (RT 57.) Although Mr. Abraham had not been involved in any incidents of

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[1] Dr. Owen was of the opinion petitioner was never really insane in the first place. (RT 6-7.)

[2] Reference is made to the Reporter's Transcript (RT) of the record on appeal, should the court have reason to consult the record.

violence in over 30 years (RT 15), Dr. Thuma thought he "would be dangerous" if he were released to CONREP (RT 48) because of his "his lack of cooperativeness to follow directions. Just refuses to do certain things, and then there's kind of an emotional thing where he gets really pretty mad at just like -- kind of scary mad about things. It's like you have to spend some time to kind of cool him off." (RT 51.)

The Superior Court denied petitioner's application. The Court of Appeal affirmed, and the California Supreme Court denied discretionary review.

Petitioner asserts that his continued confinement after he has recovered his sanity violates the Due Process Clause, and seeks reversal of the denial of his release into the program.

Petitioner raised the due process issue, both as to the State confining him in a mental institution even though he is no longer insane and placing the burden of proof on the insanity acquittee, in Point I-B and Point II of the Appellant's Brief he filed in the California Court of Appeal. The opinion of the Court of Appeal considered and rejected petitioner's burden of proof contention, see App. 7, stating, "Appellant argues that placing the burden on him violates due process and runs afoul of the Supreme Court's decisions in *Foucha v. Louisiana* (1992) 504 U.S. 71 (*Foucha*) and *Addington v. Texas* (1979) 441 U.S. 418, 425 (*Addington*). We disagree." The appellate court addressed and rejected petitioner's argument that the Constitution requires the State to release him once he is no longer insane at App. 8: "Appellant argues he is entitled to release because it is unconstitutional to hold him when he is no longer insane. Again we disagree."

REASONS FOR GRANTING THE PETITION

In T*he Minority Report*, a short story by Philip K. Dick originally published in the magazine Fantastic Universe in January, 1956, at p. 4, the "Precrime Division" of a policing system in a future society utilizes predictive policing to arrest and incarcerate "criminals" for crimes they have not yet committed, thus eliminating 99.8% of all crime. The imprisonment of would-be criminals is deemed necessary for the greater good of a safe society.[3]

Putting aside the dramatic conflicts inherent in the question of free will versus determinism, one's immediate reaction to the premise of the story is that the Due Process Clause would never permit a system of preventative detention to be put in place in the United States.

Or would it? Consider the case of Arthur Abraham.

Abraham was committed to a mental institution in 1986 after he was found not guilty by reason of insanity. His clinical diagnosis of insanity was abandoned 30 years ago, and he has not been involved in a single act of violence since he was committed. Yet the State of California continues to confine him because he has narcissistic and antisocial "traits," and a staff psychiatrist at Napa State Hospital expressed the opinion "he would be dangerous" if he were released from the hospital into the transition program. The California Court of Appeal says this kind of preventative detention is perfectly legal, even desirable: "Under appellant's reasoning, the state would be required to release a dangerous NGI committee on the ground his diagnosis had changed." App. 9.

It seems the confinement of would-be criminals is necessary for the greater good of a safe society after all.

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[3] In 2002 the story was adapted into a motion picture directed by Steven Spielberg and starring Tom Cruise. *The Minority Report*, Scorsese, M. (Producer), Spielberg, S. (Director) (Twentieth Century Fox, 2002). In the motion picture only murders can be predicted.

The adoption of such a policy by the State is not the only obstacle facing Mr. Abraham. The California Legislature has also created a presumption in favor of continued confinement. Once the insanity acquittee has been committed to a mental institution, to be released, *he* has the burden to prove not just that he is no longer insane (here it is not disputed that Arthur Abraham is not insane), but also to prove that he "will not be a danger to the health and safety of others, due to mental defect, disease, or disorder." Calif. Penal Code § 1026(k).

This statutory scheme means that in California Mr. Abraham's "traits"—the "mental defect, disease, or disorder" relied upon by the State for his continued confinement, App. 8-9—will never be presented to a jury for assessment.[4] Moreover, an insanity acquittee in California can never prevail in an appeal from a denial of his application for conditional release, at least where there is any substantial evidence presented by the State, no matter how compelling the evidence in his favor is, because a reviewing court will always defer to the trial court's weighing of the evidence and its finding that the acquittee has not sustained his burden of proof. In the case at bar, for example, the appellate court opinion states it is a "question of fact for the trial court" whether Mr. Abraham's "traits" qualify as a "mental defect, disease, or disorder"—qualities which present a "different standard for release than an initial commit proceeding." App. 9. The appellate court affirmed denial of the application, stating there is "nothing unusual" in placing the burden of proof on the defendant. App. 7.

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[4] California Penal Code § 1026.2 does not provide for a jury trial on the acquittee's application for conditional release.

