No._____

In the Supreme Court of the United States

GRAHAM L. STOWE, *PETITIONER*,

v.

GREGORY VAN RYBROEK, *RESPONDENT*.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Wisconsin court's decision is contrary to and an unreasonable application of *Foucha v. Louisiana* because it permits the state to confine NGI acquittees in mental institutions even if they are not mentally ill.

LIST OF PARTIES

The only parties to the proceeding are those named in the caption.

STATEMENT OF RELATED CASES

There are no directly related proceedings arising from the same trial-court case as this case other than those proceedings appealed here.

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TABLE OF AUTHORITIES CITED

PETITION FOR A WRIT OF CERTIORARI

Graham L. Stowe petitions for a writ of certiorari to review the judgment of the Seventh Circuit Court of Appeals.

OPINIONS BELOW

Each of the opinions below are unreported, and each opinion is reproduced in the Appendix.

- *Stowe v. Van Rybroek*, No. 23-3345, U.S. Court of Appeals for the Seventh Circuit. Entered August 21, 2024. (Appendix A:1).
- *Stowe v. Van Rybroek*, No. 18-cv-400, U.S. District Court for the Western District of Wisconsin. Entered November 6, 2023. (Appendix B:7).
- *State v. Stowe*, No. 2016AP2367-CR, unpublished slip op (Wis. Ct. App. 2019). Entered December 27, 2017. (Appendix D:60).
- *State v. Graham L. Stowe*, Brown County Case No. 2004CF0124, trial court order denying petition for conditional release. Entered June 30, 2016. (Appendix E:67).

JURISDICTION

The Seventh Circuit opinion was filed on August 21, 2024. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION

Amendment XIV provides, in relevant part:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor 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.

STATEMENT OF THE CASE

A. Introduction.

A decision by this Court is necessary to clarify that the rule set forth in *Foucha v. Louisiana*, 504 U.S. 71 (1992) extends to all NGI commitments, regardless of their duration or the allocation of the burden of proof. In *Foucha*, this Court held that, as a matter of due process, an NGI "acquittee may be held as long as he is both mentally ill and dangerous, but no longer." *Id.* at 77. Wisconsin law permits the state to confine an NGI acquittee in a mental institution without a finding that they are currently mentally ill. Instead, the only criteria

for confinement is a showing that the person presents a significant risk of harm to self, others, or property. *See* Wis. Stat. § 971.17(4)(d).

Mr. Stowe has argued that this statute is facially unconstitutional under the clearly-established law set forth in *Foucha* given that it fails to require proof of current mental illness. The lower courts have relied on Justice O'Connor's concurrence in *Foucha* to disregard this Court's holding, as discussed below. Review is necessary to clarify and reinforce *Foucha*'s holding on this important issue of constitutional law.

B. Trial court proceedings.

In 2004, Mr. Stowe was found Not Guilty by Reason of Mental Disease or Defect ("NGI") based on the fact he was suffering from an episode of psychotic depression when he committed his crimes. (*See* App. B:8). The state stipulated that Mr. Stowe was NGI and agreed that he should be civilly committed instead of imprisoned. The trial court found Mr. Stowe NGI, and imposed the maximum term of commitment of 39.5 years, which is the maximum amount of prison that could have been imposed if Mr. Stowe had been convicted.[1] (*See* App. A:1). The order at issue in the instant petition is an order

[1] Commitment is not to exceed the maximum sentence for the charged offense. Wis. Stat. § 971.17(1)(b).

denying Mr. Stowe's 2016 petition for conditional release from Mendota Mental Health Institute. (App.A:2). *See* Wis. Stat. § 971.17(4)(a).[2]

The standard that applied at Mr. Stowe's release hearing was as follows: "[t]he court shall grant the petition unless it finds by clear and convincing evidence that the person would pose a significant risk of bodily harm to himself or herself or to others or of serious property damage if conditionally released." Wis. Stat. § 971.17(4)(d).

