No. _____

In The
Supreme Court of the United States

STATE OF LOUISIANA,

Petitioner,

v.

JAMAAL EDWARDS,

Respondent.

On Petition For A Writ Of Certiorari To The Louisiana Supreme Court

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether this Court's plurality opinion in *Foucha v. Louisiana*, 504 U.S. 71 (1992), which prevents States from continuing to hold insanity acquittees who have supposedly "regained their sanity" but who are proven to still be dangerous based on demonstrated actions while committed, should be overruled or at least substantially modified.

RELATED PROCEEDINGS

State of Louisiana v. Jamaal Edwards, No. 13-4134, Louisiana Twenty-Fourth Judicial District Court, Judgment entered on July 20, 2016, adjudicating Respondent not guilty by reason of insanity, with reasons provided on July 27, 2016.

State of Louisiana v. Jamaal Edwards, No. 13-4134, Louisiana Twenty-Fourth Judicial District Court, Judgment entered on January 5, 2022, ordering Respondent's discharge following hearing on continued commitment on December 16, 2021.

State of Louisiana v. Jamaal Edwards, No. 22-K-41, Louisiana Fifth Circuit Court of Appeal, Judgment entered on May 25, 2022, remanding case to Louisiana Twenty-Fourth Judicial District Court to determine conditions of release.

State of Louisiana v. Jamaal Edwards, No. 13-4134, Louisiana Twenty-Fourth Judicial District Court, Judgment entered on May 31, 2022, imposing conditions of release after Louisiana Fifth Circuit Court of Appeal remand.

State of Louisiana v. Jamaal Edwards, No. 13-4134, Louisiana Twenty-Fourth Judicial District Court, Judgment entered on June 15, 2022, finding Respondent in violation of conditions of release.

State of Louisiana v. Jamaal Edwards, No. 22-KK-983, Louisiana Supreme Court, Judgment entered on November 1, 2022, denying writs with reasons from review of

RELATED PROCEEDINGS – Continued

Louisiana Fifth Circuit Court of Appeal judgment entered on May 25, 2022 in case no. 22-K-41 and Louisiana Twenty-Fourth Judicial District Court judgment entered on January 5, 2022 in case no. 13-4134.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, the State of Louisiana, respectfully petitions for a writ of certiorari to review the judgment of the Louisiana Supreme Court.

OPINIONS BELOW

The ruling of the Louisiana Supreme Court is reported at 348 So.3d 1269 and is reprinted in the Appendix ("App.") at App. 1-10. The ruling of the Louisiana Fifth Circuit is unpublished but is reported at 2022 WL 1657305 and is reprinted at App. 11-39. The ruling of the Louisiana District Court discharging the Respondent is unreported and is reprinted at App. 40-50.

JURISDICTION

The Louisiana Supreme Court issued its writ denial and per curiam with reasons therefor on November 1, 2022. App. 1-10. Neither party sought rehearing. By the State's calculation, this petition is due on January 30, 2023. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution provides in pertinent part that: "[. . .] [n]o 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." [. . .]

INTRODUCTION

In 2013, Respondent Jamaal Edwards murdered his fiancé and was indicted for her second degree murder. The Respondent claimed insanity, and in 2016 his gambit paid off when he was found not guilty by reason of insanity and was committed to the Eastern Louisiana Mental Health System rather than being sent to the Louisiana State Penitentiary for life. However, in December of 2021 at a continued commitment hearing, the truth emerged that the Respondent had never shown any signs of mental illness while at the mental hospital, that the Respondent's murder of his fiancé apparently stemmed from his substance abuse at the time, and that the only "disorder" that the Respondent has is antisocial personality disorder. The Respondent's doctors explained that he continues to be dangerous, engaging in deliberate and calculated acts of violence at the mental hospital, including physical

violence against male staff and sexual violence against female staff. The Respondent's doctors further expressed concern about the Respondent's substance abuse, given that substance abuse was related to the murder and given that the Respondent apparently does not see a problem with him using drugs again.

However, constrained by this Court's plurality opinion in *Foucha v. Louisiana*, 504 U.S. 71 (1992) that an insanity acquittee may only be held in continued commitment if he is **both** mentally ill **and** dangerous, the Respondent's doctors reluctantly acknowledged that they have no choice but to recommend discharge given that although the Respondent was found not guilty by reason of insanity and is indisputably still dangerous, he is not "mentally ill." The Louisiana Supreme Court would later deny the State's writ application (which the State filed so as to get this matter into a posture for this Court's eventual review) "reluctantly" and "with trepidation," providing detailed reasons for its writ denial "to urge the United States Supreme Court to reexamine this area of law." So too urges the State of Louisiana.