1.
The State Court Decision Decided an Important Question of Federal Law in Conflict with Relevant Decisions of This Court, Which Hold That a Committed Insanity Acquittee Is Entitled to Release When He Has Recovered His Sanity. The Court Should Grant Certiorari Pursuant To Supreme Court Rule 10(c).

A reader of the California court's opinion might be struck with the marked difference between the state court's reasoning and the reasoning found in a similar case decided by this court and cited in the state court opinion, *Foucha v. Louisiana*, *supra* 504 U.S. 71, where the court held that once Mr. Foucha was no longer insane, "the basis for holding Foucha in a psychiatric facility as an insanity acquittee has disappeared, and the State is no longer entitled to hold him on that basis." (*Id*. at 78.) The California appellate court, however, disagreed with petitioner's contention that *Foucha* stood for the proposition that "he is entitled to release because it is unconstitutional to hold him when he is no longer insane." App. 8.

Mr. Foucha had an antisocial personality, which did not qualify as a mental disease, *Foucha*, *supra*, at 75, and the State, not unlike in the case at bar, asserted that "because Foucha once committed a criminal act and now has an antisocial personality that sometimes leads to aggressive conduct, a disorder for which there is no effective treatment, he may be held indefinitely."[5] *Id*. at 82. But the Court, effectively rejecting *The Minority Report's* premise that the confinement of would-be criminals is necessary for the greater good of society, observed that the State's rationale would "be only a step away from substituting confinements for dangerousness" for our present system requiring proof beyond a reasonable doubt that a criminal law has been violated. *Id*. at 83. The appellate opinion in the case at bar, in contrast, concluded that even though petitioner's personality traits "did not fully meet the criteria for a single personality disorder," App. 9,

[5] Unlike the acquittee in *Foucha*, Mr. Abraham's antisocial "traits" have never led to aggressive conduct during his period of confinement.

and he had not been involved in any violent incidents in more than 30 years of confinement, App. 3-4, the trial court was justified in finding that petitioner's antisocial and narcissistic "traits" were a sufficient "mental illness," as the court characterized them, App. 8, to confine him indefinitely. The opinion makes the rather bold assertion that *Foucha* "does not say that the mental illness must be the same one as the one underlying the initial NGI determination." App. 9.

The reasoning of the California court's opinion closely parallels that used by the Louisiana Supreme Court in *State v. Foucha*, 568 So.2d 1138 (1990), where the court viewed due process as "flexible." Indeed, language used in the state court decision in the case at bar is identical to that utilized in the Louisiana Supreme Court's decision, 568 So.2d at 1144, to justify its conclusion that the "protection of society" was a constitutionally adequate purpose for continuing Mr. Foucha's confinement under the "dangerousness test" of the Louisiana statute: " '[D]ue process is flexible and calls for such procedural protections as the particular situation demands.' " App. 8.

The California court cited *Jones v. United States*, 463 U.S. 354, 367-368 (1983) as the source of that language. That language does appear in *Jones*, but it was not used to justify the *continued* confinement of Mr. Jones; rather it was used in the context of justifying *the initial commitment at the criminal trial* without holding a second hearing to determine if the defendant was still insane at the time of judgment. *Jones* at 367. The California court seems to have missed this crucial distinction, for it cited as supportive a California case, *People v. Sword*, 29 Cal.App.4th 614 (1994), which mistakenly stated that *Jones* had upheld a District of Columbia statute that required an insanity acquittee "to prove that he was no longer insane or dangerous by a preponderance of the evidence in order to be released." *People v. Sword*, 29 Cal.App.4th at 622.

The same erroneous statement about the nature of the ruling in *Jones* appears in a later decision by the California Supreme Court, *People v. McKee*, 47 Cal.4th 1172 (2010), where the court held that it was not a violation of the Due Process Clause to require a sexually violent predator [SVP] seeking release from his commitment to prove by a preponderance of the evidence that he is no longer an SVP. The court based its decision on the mistaken assumption that the Court in *Jones* had "considered" and "rejected a due process challenge" to a similar the District of Columbia burden-shifting statute, enacted for "the protection of society." *Id*. at 1189-1190. The court in *McKee* stated, "Accordingly, as in *Jones*, the requirement that McKee, *after his initial commitment*, must prove by a preponderance of the evidence that he is no longer an SVP does not violate due process." *McKee*, at p. 1191 [italics added].

But there is no "as in *Jones*" to support that statement. *Jones* did not decide the constitutionality of the District of Columbia's burden-shifting statute in the context of determining whether an insanity acquittee should be released, and footnote 11, at 463 U.S. 363, pointedly cautioned that the Court was *not* ruling on the validity of release procedures, because Jones had never raised the issue. Yet as a decision of the highest court of the state, *McKee* is binding on all other California courts for the proposition that this Court has ruled that the Due Process Clause is not offended by shifting the burden of proof on the issue of the loss of one's liberty from the State to the person detained.