At the hearing on Mr. Stowe's petition, three psychological experts all testified in agreement that Mr. Stowe did not have a current mental illness and had not received psychiatric services in many years. (App. B: 9-10). He showed no clinical signs of psychotic depression, and instead, the doctors only found criteria for a personality disorder. (App. B: 10). The trial court ruled "that the petition for conditional release is denied because the state has proven by clear and convincing evidence that defendant, Graham L. Stowe, would pose a significant risk of bodily harm to himself or to others or serious property damage if conditionally released." (App.E:67).

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[2] Mr. Stowe was confined in the mental institute when he filed his petition for writ of habeas corpus. While his appeal was pending in the Seventh Circuit, he was placed on conditional release.

C. State court of appeals proceedings.

Mr. Stowe appealed the denial of his petition for conditional release to the Wisconsin Court of Appeals. (App.D:60). He argued, among other claims, that Wis. Stat. § 971.17(4)(d) is facially unconstitutional because it permits continued confinement in a mental institution without a finding of current mental illness, contrary to *Foucha* v. *Louisiana,* 504 U.S. at 77. In *Foucha,* this Court held that an NGI "acquittee may be held as long as he is both mentally ill and dangerous, but no longer." *Id.* Mr. Stowe acknowledged that the Wisconsin Supreme Court had previously upheld the NGI release standard in *State v. Randall,* 192 Wis. 2d 800, 532 N.W.2d 94 (1995). However, he contended that *Randall* was wrongly decided. The court of appeals affirmed the trial court, finding itself bound by *Randall.* (App.D:66). Mr. Stowe filed a petition for review to the Wisconsin Supreme Court, which was denied. (*See* App. B:14).

D. Writ of habeas corpus in district court.

Mr. Stowe filed a petition for a writ of habeas corpus in the Federal District Court for the Western District of Wisconsin under 28 U.S.C. § 2254. He restated his claim that Wis. Stat. § 971.17(4)(d) is unconstitutional because it fails to require a finding of current mental

illness, as required by *Foucha*, 504 U.S. at 77. Given the court of appeals' conclusion that it was bound by *Randall*, which previously upheld the statutory standard, Mr. Stowe argued that *Randall* was contrary to and an unreasonable application of *Foucha*.

The District Court, the Honorable William M. Conley presiding, referred the petition to Magistrate Judge Stephen L. Crocker for a Report and Recommendation. Magistrate Judge Crocker filed a Report and Recommendation, which recommended that the petition be denied. (App. C: 26). Mr. Stowe filed an Objection.

Subsequently, the district court entered an opinion and order denying Mr. Stowe's habeas petition. (App.B:7). The court agreed that pursuant to *Foucha*, "the state must show both that an insanity acquittee is mentally ill and dangerous to deny him conditional release." (App.B:19 n6). However, the court rejected Mr. Stowe's contention that Wis. Stat. § 971.17(4)(d) is facially unconstitutional. The court issued a certificate of appealability on this claim. (App.B:25).

E. Seventh Circuit appeal.

Mr. Stowe appealed the district court's judgment, and again argued that Wis. Stat. § 971.17(4)(d) is facially unconstitutional. The Seventh Circuit Court of Appeals affirmed the district court. (App.A:1).

First, the court stated that Mr. Stowe faced an "insuperable hurdle" in the form of Justice O'Connor's concurring opinion in *Foucha*. According to the court, the concurrence was the "controlling vote" and had the effect of "limiting the scope of the holding." (App.A:4) (citing *Foucha*, 504 U.S. at 86-90). The court stated that the concurrence "stressed features of Louisiana's system that § 971.17 does not share." (App.A:4). Those features included: the fact that Wisconsin limits the term of commitment to the corresponding prison term had the person been convicted; and the state bears the burden of proof to justify continued detention. (App.A:5). The court concluded that there was no "stark incompatibility between *Randall* and Justice O'Connor's views." (App.A:4).