This case involves an indisputably dangerous Respondent who has essentially secured a verdict of not guilty by reason of insanity to second degree murder by persuading a factfinder that he was insane, and who has now in a bait and switch maneuver secured his release from commitment by now positing that, aside from antisocial personality disorder, there is actually nothing wrong with him at all. As such, this case presents the ideal posture for this Court to reconsider its

plurality opinion in *Foucha v. Louisiana*, 504 U.S. 71 (1992), which, by prohibiting the continued commitment of insanity acquittees unless they are **both** mentally ill **and** dangerous, mandates the release of indisputably dangerous individuals such as the Respondent back into our communities. A consideration of the interests at stake, of the sound reasoning of the dissents in *Foucha*, and of subsequent jurisprudence reinforcing the vast discretion of States in legislating on mental health and insanity counsel that this Court should take this opportunity to overrule or at least substantially modify its plurality opinion in *Foucha* so as to ensure that the States have the constitutional imprimatur to provide for the commitment of individuals who have, after being adjudicated not guilty by reason of insanity, continued to be dangerous to our communities.

STATEMENT OF THE CASE

1. The murder of Ms. Tracy Nguyen

On August 10, 2013, Respondent Jamaal Edwards fatally shot his fiancé, Ms. Tracy Nguyen. The Respondent had previously in May of 2013 been admitted to the East Jefferson General Hospital, exhibiting psychotic behavior. The Respondent was released after a ten-day visit, but in August of 2013, the Respondent began to again exhibit bizarre and paranoid behavior, believing that people were watching him and were out to harm him, keeping Ms. Nguyen up at night, and

believing that his own eleven-year-old nephew was the devil. The Respondent's mother became alarmed at this behavior and attempted to speak to the Respondent and Ms. Nguyen about it, causing the Respondent to exhibit even more paranoid behavior. The Respondent shortly thereafter retrieved a firearm from Ms. Nguyen's vehicle, shot Ms. Nguyen, stood over her body shouting "like Tarzan," and then rolled around a side yard. During and after his apprehension, the Respondent continued to engage in bizarre behavior. While the Respondent was being held pending trial, there were numerous altercations that were instigated by the Respondent. App. 51-58.

2. The Respondent is found not guilty by reason of insanity

The Respondent was ultimately indicted for second degree murder of Ms. Tracy Nguyen in violation of La. R.S. 14:30.1. However, on July 20, 2016, the Respondent was found not guilty by reason of insanity pursuant to La. C.Cr.P. art. 558.1 and was committed to the Eastern Louisiana Mental Health System. On July 27, 2016, the Louisiana District Court provided reasons for judgment, explaining the history of this case, further explaining that three experts were of the opinion that the Respondent was insane at the time of the offense,[1] and further explaining that it found the

[1] Relative to insanity under Louisiana law, La. R.S. 14:14 provides that "[i]f the circumstances indicate that because of a mental disease or mental defect the offender was incapable of distinguishing between right and wrong with reference to the

Respondent to be a danger to others. In so determining dangerousness, the Louisiana District Court observed that: (1) the Respondent shot and killed his girlfriend (or fiancé), with whom he apparently had a good relationship, while actively psychotic; (2) that the Respondent has had other psychological symptoms since the murder; (3) that the Respondent has a lengthy history of altercations with patients, inmates, and staff members; (4) that the Respondent fashioned a knife out of a toothbrush while incarcerated; (5) that the Respondent has an affinity for weapons; and (6) that expert testimony reflected that the Respondent is a danger to others. Accordingly, the Respondent was committed to the Eastern Louisiana Mental Health System. App. 51-58.

3. In a complete reversal, the Respondent is later found to not be "mentally ill" and is ordered discharged based on this new and contrary determination

On December 16, 2021, the Louisiana District Court conducted a hearing as to whether the Respondent should remain committed to the mental hospital. Drs. Deonna Dodd and Shannon Sanders testified to the effect that, while the Respondent in 2016 secured a finding of not guilty by reason of insanity by persuading the Louisiana District Court (and the three experts relied upon by the Louisiana District Court) that he

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conduct in question, the offender shall be exempt from criminal responsibility."

was insane, in actuality: (1) the Respondent has never shown any signs of mental illness while at the mental hospital; (2) the Respondent thus has never needed antipsychotic medication while at the mental hospital; (3) the Respondent's murder of his fiancé apparently stemmed from his substance abuse at the time (which does not constitute insanity under Louisiana law);[2] and (4) the only "disorder" that the Respondent has is antisocial personality disorder (which makes one more prone to criminal conduct but which is not considered a "treatable mental illness"). App. 93-139.