We submit that insanity, and not some other mental defect such as arrogance or a sense of entitlement, is the touchstone, and the *only* touchstone, when it comes time to apply the Due Process Clause to the continued confinement of an insanity acquittee. More specifically, this Court has expressly held—twice—that the State cannot continue to confine an insanity acquittee after he has regained his sanity.

In *Jones v. United States*, *supra* 463 U.S. 354, 368, the Court held, "The committed acquittee is entitled to release when he has recovered his sanity or is no longer dangerous." That language appears reasonably explicit, but seven years later the Supreme Court of Louisiana in *State v. Foucha* interpreted it as merely interpreting statutory law of the District of Columbia, having no constitutional significance.

When this Court granted certiorari in *Foucha v. Louisiana*, *supra* 504 U.S. 71, the Court made clear that *Jones* was in fact based on the Constitution: "We held, however [in *Jones*], that '[t]he committed acquittee is entitled to release when he has recovered his sanity or is no longer dangerous,' " because even if the basis of the initial commitment was permissible, "it could not constitutionally continue after that basis no longer existed." *Id.* at 77. The Court continued, "The court below was in error in characterizing the above language from *Jones* as merely an interpretation of the pertinent statutory law in the District of Columbia and as having no constitutional significance." *Id*. at 78.

Insanity—the basis of Mr. Abraham's initial commitment—no longer exists. But the California court in our case concluded, "*Foucha* does not stand for the proposition that it is improper to require a defendant to prove by a preponderance of the evidence that he no longer suffers from a mental illness or is dangerous once there has been an initial insanity commitment." App. 8.

Foucha makes clear that the burden of proof lies with the State when it comes to the involuntary confinement of a person:

> The State may also confine a mentally ill person if it shows "by clear and convincing evidence that the individual is mentally ill and dangerous," *Jones*, 463 U. S., at 362. Here, the State has not carried that burden; indeed, the State does not claim that Foucha is now mentally ill.

504 U. S. at 80. "[T]he State has not carried that burden" does not sound very much like an implicit approval of a statute placing the burden of proof on the insanity acquittee. Yet the California Court of Appeal concluded, "There is nothing unusual about placing this burden of proof on [the] defendant." App. 7.

What about Mr. Abraham's narcissistic and antisocial "traits"? Are they enough to continue his confinement? In *Foucha* the State of Louisiana asserted that "because Foucha once committed a criminal act and now has an antisocial personality that sometimes leads to aggressive conduct, a disorder for which there is no effective treatment, he may be held indefinitely." *Id*. at 82. The Court responded to this argument thusly: "This rationale would permit the State to hold indefinitely any other inanity acquittee not mentally ill who could be shown to have a personality disorder that may lead to criminal conduct." *Ibid*. It is clear that the Court did not consider an antisocial personality to be a "mental illness" of the kind included within the ambit of a verdict of not guilty by reason of insanity. *A fortiorari*, neither are antisocial personality "traits."

This Court in *Foucha* recognized that detention without trial is a "carefully limited exception" permitted by the Due Process Clause, for example, pretrial detention without bail, but continued, "We decline to take a similar view of a law like Louisiana's, which permits the indefinite detention of insanity acquittees who are not mentally ill but who do not prove they would not be dangerous." *Id*. at 83. The Court pointed out that to confine a person who is insane and dangerous the State must prove its case by clear and convincing evidence, and concluded, "The court below gave no convincing reason why the procedural safeguards against unwarranted confinement which are guaranteed to insane persons and those who have been convicted may be denied to a sane acquittee, and the State has done no better in this Court. *Id*. at 86.

Petitioner submits that the State has done no better in the case at bench, either.

2.
The California Statute Creates an Unconstitutional "Different Standard" for the Confinement of Insanity Acquittees Once They Have Recovered Their Sanity.

In *Jones v. United States* the court found that it was not unreasonable for Congress to determine that an acquittal by reason of insanity supports an inference of continuing mental illness, at least when the acquittee is entitled to a hearing within 50 days to determine his eligibility for release. *Id*., 463 U.S. at 366. But such an inference is inapplicable in the context of the case at bar, for two reasons.

First, in *Jones* the question was whether the inference continued from the time of the crime until the criminal court committed the acquittee to a mental institution, and arguably for a relatively short time after the commitment. But an inference must be based on reason, not upon the ritualistic incantation of a rule of law, which means the inference must be fair and reasonable as it is applied in a particular case.