Next, the court concluded that Mr. Stowe could not prevail on a facial challenge to the statute because, "state courts implementing § 971.17(4)(d) often will make all findings required to support detention on anyone's understanding of the Due Process Clause," and so "a federal court cannot be confident that 'a substantial number of [the law's] applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep'" or that "'no set of circumstances exists under which the [law] would be valid.'" (App.A:5) (quoting *United States v. Salerno*, 481 U.S. 739, 745 (1987). The court

emphasized that Mr. Stowe was not appealing an as-applied challenge to the statute, and had he done so, the trial court might have found that he had a "mental problem." (App.A:6). Mr. Stowe now petitions for a writ of certiorari.

REASON FOR GRANTING THE PETITION

A decision by this Court is warranted to clarify that the rule set forth in *Foucha v. Louisiana* extends to all NGI commitments, regardless of their duration or the allocation of the burden of proof.

A. Standard of review.

Authority to issue habeas corpus relief is provided by 28 U.S.C. § 2254, as amended by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). Habeas relief is warranted when a person shows that he or she "is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a). The AEDPA standard is set forth in 28 U.S.C. § 2254(d). It provides that a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a state court shall not be granted unless the adjudication of the claim either: (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; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. 28 U.S.C. § 2254(d).

The term "clearly established law" refers to this Court's holdings and governing principles. *Lockyer v. Andrade*, 538 U.S. 63, 71 (2003). 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 [Supreme Court] cases" or "decides a case differently than the Supreme Court has on materially indistinguishable facts." *Williams v. Taylor*, 529 U.S. 362, 405 (2000).

A decision unreasonably applies clearly established federal law if it "identifies the correct governing legal principle from [the Supreme Court's] decisions but unreasonably applies that principle" to the facts of the case. *Id.* at 413. "A state court's determination that a claim lacks merit precludes federal habeas relief so long as 'fairminded jurists could disagree' on the correctness of the state court's decision." *Harrington v. Richter*, 562 U.S. 86, 101 (2011) (quoting *Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004)). "The state court decision must be objectively unreasonable, not just incorrect or erroneous." *Lockyer*, 538 U.S. at 65 (2003).

B. *Foucha* held that it is a violation of due process to confine an NGI acquittee in a mental institution absent a finding that they are mentally ill.

Commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection. *Addington v. Texas*, 441 U.S. 418 (1979). The Due Process Clause "requires that the nature and duration of commitment bear some reasonable relation to the purpose for which the individual is committed." *Jones v. United States*, 463 U.S. 354, 368 (1983) (quoting *Jackson v. Indiana*, 406 U.S. 715, 738 (1972)).

In *Foucha*, this Court struck a Louisiana statute that permitted the state to confine an NGI acquittee in a mental institution "whether or not he [wa]s then mentally ill." *Foucha*, 504 U.S. at 73. Doctors concluded that Foucha was in remission from mental illness. *Id.* at 74-75. However, he was diagnosed with a personality disorder, which was not considered a treatable mental illness. *Id.* at 75. The trial court denied release after finding that Foucha was still dangerous. *Id.* Foucha argued that the Due Process and Equal Protection Clauses were "violated by the statutory provision permitting confinement of an insanity acquittee based on dangerousness alone." *Id.* at 75.

This Court held that Louisiana's statute was invalid. In Part III of the decision, the Court determined that the statute violated equal

protection. *Id.* at 84-86. This was a plurality holding. *See id.* at 71-72. However, in Parts I and II, the Court held that it also violated substantive due process—and this was a majority holding. *Id.* at 75-83. The Court held that, if Foucha was not mentally ill, then "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." *Id.* at 78. Although Justice O'Connor did not join the majority on Part III, she *did* join the majority's opinion in Parts I and II—containing the substantive due process holding. *Foucha*, 504 U.S. at 86. *See id.* at 75-83. She also wrote a separate concurrence, as discussed in additional detail below.