More specifically, Dr. Dodd explained that the Respondent has consistently shown serious violence during his time at the mental hospital, including physical violence towards patients and staff (as one example, physically assaulting a staff member resulting in a jaw fracture and hearing loss) and sexual violence towards women (such as sexually grabbing and masturbating in front of female staff). Dr. Dodd further explained that the Respondent's violence is calculated and not impulsive (in particular, he acts violently whenever the staff try to move him to a less restrictive part of the mental hospital because he prefers the "accommodations" in the higher security part of the mental hospital). Dr. Dodd concluded that the Respondent is in fact dangerous to others but that this danger does not stem

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[2] Louisiana jurisprudence is clear that intoxication and insanity are separate defenses and voluntary intoxication cannot substantiate an insanity defense. *State v. Williams*, 09-1056 (La. 5/13/09), 8 So.3d 548; *State v. Scott*, 344 So.2d 1002, 1004-1006 (La. 1977).

from "mental illness" (except for the Respondent's antisocial personality disorder and disregard for others) and while the Respondent is seriously violent, a danger to others, has no remorse for the acts of violence he engaged in at the mental hospital, and "will use manipulation, criminal behavior, violence, to obtain whatever his goal is at the time," because the Respondent is not "mentally ill" she did not recommend further commitment at the mental hospital. Dr. Sanders testified consistently with Dr. Dodd and also discussed the Respondent's continuous violence at the mental hospital and her concerns about the Respondent seeing no problems with potentially using drugs again, which apparently were involved in the Respondent's murder of his fiancée. App. 93-139.

Despite the Respondent pulling off a "bait and switch" maneuver of claiming insanity in 2016 to escape a conviction and life without parole sentence for second degree murder under La. R.S. 14:30.1 and then essentially in 2021 embracing the proposition that he is not (and never was) "insane" to obtain discharge, the Respondent's doctors, constrained by this Court's plurality opinion in *Foucha v. Louisiana*, 504 U.S. 71 (1992) that an insanity acquittee may only be held in continued commitment if he is **both** mentally ill **and** dangerous, reluctantly acknowledged that they have no choice but to recommend discharge given that although the Respondent was found not guilty by reason of insanity and is indisputably still dangerous, he is not "mentally ill." After briefing, the Louisiana District

Court, on January 5, 2022, issued an order unconditionally discharging the Respondent. App. 40-50.

4. The Louisiana Fifth Circuit authorized the Louisiana District Court to impose conditions of release, which the Respondent quickly violated

After obtaining a stay, the State sought review, and on May 25, 2022, the Louisiana Fifth Circuit denied writs in part and granted writs in part. In particular, the Louisiana Fifth Circuit held that the Louisiana District Court correctly ruled that the Respondent had to be discharged from the mental hospital, but that the Louisiana District Court had the authority to place conditions upon the Respondent's release, and remanded for the Louisiana District Court to determine what conditions, if any, to impose. Of note, the Honorable Judge John Molaison, Jr. concurred and expressed concerns about the implications of this Court's plurality opinion in *Foucha*, in particular echoing the continuing relevance of Justice Thomas's dissent in *Foucha*. App. 11-39.

On May 31, 2022, the Louisiana District Court conducted a hearing pursuant to the Louisiana Fifth Circuit's remand order and ordered the Respondent released with several conditions so as to protect the public safety, including a condition that the Respondent not contact any of the staff at the mental hospital. Shortly after the Respondent's release, the Respondent contacted a female nurse with whom he was and is

disturbingly fixated. The Respondent was arrested, and on June 15, 2022, the Louisiana District Court sentenced the Respondent to fifteen days in parish prison for violating his conditions of release. App. 59-71, 72-92.