An inference "grows weaker as time passes, until it finally ceases to exist." *Maggio v. Zeitz*, 333 U.S. 56, 65, n. 2 (1948) ["presumption of continuing possession" in bankruptcy proceeding]; see also *People v. McDonough*, 196 Cal.App.4th 1472, 1493 (2011) [reversing denial of outpatient status application nine years after commitment pursuant to Calif. Penal Code § 1026.2 because acquittee had met her burden of proof, but recognizing the inference at the time of the verdict that defendant was mentally ill and dangerous "may become weaker as substantial time elapses"]; *In re Lawrence,* 44 Cal.4th 1181, 1228 (2008) [reversing denial of parole because "petitioner's conviction offense does not

reliably predict, 36 years after commission of the offense and following 24 years of incarceration and demonstrated rehabilitation, that petitioner currently poses a danger to society"].)

The passage of 30 years is sufficient time to say that it is constitutionally unreasonable to rely on an inference of continuing mental illness to deprive a person of his liberty.

Second, the California appellate court did not rely on a presumption of continuing insanity (as determined at the criminal trial) to justify petitioner's continued confinement. In rejecting petitioner's contention that he is entitled to release because it is unconstitutional to hold him when he is no longer insane, App. 8, the court relied on a California statute that provides that once there has been an acquittal by reason of insanity, a "different standard for release than an initial commitment proceeding" is imposed on the acquittee. The opinion went on to state that *Foucha v. Louisiana* "does not say the mental illness must be the same one as the one underlying the initial NGI determination." App. 9.

What is the "different standard" the State of California has imposed on the acquittee?

To be found not guilty by reason of insanity, a defendant must prove by a preponderance of the evidence that "he or she was incapable of knowing or understanding the nature and quality of his or her act and of distinguishing right from wrong at the time of the commission of the offense." Calif. Penal Code § 25(b).

That was the "standard" underlying the NGI determination at petitioner's criminal trial.

By the time of petitioner's application for conditional release, he had been diagnosed "as having an 'other specified personality disorder' featuring antisocial and narcissistic traits. He did not fully meet the criteria for a single

personality disorder, and had had the same diagnosis for a long time." App. 9. These traits included things like "ideas of self-importance. He was grandiose. He had exaggerated achievements and talents. He expected recognition. He was very arrogant and entitled." (RT 35.) At the time of his crime, petitioner had been unable to control his anger, but Dr. Owen concluded he now "has demonstrated control over his anger." (RT 36.) Petitioner had always followed the hospital rules (RT 33), but Dr. Thuma thought he would be "too persnickety and stubborn" to follow the rules of the CONREP program (RT 58); at times petitioner gets "really pretty mad" and you have to cool him off. (RT 51.)

The "different standard" imposed by the statute, then, is that to obtain release following an NGI verdict, the acquittee does not have to prove he is no longer insane; he has to prove that he is not arrogant, stubborn, or persnickety .

Freedom from bodily restraint has always been at the core of the liberty interest protected by the Due Process Clause from arbitrary governmental action. The Constitution does not permit the creation of a "different standard" to confine insanity acquittees once they have recovered their sanity. If they are to be held longer, the State is required to afford the protections constitutionally required in a civil commitment proceeding, where the State has the burden of proving of proving by clear and convincing evidence that the person sought to be confined is mentally ill and dangerous. See *Foucha v. Louisiana*, *supra* 504 U.S. at 75, citing *Addington v. Texas, supra,* 441 U.S. 418.

In *Foucha v. Louisiana* the state statute, like the California statute, did not entitle Mr. Foucha to an adversary hearing at which *the State* had to prove by clear and convincing evidence that he was dangerous to the community. "Indeed, the State need prove nothing to justify continued detention." *Id*., 504 U.S. at 81. The Court observed that the Louisiana statute "was enough to defeat Foucha's liberty interest in physical liberty. It is not enough to defeat Foucha's

liberty interest under the Constitution in being freed from indefinite confinement in a mental facility." *Id*. at 82.

We can think of no reason a California statute which says the State need prove nothing to justify continued detention is enough to defeat Mr. Abraham's liberty interest under the Constitution.

CONCLUSION

Twice this Court has expressly held that the State cannot continue to confine an insanity acquittee after he has regained his sanity.

In *Jones v. United States*, *supra* 463 U.S. 354, 368, the Court held, "The committed acquittee is entitled to release when he has recovered his sanity or is no longer dangerous." In *Foucha v. Louisiana*, *supra* 504 U.S. 71 this Court said, "We held, however [in *Jones*], that '[t]he committed acquittee is entitled to release when he has recovered his sanity or is no longer dangerous,' " because even if the basis of the initial commitment was permissible, "it could not constitutionally continue after that basis no longer existed." *Id.* at 77.

The California court in the case at bar used language identical to that used by the Louisiana Supreme Court to support the conclusion that there was no reason to apply the standards for involuntary civil commitment found in *Addington v. Texas*, *supra* 441 U.S. at 425-433: "[D]ue process is flexible and calls for such procedural protections as the particular situation demands." App. 8; *State v. Foucha*, 568 So.2d at 1144. This Court concluded this was not a convincing reason why the procedural safeguards guaranteed by the Due Process Clause may be denied to a sane acquittee. *Foucha*, *supra*, 504 U.S. at 86.

Commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection. If an insanity acquittee is truly mentally ill and dangerous, the State may commit him to a mental institution.

But the Due Process Clause requires first there must be proof by the State, *Addington v. Texas*, *supra* 441 U.S. at 427, by clear and convincing evidence, *id*., at 431, that the person is mentally ill and poses a danger to himself or others. *Id*., at 426. The Constitution does not permit the confinement of would-be criminals for the greater good of a safe society. That, we submit, is science fiction.

Petitioner prays that the Court grant the petition for certiorari.

Petitioner suggests that summary reversal would be appropriate in a case such as this, where constitutional error is manifest. See Supreme Court Rule 16.1. The Court may wish to remand the matter with directions to reconsider the case in light of this Court's holding in *Jones*, reaffirmed in *Foucha,* that a committed insanity acquittee "is entitled to release when he has recovered his sanity," *Jones v. United States*, *supra* 463 U.S. at 368; *Foucha v. Louisiana*, *supra*, 504 U.S. at 77, and the statement in *Foucha* that keeping an insanity acquittee against his will in a mental institution when the acquittee manifests no more than an antisocial personality "is improper absent a determination in civil commitment proceedings of current mental illness and dangerousness." *Foucha*, supra, at 78.

Respectfully submitted,

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Appendix A

Decision
of the California Court of Appeal

Filed 9/28/18 P. v. Abraham CA1/5

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. ARTHUR ABRAHAM, Defendant and Appellant.	A148268 (San Mateo County Super. Ct. No. SC014720A)

The trial court denied appellant Arthur Abraham's application for restoration of sanity and conditional release to a local outpatient program pursuant to Penal Code section 1026.2.[1] Appellant contends: (1) he is being held in violation of due process because the state should have carried the burden of showing he remained insane; (2) the California procedure for determining whether a person found not guilty by reason of insanity (NGI) has been restored to sanity is unconstitutional because it allows a defendant to continue being held even when he ceases to be insane; and (3) his "traits" do not qualify as a "mental defect, disease or disorder." We affirm.

I. FACTS AND PROCEDURAL HISTORY

A. *The Offenses and NGI Commitment*

Appellant shot his pregnant common law wife, with whom he had a son, in 1984. In 1985, a jury found appellant NGI of the charged offenses of second degree murder and inducing criminal abortion and he was committed to the state hospital for a maximum

[1] Further statutory references are to the Penal Code.

term of 17 years to life. In 1985, the People refiled charges of sexual assault against the same victim and the parties stipulated to a finding that appellant was NGI as to these charges as well. Appellant was committed to the state hospital for a maximum term of 27 years and was transferred to Napa State Hospital in 1994.

B. *Past Petitions for Outpatient Treatment*

In 1996, appellant filed a petition seeking outpatient treatment under section 1026.2. The superior court denied the petition, a result affirmed on appeal in an unpublished decision. (*People v. Abraham* (July 21, 1997, A074868) [nonpub. opn.].) In 2005, appellant filed a petition for writ of habeas corpus, which was construed as a petition for outpatient treatment and ultimately denied. This result was also affirmed on appeal in an unpublished decision. (*People v. Abraham* (Sept. 28, 2007, A115860 [nonpub. opn.].) The superior court denied a third petition seeking placement in a conditional release program in 2013, which was again affirmed on appeal. (*People v. Abraham* (May 1, 2014, A138799) [nonpub. opn.].)

C. *Current Petition*

Appellant filed the current petition for outpatient treatment on February 25, 2015, alleging he was no longer a danger to the health and safety of others based on a mental defect, disease or disorder. A report prepared by Dr. Neil Khanna, a staff psychiatrist for the state, recommended that appellant be retained in custody. A hearing was held on May 2, 2016.

1. Appellant's Case

Dr. Robert Owen, a licensed clinical psychologist, evaluated appellant in 2012 and 2015 and testified on behalf of appellant. He interviewed appellant and evaluated his personal history, education, work history and medical records, but did not treat him. According to Dr. Owen, appellant did not have any serious criminality until he very violently raped his common law wife in 1984. Eight months later, appellant shot and killed her. In order to obtain a verdict of not guilty by reason of insanity, appellant feigned psychotic symptoms and he was diagnosed with psychosis by three court-appointed alienists who determined he was insane at the time of the crimes. When

appellant first arrived at the state hospital he was diagnosed with a psychotic disorder, but after he confessed that he was feigning symptoms of psychosis, the hospital staff changed his diagnosis to malingering.