As relevant to Mr. Stowe's habeas proceeding, the rule from *Foucha* is that: an NGI acquittee "may be held as long as he is both mentally ill and dangerous, but no longer." *Foucha*, 504 U.S. at 71.

C. The Wisconsin court's decision upholding an NGI release provision that permits continued confinement of an NGI acquittee who does not have a mental illness was contrary to and an unreasonable application of *Foucha*.

1. Wisconsin's NGI release provision is facially unconstitutional because it permits continued confinement of a non-mentally ill person in a mental institution.

Wisconsin's NGI conditional release provision permits confinement in a mental institution based solely on a finding that the person would pose a "significant risk" to self, others, or property if released. *See* Wis. Stat. § 971.17(4)(d). However, in order to comply with *Foucha*, the statute would need to include a requirement that the court find that the individual is *also* currently mentally ill.

The Seventh Circuit Court of Appeals determined that a state trial court's ability to consider an individual's current mental condition meant that Wis. Stat. § 971.17(4)(d) could be applied in a constitutional manner. (App.A:5). The court noted that, in making the conditional release determination, "the court may consider, without limitation because of enumeration, the nature and circumstances of the crime, the person's mental history and present mental condition." *See* Wis. Stat. § 917.17(4)(d).

Yet, just because the trial court "may" consider a person's mental condition, does not mean the statute can be applied constitutionally. There is no indication that the Louisiana statute in *Foucha* prohibited a judge from considering the individual's mental condition, but the statute was still unconstitutional. *See Foucha*, 504 U.S. at 83. The reason why Wis. Stat. § 971.17(4)(d) is facially unconstitutional is that it never *requires* a finding that the individual is currently both mentally ill and dangerous. Yet, such a finding is not optional; it is mandatory.

2. The Wisconsin court decision is contrary to and an unreasonable application of *Foucha*.

Given that Mr. Stowe's state appeal was decided based on a prior state court holding in *Randall*, the focus of this proceeding is on the state court decision in *Randall*. In *Randall*, the Wisconsin Supreme Court upheld the conditional release standard against a claim that it violated *Foucha*. *See Randall*, 192 Wis. 2d 800.[3] The court concluded that a "single standard for commitment, based on dangerousness alone, is permissible" under the Due Process Clause if three criteria are met: (1) the maximum duration of the commitment is

[3] At issue was the 1987-88 version of the statute, which has since been amended. However, what was true of the 1987-88 version is true of the

limited to reflect the acquittee's specific crimes; (2) the State bears the burden of proof at a recommitment or release hearing; and (3) the State must confine the acquittee "in a facility appropriate to his or her mental condition." *Id.* at 840-841.

Randall relied significantly on Justice O'Connor's concurrence in *Foucha*, which the court found had "left the door open" to statutes permitting the continued confinement of a non-mentally ill acquittee. *Randall*, 192 Wis. 2d at 832 n.22 (citing *Foucha*, 504 U.S. at 87-88). Justice O'Connor jointed the majority's opinion in Parts I and II of the decision, which contain the substantive due process holding. *Foucha*, 504 U.S. at 78-83. In a separate concurrence, she also wrote to clarify that, "[t]his case does not require us to pass judgment on more narrowly drawn laws that provide for detention of insanity acquittees, or on statutes that provide for punishment of persons who commit crimes while mentally ill." *Foucha*, 504 U.S. at 87. To this end, she wrote, "I do not understand the Court to hold that Louisiana may never confine dangerous insanity acquittees after they regain mental health." *Id.* at 87.

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current version—it "permits the continued confinement of a sane but 'dangerous' insanity acquittee." *See id.* at 807.

Justice O'Connor generally stated that, "[i]t might therefore be permissible for Louisiana to confine an insanity acquittee who has regained sanity if, unlike the situation in this case, the nature and duration of detention were tailored to reflect pressing public safety concerns related to the acquittee's continuing dangerousness." *Id.* (citing *United States v. Salerno*, 481 U.S. 739, 747-751 (1987); *Schall v. Martin*, 467 U.S. 253, 264-271, (1984); *Jackson*, 406 U.S. at 738)).