5. The Louisiana Supreme Court denied writs "reluctantly" and "with trepidation," and urged this Court "to reexamine this area of law"

The State meanwhile sought review in the Louisiana Supreme Court, positing in the Louisiana Supreme Court (as the State did in the Louisiana District Court and Louisiana Fifth Circuit), that *Foucha v. Louisiana*, 504 U.S. 71 (1992) was wrongly decided and should be overruled or at least substantially modified; the State of course acknowledged that only this Court is at liberty to overrule or modify its own precedents but sought review in the Louisiana Supreme Court so as to ensure that this matter would be in the proper posture for presentation to this Court on a petition for a writ of certiorari. On November 1, 2022, the Louisiana Supreme Court denied writs with a detailed per curiam, carefully explaining the procedural history and facts of this case, and expressing concerns that "Respondent's potential for future violence is clear and apparent," that "[h]is antisocial personality disorder in conjunction with his persistent substance abuse is a recipe for almost certain disaster," that "[t]he State has shown by clear and convincing evidence that [the Respondent] is dangerous," and that "[r]eleasing him into

the community under these circumstances endangers public safety." However, only this Court has the authority to overrule or modify its own precedents (and the Louisiana Legislature was compelled after this Court decided *Foucha* to amend Louisiana law to comply therewith). As such, the Louisiana Supreme Court ultimately ruled that "we are constrained under United States Supreme Court precedent and existing statutory enactments in response thereto to deny the State's writ application, which we reluctantly do with trepidation." The Louisiana Supreme Court then noted that it provided detailed reasons with its writ denial, an unusual course of action for the Louisiana Supreme Court for a case in this posture, "to urge the United States Supreme Court to reexamine this area of law and the Louisiana Legislature to act." The State now files the instant timely petition for a writ of certiorari. App. 1-10.

REASONS FOR GRANTING THE PETITION

1. *Foucha* warrants reconsideration, as *Foucha* hamstrings States from protecting society from dangerous individuals, is not worthy of stare decisis, and should be supplanted by a test that focuses on dangerousness

Respectfully, this Court's 1992 plurality opinion in *Foucha v. Louisiana*, 504 U.S. 71 (1992) warrants reconsideration. *Foucha* hamstrings States from protecting society by mandating the release of indisputably

dangerous insanity acquittees like the Respondent when the State is unable to prove present mental illness. A consideration of the factors underlying whether to overrule a wrongly decided case strongly counsels declining to accord *Foucha* the shield of stare decisis. Furthermore, to the extent that *Foucha* raised fair constitutional concerns with placing the burden on an insanity acquittee to prove that he is no longer dangerous, the State does not ask this Court for a return to the pre-*Foucha* system, but rather only that this Court find that to continue to commit an insanity acquittee, the State bears the burden of proving by clear and convincing evidence that the insanity acquittee is still dangerous (without requiring the State to prove present mental illness).

a. *Foucha* hamstrings the important State interest in protecting society from dangerous insanity acquittees

Prior to this Court's 1992 plurality opinion in *Foucha*, Louisiana law authorized the continued commitment of a defendant found not guilty by reason of insanity until such a time as he was determined to be no longer dangerous, and La. C.Cr.P. art. 657 provided in pertinent part at the time that to be entitled to discharge, an insanity acquittee bore the burden of proving that he could be discharged without danger to others or himself. Indeed, Official Revision Comment (b) to La. C.Cr.P. art. 657 provided in pertinent part, referencing the American Law Institute Model Penal Code, that:

> [. . .] It seems preferable to make dangerousness the criterion for continued custody, rather than to provide that the committed person may be discharged or released when restored to sanity as defined by the mental hygiene laws. Although his mental disease may have greatly improved, such a person may still be dangerous because of factors in his personality and background other than mental disease. Also, such a standard provides a possible means for the control of the occasional defendant who may be quite dangerous but who successfully feigned mental disease to gain an acquittal." [. . .]

Official Comment (b) to La. C.Cr.P. art. 657.

In their dissents in *Foucha*, Justice Kennedy and Justice Thomas echoed this sage advice as to making dangerousness the linchpin for continued commitment. *Foucha*, 504 U.S. at 99, Kennedy, J., dissenting; *Foucha*, 504 U.S. at 102-112, Thomas, J., dissenting.

However, in *Foucha*, a plurality of this Court upended this rule and dictated that henceforth the Due Process and Equal Protection Clauses of the Fourteenth Amendment would require that an insanity acquittee may only be held in continued commitment so long as it is established by clear and convincing evidence that he is **both** mentally ill **and** dangerous. The following year, Louisiana amended La. C.Cr.P. art. 657 in Act 700 of 1993 to comply with *Foucha*. Respectfully, *Foucha* was wrongly decided, and this Court should now overrule or at least substantially modify *Foucha*

and restore much-needed flexibility and discretion to Louisiana and to the other States as to the commitment of demonstrably dangerous insanity acquittees.