Dr. Owen diagnosed appellant with a personality disorder, which involves the way in which a person thinks, feels, and acts, such as obsessive-compulsive, narcissistic, or antisocial personality disorder. Personality disorders are hard to treat, and symptoms may decline with age. A personality disorder is different from a clinical disorder that requires treatment in a clinic, such as depression, schizophrenia, or bipolar disorder. Appellant did not fit the diagnostic criteria for a specific personality order, therefore, Dr. Owen diagnosed him with "other specified personality disorder with obsessive-compulsive and narcissistic traits." The narcissistic traits included feelings of entitlement, feeling superior to others, and being impatient with other people. The state hospital was not specifically set up to address personality disorders, and there was no real medication for personality disorders. However, some of the group therapy would address problems related to certain personality disorders.

Dr. Owen administered to appellant the Hare Psychopathy Checklist, which assesses whether a person is a typical psychopath. Appellant scored a 12 out of a possible 40, meaning he was considerably below the severe psychopathy range that would make him more typically aggressive. In previous tests by other psychologists, appellant got widely divergent scores. Dr. Owen also performed the Static-99R test, which assessed the risk of sexually reoffending. Appellant's score was negative 2, which was very low, and his likelihood of reoffending was around 2.8 percent.

In Dr. Owen's opinion, appellant was not NGI at the time of his initial commitment. Appellant did not have a type of mental disorder that Dr. Owen typically had seen in NGI cases, such as schizophrenia or bipolar disorder. Appellant had basically "conned the system." The personality disorder alone would not have been sufficient for an NGI verdict.

Over the 30 years of his commitment, appellant attended a variety of group therapy sessions, sex offender treatment, and general treatment to address his offenses.

He had not been involved in any violent incidents, been medicated, or been placed in restraints. Appellant had been deceitful and manipulative. He had trouble with the staff. For a long time he was not remorseful about the rape and murder of his wife.

Appellant had never completed sexual offender treatment. After his last petition for restoration of sanity was denied, appellant reenrolled in sexual offender treatment, but he quit before he completed this program. Appellant was also encouraged by the hospital to attend dialectical behavior treatment (DBT), which he began and quit as well.

Dr. Owen thought appellant's likelihood of committing a new sex crime was very low because he was a 60-year-old man with diabetes and low testosterone. There was a 97 percent likelihood appellant would not commit a new sex crime. Therefore, he probably did not need years of sexual offender treatment.

Appellant was twice involved in "relationships" with female staff members that caused the staff members to be transferred out of the unit. He was alleged to have stalked and threatened one of the staff members. He also had a girlfriend in the hospital who cheated on him and got pregnant. Appellant never lashed out at her, but he was never alone with her.

Dr. Owen characterized the original crime as a crime of passion. His wife was unfaithful, and he was enraged. In Dr. Owen's opinion, it was speculative to consider that appellant's personality disorders contributed to the crime. Dr. Owen thought the year in the conditional release program (CONREP) would be a good time for him to transition back into the community, but he acknowledged the transition would be difficult.

2. The People's Case

The People called Dr. Nathan Thuma, M.D., a psychiatrist at Napa State Hospital who had treated appellant for a year. Dr. Thuma opined that appellant posed a risk of harm to others as a result of a mental disease, defect or disorder. Appellant's diagnosis was "other specified personality disorder" featuring antisocial and narcissistic traits. The diagnosis was "other" specified because appellant did not meet the full criteria for any single personality disorder. Appellant had had the same diagnosis for a long time.

Appellant's antisocial traits included the crimes for which he was committed, lack of empathy for the victims or for other people, and failure to conform to norms, such as not conforming to the advice of hospital staff. He was deceitful and manipulative. He had lied about his sexual history and lied on a lie detector test. The only reason he had not been diagnosed with antisocial personality disorder was that the hospital did not have information that he had exhibited those traits prior to the age of 15. Appellant's narcissistic traits included being hotheaded and intimidating. He denigrated and was critical of people and required an excessive amount of attention.

The hospital wanted to administer new psychological tests before the hearing on appellant's petition, but appellant refused to cooperate because he did not want the results used in court. In past testing, appellant scored "somewhere in the middle" on a test used for predicting possible future violence, with a score that was associated with a 35 percent chance of violent recidivism in seven years and a 48 percent chance of violent recidivism in ten years. On a past test measuring risk of violent sexual recidivism, appellant's score was associated with a 49 percent chance of violent recidivism in seven years and a 59 percent chance of violent recidivism in ten years. Dr. Thuma could not explain the difference in the Hare test scores.

In Dr. Thuma's opinion, appellant continued to pose a danger to the community. Appellant did not follow directions, refused to do certain things, and would get extremely angry. On several occasions, Dr. Thuma had to spend time with him to cool him off when he was angry. Also, the crimes appellant committed before entering the hospital were powerfully predictive of future behavior, including violence.