Briefly, Justice O'Connor mentioned Wisconsin's statute as potentially passing muster. Yet, her reference indicates that she believed Wisconsin law required something that it does not in fact require: that the state "hold acquittees in facilities appropriate to their mental condition." *See Foucha*, 504 U.S. at 89.

Justice O'Connor unambiguously stated, however, "I think it clear that acquittees could not be confined as mental patients absent some medical justification for doing so; in such a case the necessary connection between the nature and purposes of confinement would be absent." *Foucha*, 504 U.S. at 88.

In its effort to distinguish *Foucha*, the *Randall* court focused on a couple of differences between the Louisiana statute and Wisconsin's provision. First, whereas the NGI commitment in *Foucha* was indefinite, Wisconsin has time limits. *Randall*, 192 Wis. 2d at 808-809.

Second, in Wisconsin, the state bears the burden of proof by clear and convincing evidence to prove current dangerousness. *Id.* at 808. The Seventh Circuit likewise relied on these features. (App.A:5).

Randall was wrong to use Justice O'Connor's concurrence as a basis to uphold Wisconsin's unconstitutional release standard. First, concurrences may only be considered to interpret fragmented decisions. *See Marks v. United States*, 430 U.S. 188 (1977). Parts I and II of *Foucha* are not fragmented—instead, the holding on substantive due process was a majority holding. In a footnote, *Randall* noted this breakdown of the court; however, in the body of the decision—to shore up its reliance on Justice O'Connor's concurrence—the court described *Foucha* as "divided." *Randall*, 192 Wis. 2d at 830, 831 n 20.

Second, Justice O'Connor's generalized statements about hypothetical alternative provisions that might be constitutional does not negate her explicit agreement with the majority's specific statement as a matter of due process, an NGI "acquittee may be held as long as he is both mentally ill and dangerous, but no longer." *Foucha*, 504 U.S. at 77. Nor should her passing use of the term "medical justification" be considered a separate concept from mental illness. There is no medical justification for locking a person into a mental institution if the person does not have current mental illness.

The differences between the Louisiana statute and Wisconsin statute noted by *Randall* and the Seventh Circuit are immaterial to the specific feature that Mr. Stowe challenges. The fact that commitment in Wisconsin is not indefinite does not excuse the failure to require proof of current mental illness because due process requires that the "nature" as well as the duration of the commitment bear reasonable relation to the purpose for which the individual is committed. *See Jones*, 463 U.S. at 368. And as to the burden of proof issue, the fact that the state is required to prove current dangerousness does not excuse the fact that no proof whatsoever of mental illness is required because these are two separate criteria.

In short, *Foucha* held that an NGI acquittee may be held for only so long as he or she is both mentally ill and dangerous. Louisiana's statute allowed continued detention based on a finding of dangerousness alone. This feature rendered Louisiana's statute unconstitutional. Wisconsin's release statute shares this feature. Therefore, Wisconsin's statute is also unconstitutional. By upholding the standard, *Randall* was contrary to and an unreasonable application of *Foucha*. And by upholding the same standard in Mr. Stowe's case, the court of appeals decision was likewise infirm.

This Court is asked to grant review to clarify that Justice O'Connor's concurrence did not leave "the door open" to statutes permitting the continued confinement of non-mentally ill acquittees.[4] *See Randall*, 192 Wis. 2d at 832 n.22. Instead, *Foucha*'s rule extends to all NGI commitments, irrespective of their duration and the allocation of the burden of proof.

CONCLUSION

Mr. Stowe respectfully asks the Court to grant his petition for writ of certiorari.

Dated this 19th day of November, 2024.

Respectfully submitted,

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[4] Mr. Stowe could find no other state that has viewed Justice O'Connor's concurrence in this manner, and instead, every other state he has consulted has enacted statutes that comply with *Foucha*.