In *Foucha*, this Court considered a situation eerily similar to the instant case. The defendant in *Foucha* had been found not guilty by reason of insanity and committed, and when he later was examined to determine whether he could be safely released, the doctors found that (similar to the instant Respondent) he: (1) "probably suffered from a drug induced psychosis but that he had recovered from that temporary condition;" (2) "evidenced no signs of psychosis or neurosis and was in 'good shape' mentally;" (3) "had, however, an antisocial personality, a condition that is not a mental disease and that is untreatable;" and (4) had been involved in violent altercations while confined; accordingly, the doctors could not certify that he would not be dangerous were he released. *Foucha*, 504 U.S. at 74-75. The Louisiana Courts ordered the defendant in *Foucha* returned to the mental hospital for continued commitment based upon his continuing dangerousness, but this Court reversed. This Court found that the State could not perpetuate that defendant's commitment due to his antisocial personality disorder/his continued dangerousness, finding that to continue to hold an insanity acquittee the State must show by clear and

convincing evidence that he is **both** mentally ill **and** dangerous. *Foucha*, 504 U.S. at 74-86.[3, 4]

Respectfully, the *Foucha* plurality cast aside a tested system focused on dangerousness which ably addressed the continuing dangerousness of some insanity acquittees. Given that the insanity defense may only be raised by a defendant himself and given that a finding of not guilty by reason of insanity is at its core a finding that the defendant committed the crime because he suffers from some sort of mental defect, the pre-*Foucha* system wisely considered the issue of mental illness for an insanity acquittee to be "stipulated" (by a de facto "stipulation" from the defendant that he has a mental defect by raising the insanity defense in the first place and then by a finding from the jury or the court agreeing with the defendant's "stipulation"). With the issue of mental illness for an insanity acquittee so "stipulated" (and with the inherent uncertainty as to whether a mental illness has been "cured"), the pre-*Foucha* system accordingly focused its attention on the outstanding issue of dangerousness. The *Foucha* plurality cast aside this able system, and as Justice Thomas bemoaned in his dissent, thus cast aside "not some quirky relic of a bygone age, but a codification of the current provisions of the American Law Institute's

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[3] Contrast with committing a defendant found not guilty by reason of insanity immediately after his verdict; *Foucha* noted this distinction. *Foucha*, 504 U.S. at 76-77.

[4] See also *State v. Boudreaux*, 605 So.2d 608 (La. 1992) (the Louisiana Supreme Court summarizing *Foucha* shortly after this Court handed it down).

Model Penal Code," and did so without coherently "explain[ing] precisely what is wrong with it." *Foucha*, 504 U.S. at 102, Thomas, J., dissenting.

The practical result of the plurality opinion in *Foucha* was necessarily to compel the release of demonstrably dangerous individuals, including the defendant in *Foucha* itself and including the instant Respondent, because although they had essentially "stipulated" to their mental defects by raising the insanity defense and although they were clearly still dangerous, the State could not prove present mental illness by clear and convincing evidence. The Louisiana Supreme Court in this case best summed up this clear and present threat to public safety when it noted below that "Respondent's potential for future violence is clear and apparent," that "[h]is antisocial personality disorder in conjunction with his persistent substance abuse is a recipe for almost certain disaster," that "[t]he State has shown by clear and convincing evidence that [the Respondent] is dangerous," and that "[r]eleasing him into the community under these circumstances endangers public safety." App. 3, 9. However, the Louisiana Supreme Court conceded that "we are constrained under United States Supreme Court precedent and existing statutory enactments in response thereto to deny the State's writ application, which we reluctantly do with trepidation," further noting that it provided detailed reasons with its writ denial "to urge the United States Supreme Court to reexamine this area of law and the Louisiana Legislature to act." App. 9-10. The Louisiana Legislature had

passed Act 700 of 1993 amending La. C.Cr.P. art. 657 because this Court's 1992 plurality opinion in *Foucha* compelled the Louisiana Legislature to do so. Only this Court may restore the authority to Louisiana and the other States to consider legislatively whether a system that focuses on dangerousness better protects the public safety. As discussed in more detail infra, the well-reasoned dissents in *Foucha* and subsequent jurisprudential developments counsel that this Court should now take this opportunity to overrule or at least substantially modify *Foucha*.