Appellant had several incidents at the state hospital that showed he continued to have problems with women. He got into an inappropriate relationship with a worker at a hospital in 1991, and when the relationship was exposed he wanted to sue the person involved, the doctor, and the hospital. Then, in 1999, he made advances toward a young social worker at the hospital. He stalked her and when his behavior was exposed, he got very angry. In 2003, he had a work detail experience where he alienated all the women

he was working with and had to be removed from the program. He was not able to live on a coed unit.

Another concern was appellant's failure to complete treatment. In 2006, CONREP decided he needed sex offender therapy treatment, but appellant had not completed the treatment. Appellant had started the treatment several times, but at a certain point refused to continue. He argued with treatment providers and did not trust the staff or doctors at Napa State Hospital. He started DBT treatment, which would have been useful to treat his personality disorder, but then after a certain point refused to continue. He later went back to sex offender treatment, where he refused to cooperate again, and then went back to DBT with the same results. Appellant understood that he needed to finish the various treatments in order to be released to CONREP. Appellant also tried a "Transition To" program, which Dr. Thuma described as a "debacle." On the first day of the program, appellant alienated the group leader by grandstanding, saying he was not sick and the treatment was not going to help him, and overall not setting the right tone for the group. The group leader kicked him out of the session. Dr. Thuma thought appellant was too "persnickety and stubborn" to follow the rules and regulations of CONREP.

3. The Trial Court's Ruling

The trial court denied appellant's petition, noting that even though appellant's personality disorder did not fall into a specific personality disorder category, there was no disagreement between Drs. Thuma and Owen that appellant had a mental disorder. Appellant's refusal to go through the treatment programs concerned the court, because such treatment programs show progress and "a certain degree of acknowledgement on his part of wrongdoing and acceptance of responsibility" and appellant's refusal to complete the treatment programs was a reflection of his manipulative behavior, which began when appellant manipulated his way into the system in the first place. Appellant's continued manipulation caused the court concern "with respect to the danger he poses." The court described appellant as "toxic." In light of the evidence and the totality of the circumstances, the court ruled that appellant "suffers from a mental disorder which is

likely to pose a danger to the health and safety of others, so the petition is going to be denied at this point."

II. DISCUSSION

Under California law, one of the ways a defendant who has been found NGI may be released is by applying for a restoration of sanity under section 1026.2. First, the court holds a hearing to determine whether the applicant " 'would be a danger to the health and safety of others, due to mental defect, disease, or disorder, if under supervision and treatment in the community.' " (§ 1026.2, subd. (e).) "If the court finds no impediment, it shall order the person to be placed in a local outpatient program for a period of one year. At the end of the year, the court shall conduct a trial 'to determine if sanity has been restored, which means the applicant is no longer a danger to the health and safety of others, due to mental defect, disease, or disorder.' " (*People v. Beck* (1996) 47 Cal.App.4th 1676, 1681 (*Beck*).) At issue here is the first step of this procedure.

A. *Burden of Proof*

A person who applies for outpatient treatment and a restoration of sanity under section 1026.2 has the burden of proof by a preponderance of the evidence. (§ 1026.2, subd. (k); *People v. Bartsch* (2008) 167 Cal.App.4th 896, 903 (*Bartsch*).) Appellant argues that placing the burden on him violates due process and runs afoul of the Supreme Court's decisions in *Foucha v. Louisiana* (1992) 504 U.S. 71 (*Foucha*) and *Addington v. Texas* (1979) 441 U.S. 418, 425 (*Addington*). We disagree. "There is nothing unusual about placing this burden of proof on [the] defendant." (*People v. Sword* (1994) 29 Cal.App.4th 614, 624 (*Sword*); see also *In re Franklin* (1972) 7 Cal.3d 126, 147 [approving preponderance-of-the-evidence standard.)

Addington involved a statute that allowed for an indefinite civil commitment without a criminal act. The Court concluded the Fourteenth Amendment's due process clause required the state to prove dangerousness (in a case where mental illness was conceded) by clear and convincing evidence. (*Addington*, *supra*, 441 U.S. at pp. 431–433.) "The *Addington* Court expressed particular concern that members of the public could be confined on the basis of 'some abnormal behavior which might be perceived by

some as symptomatic of a mental or emotional disorder, but which is in fact within a range of conduct that is generally acceptable.' [Citations.] In view of this concern, the Court deemed it inappropriate to ask the individual 'to share equally with society the risk of error.' [Citation.] But since automatic commitment . . . follows only if the *acquittee himself* advances insanity as a defense and proves that his criminal act was a product of his mental illness, there is good reason for diminished concern as to the risk of error. More important, the proof that he committed a criminal act as a result of mental illness eliminates the risk that he is being committed for mere 'idiosyncratic behavior.' [Citation.] A criminal act by definition is not 'within a range of conduct that is generally acceptable.' [Citation.] . . . [C]oncerns critical to . . . *Addington* are diminished or absent in the case of insanity acquittees. Accordingly, there is no reason for adopting the same standard of proof in both cases. '[D]ue process is flexible and calls for such procedural protections as the particular situation demands.' " (*Jones v. United States* (1983) 463 U.S. 354, 367–368, fn. omitted.)