b. Stare decisis does not compel maintaining *Foucha*

Stare decisis counsels that precedent should not be overruled lightly. However, as this Court pointed out recently in *Ramos v. Louisiana*, 140 S.Ct. 1390 (2020):

> [. . .] Of course, the precedents of this Court warrant our deep respect as embodying the considered views of those who have come before. But stare decisis has never been treated as "an inexorable command." And the doctrine is "at its weakest when we interpret the Constitution" because a mistaken judicial interpretation of that supreme law is often "practically impossible" to correct through other means. To balance these considerations, when it revisits a precedent this Court has traditionally considered "the quality of the decision's reasoning; its consistency with related decisions; legal developments since the

> decision; and reliance on the decision." In this case, each factor points in the same direction.

Ramos, 140 S.Ct. at 1405 (footnotes omitted).

Foucha implicated a plurality opinion of this Court interpreting the Due Process and Equal Protection Clauses of the Fourteenth Amendment, and accordingly, stare decisis should be considered "at its weakest" given that *Foucha* thus interpreted the United States Constitution and thus hamstrings the States in acting as laboratories of democracy with regard to how to best protect society from still dangerous insanity acquittees; only a ruling from this Court overruling or at least substantially modifying *Foucha* can restore this authority to the States. The factors listed by this Court also counsel in favor of revisiting the correctness of *Foucha*. First, "the quality of the decision's reasoning" is suspect, given that *Foucha* was a plurality scant on reasoning when compared to the more thorough and compelling dissents from Justice Kennedy and Justice Thomas, which, as discussed in more detail infra, meticulously explained the ocean of constitutional difference between insanity acquittees versus other classes of individuals which more than justifies permitting the States to treat insanity acquittees differently. Second, *Foucha* was, as discussed in more detail infra, not at all dictated by other precedents. Third, *Foucha* has, as discussed in more detail infra, been undermined by more recent precedents from this Court relative to the vast discretion of States on mental health and insanity issues. Fourth, reliance interests on *Foucha* are weak to the point of being practically nonexistent; certainly,

insanity acquittees who were so acquitted while *Foucha* was good law may seek to claim that they are "grandfathered in" to the *Foucha* regime (although the State does not concede that this argument would have merit and this Court need not address that issue in this case), but overruling or substantially modifying *Foucha* upsets no meaningful reliance interests and would merely restore to the States their rightful discretion.

In his concurrence in *Ramos*, Justice Kavanagh pointed out that "some of the Court's most notable and consequential decisions have entailed overruling precedent," collecting numerous cases of monumental constitutional magnitude across both the civil and the criminal spectrum, many of which we now take for granted and the rest of which future generations will likely one day themselves take for granted. *Ramos*, 140 S.Ct. at 1411-1412, Kavanaugh, J., concurring in part. Justice Kavanaugh, in explaining his vote in *Ramos*, further noted that in deciding whether to overrule precedent, it is an appropriate consideration to ask whether "the prior decision caused significant negative jurisprudential or real-world consequences." *Id.* at 1415. Here, the real world impact of *Foucha* is readily apparent: violent criminals who themselves "stipulated" to being mentally defective by raising the insanity defense in the first place and who are still indisputably dangerous may go free simply because a State cannot prove present mental illness (and even worse, because they may have feigned "mental illness" to secure an insanity acquittal and thereafter convince

a different factfinder that they are not insane after all to secure their release from commitment).

The State acknowledges that if this Court were to overrule or substantially modify *Foucha*, this would not grant immediate relief to Louisiana, as the present version of La. C.Cr.P. art. 657 is essentially a "codification" of *Foucha.* However, this informs the reason why stare decisis is "at its weakest" when it comes to matters of constitutional interpretation. As discussed above, the Louisiana Legislature in Act 700 of 1993 amended La. C.Cr.P. art. 657 specifically to come into compliance with *Foucha*. Any argument that certiorari should be denied because of the present version of La. C.Cr.P. art. 657 overlooks the Catch-22 inherent in this situation. Until such a time as this Court overrules or substantially modifies *Foucha*, the Louisiana Legislature is hamstrung from considering whether to amend La. C.Cr.P. art. 657 to focus on dangerousness without violating the oath of office that we all take to uphold the United States Constitution, of which this Court is the final arbiter. See La. R.S. 42:52. Put another way, there is simply no other realistic way for the question of whether to overrule or substantially modify *Foucha* to reach this Court other than in this posture, given that passing a law in violation of *Foucha* to thereafter seek certiorari would require our legislators and legislative stakeholders to violate their oaths of office by passing a law that they know to (under *Foucha*) be unconstitutional.

c. The State does not ask for a complete return to the pre-*Foucha* system, but merely for dangerousness to be the standard, even if the State bears the burden of proving dangerousness

Importantly, the State does not ask this Court to go so far as to completely endorse the pre-*Foucha* law, which may still be potentially problematic. Pre-*Foucha*, La. C.Cr.P. art. 657 placed the burden upon an insanity acquittee to prove that he was no longer dangerous; obviously, proving a negative is difficult and raises due process concerns, concerns that were fairly pointed out in *Foucha*. However, the plurality solution in *Foucha* (i.e., to require the State to prove by clear and convincing evidence **both** mental illness **and** dangerousness to continue to hold an insanity acquittee) falls short of protecting the public safety and is not in keeping with the vast discretion afforded to States in legislating on mental health and insanity.

The State would respectfully suggest that this Court's concerns in *Foucha* about placing the burden on the insanity acquittee can be remedied by modifying *Foucha* to hold the following: to continue to hold an insanity acquittee, the State bears the burden of proving by clear and convincing evidence that the insanity acquittee is still dangerous (without requiring the State to prove present mental illness). This is in keeping with the fact that the insanity defense itself only comes into play if raised by a defendant and is accordingly tantamount to a stipulation of mental defect, is in keeping with the vast discretion afforded to States

in legislating on mental health and insanity, is in keeping with the need to protect society from dangerous insanity acquittees, and is in keeping with the need for States to have a mechanism to discourage abuses of the insanity defense (similar to what likely happened in this case and what likely happened in *Foucha* itself). Indeed, the *Foucha* plurality hinted as to the true problem:

> [. . .] Under the state statute, *Foucha* is not now entitled to an adversary hearing at which the State must prove by clear and convincing evidence that he is demonstrably dangerous to the community. Indeed, the State need prove nothing to justify continued detention, for the statute places the burden on the detainee to prove that he is not dangerous.

Foucha, 504 U.S. at 81-82.

This Court's concern in *Foucha* about placing the burden on the insanity acquittee is rectified by the State's suggested rule, which was also suggested by the Louisiana Supreme Court below when the Louisiana Supreme Court observed that the State had proven the Respondent dangerous by clear and convincing evidence. As an additional safeguard, the State would suggest that to prove continuing dangerousness by clear and convincing evidence, this Court might consider restrictions such that the State may not rely solely upon either the nature of the crime itself or upon any diagnosis of any personality disorder. This strikes a fair (and the State would submit constitutional) balance in ensuring that an insanity acquittee's

due process rights are honored while simultaneously respecting the vast discretion afforded to States in their treatment of insanity and the critical duty of States to protect society from still-dangerous insanity acquittees like the Respondent.

2. *Foucha* was wrongly decided and should be overruled or at least substantially modified

Respectfully, the State submits that *Foucha* was wrongly decided and should be overruled or at least substantially modified. In coming to its conclusion, the *Foucha* plurality suggested that insanity acquittees are similarly situated to other classes of individuals (in particular, individuals who are outright found "not guilty," civil commitment patients, and convicted criminal defendants who are still dangerous at the end of their prison terms). As the dissents from Justice Kennedy and Justice Thomas counsel, insanity acquittees are distinct from these classes of individuals such that a State may constitutionally decide that they warrant different treatment. The flaws in *Foucha* are only further highlighted by subsequent jurisprudence, in particular jurisprudence discussing the commitment of dangerous sexual predators and discussing the vast discretion afforded to States in legislating on insanity (including the right to abolish the insanity defense altogether). Furthermore, the standard suggested by the State of requiring the State to prove dangerousness by clear and convincing evidence to continue to hold an insanity acquittee would negate any concerns about "indefinite" commitment.

a. Insanity acquittees are not similarly situated to the other classes of individuals relied upon by the *Foucha* plurality and thus may constitutionally be treated differently

The flaws in the reasoning in *Foucha* and the soundness of the reasoning in the dissents gravitate around the simple truth that an insanity acquittee is simply not similarly situated to individuals who are outright found "not guilty," to civil commitment patients, or to convicted criminal defendants who are still dangerous at the end of their prison terms. The *Foucha* plurality essentially put insanity acquittees in similar positions to these three classes of individuals so as to extrapolate jurisprudential principles applicable to those classes to insanity acquittees. However, insanity acquittees are substantially different from those classes of individuals, and those differences counsel that a State may constitutionally decide that insanity acquittees thus warrant different treatment.[5]