Foucha does not require a different result. In that case, the defendant was being held after a verdict of NGI and was concededly no longer mentally ill. (*Foucha*, *supra*, 504 U.S. at p. 73–75.) The court struck down a statute that enabled the state to continue holding an NGI committee after he had recovered his sanity only if he was no longer dangerous (*Ibid*.) *Foucha* does not stand for the proposition that it is improper to require a defendant to prove by a preponderance of the evidence that he no longer suffers from a mental illness or is dangerous once there has been an initial insanity commitment. (See *Sword*, *supra*, at p. 624.)

B. *Cessation of Insanity*

Appellant argues he is entitled to release because it is unconstitutional to hold him when he is no longer insane. Again we disagree. Although a petition under section 1026.2 is commonly referred to as a petition regarding a restoration to *sanity*, the statute actually calls for release "[i]f the court at the hearing determines the applicant will not be a danger to the health and safety of others, due to mental defect, disease, or disorder, while under supervision and treatment in the community." (§ 1026.2, subd. (e).) This

imposes a different standard for release than an initial commitment proceeding. (*People v. Williams* (1988) 198 Cal.App.3d 1476, 1480; see also *People v. McCune* (1995) 37 Cal.App.4th 686 [allowing different mental illness to underlie NGI extension under 1026.5 than that underlying initial NGI commitment].)

Appellant again cites *Foucha* in support of his claim, and that decision again fails to assist him. (*Foucha*, *supra*, 504 U.S. at p. 79.) *Foucha* requires a finding of current mental illness and dangerousness to support a civil commitment. It does not say the mental illness must be the same one as the one underlying the initial NGI determination. Under appellant's reasoning, the state would be required to release a dangerous NGI committee on the ground his diagnosis had changed. The California statutes were amended to conform with *Foucha* in 1993. (*Beck*, *supra*, 47 Cal.App.4th at pp. 1681–1682.) No more is required on this front.

c. *Appellant's "Traits" as Mental Disorder*

Appellant contends he does not have a "mental defect, disease, or disorder" as is necessary to support the denial of his petition for outpatient treatment. We review the claim for abuse of discretion, drawing every reasonable inference in favor of the trial court's determination. (*Sword*, *supra*, 29 Cal.App.4th at pp. 624–625.) " 'Under that standard, it is not sufficient to show facts affording an opportunity for a difference of opinion. [Citation.] '. . . [D]iscretion is abused only if the court exceeds the bounds of reason, all of the circumstances being considered." ' " (*Bartsch, supra,*167 Cal.App.4th at p. 900.)

According to Dr. Thuma, the People's expert, appellant was diagnosed as having an "other specified personality disorder" featuring antisocial and narcissistic traits. He did not fully meet the criteria for a single personality disorder, and had had the same diagnosis for a long time. Appellant's expert, Dr. Owen, did not disagree with this diagnosis, and whether it amounted to a mental defect, disease or disorder was a question of fact for the trial court. (*People v. Williams* (2015) 242 Cal.App.4th 861, 872–873 [rejecting claim that defendant who suffered from personality disorder not otherwise specified did not suffer from mental disease, defect or disorder under § 1026.2]; *People v.*

Superior Court (Blakely) (1997) 60 Cal.App.4th 202, 213–214 [question of fact as to whether antisocial personality disorder qualifies under § 1026.2].)

III. DISPOSITION

The judgment is affirmed.

NEEDHAM, J.

We concur.

JONES, P.J.

SIMONS, J.

(A148268)

Appendix B

Order
of the California Court of Appeal
Denying Petition for Rehearing

COPY

COURT OF APPEAL, FIRST APPELLATE DISTRICT
350 MCALLISTER STREET
SAN FRANCISCO, CA 94102
DIVISION 5

THE PEOPLE,
Plaintiff and Respondent,
v.
ARTHUR ABRAHAM,
Defendant and Appellant.

A148268
San Mateo County No. SC014720A

BY THE COURT:

The petition for rehearing is denied.

Date: OCT 18 2018

Jones, P.J. P.J.

oruu

Appendix C

Order of the California Supreme Court Denying Review

Court of Appeal, First Appellate District, Division Five - No. A148268

S252452

IN THE SUPREME COURT OF CALIFORNIA

En Banc

THE PEOPLE, Plaintiff and Respondent,

v.

ARTHUR ABRAHAM, Defendant and Appellant.

The petition for review is denied.

CANTIL-SAKAUYE

Chief Justice