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[5] In this vein, Justice Thomas suggested that the *Foucha* plurality's procedural due process analysis "is in reality an equal protection analysis" such that "there being no rational distinction between A and B, the State must treat them the same." *Foucha*, 504 U.S. at 107-108, Thomas, J., dissenting. This Court has pointed out that "a classification neither involving fundamental rights nor proceeding along suspect lines is accorded a strong presumption of validity" and that "[s]uch a classification cannot run afoul of the Equal Protection Clause if there is a rational relationship between the disparity of treatment and some legitimate governmental purpose." *Heller v. Doe by Doe*, 509 U.S. 312, 319-320 (1993) (internal citations omitted).

i. Insanity acquittees are not similarly situated to "outright" acquittees

Relative to the comparison of insanity acquittees to those outright found not guilty, the *Foucha* plurality noted that the State, relative to an insanity acquittee, has no punitive interest because "[a]s Foucha was not convicted, he may not be punished" and that "Louisiana has by reason of his acquittal exempted Foucha from criminal responsibility as [La. R.S. 14:14] requires." *Foucha*, 504 U.S. at 80. Respectfully, this comparison is unavailing.

Justice Kennedy aptly pointed out that under Louisiana law, an individual who has been "acquitted" on the ground of insanity has necessarily been determined beyond a reasonable doubt to have committed the crime in question, albeit that the individual has also established the affirmative defense of insanity. *Foucha*, 504 U.S. at 92-93, Kennedy, J., dissenting.[6] As such, as to any insanity acquittee under Louisiana law, the State has of necessity complied with the requirements of *In re Winship*, 397 U.S. 358 (1970) that the State prove every element of the crime beyond a

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[6] This of course has not changed in the intervening years, as the Louisiana Supreme Court observed below that "[a] finding of not guilty by reason of insanity is a determination that he undoubtedly committed the charged criminal act but he cannot be punished for it because he was legally insane at the time of his actions." App. 9. The State further notes that pertinent Louisiana statutory law relative to finding a criminal defendant not guilty by reason of insanity (La. R.S. 14:14, La. C.Cr.P. art. 552, and La. C.Cr.P. art. 558.1) has not changed since this Court decided *Foucha*.

reasonable doubt, and "[i]t is well settled that upon compliance with *In re Winship*, the State may incarcerate on any reasonable basis." *Foucha*, 504 U.S. at 92-93, Kennedy, J., dissenting. This is the very opposite of an individual who is outright found not guilty, as the defining characteristic of that individual is that the State failed to prove guilt beyond a reasonable doubt. Justice Thomas echoed the same sentiments. *Foucha*, 504 U.S. at 92-104, Thomas, J., dissenting.

Justice Kennedy, reflecting on the vast discretion afforded to the States in legislating on insanity, further observed that "[n]or should we entertain the proposition that this case differs from a conviction of guilty because petitioner has been adjudged 'not guilty by reason of insanity,' rather than 'guilty but insane.'" *Foucha*, 504 U.S. at 94, Kennedy, J., dissenting. Justice Kennedy further noted that "[a]lthough Louisiana has chosen not to punish insanity acquittees, the State has not surrendered its interest in incapacitative incarceration." *Id.* at 98. An insanity acquittee, aside from the legal principle that he cannot be "punished," thus bears little real similarity to an "outright" acquittee.[7]

[7] For similar reasons, an insanity acquittee is not similarly situated to an individual found incompetent to proceed to trial, as for the latter there has been no determination beyond a reasonable doubt that he committed a criminal act.

ii. Insanity acquittees are not similarly situated to civil commitment patients

The *Foucha* plurality relied most heavily upon the comparison of insanity acquittees to civil commitment patients, referencing the dual requirement of proving mental illness and dangerousness by clear and convincing evidence to civilly commit an individual as in *Addington v. Texas*, 441 U.S. 418 (1979). *Foucha*, 504 U.S. at 75-76. Respectfully, this glossed over substantial differences between the two, expounded on by Justice Kennedy and Justice Thomas. These differences include the facts that: (1) while a civil commitment is a civil proceeding focusing on predicting future dangerousness, an insanity acquittee commitment is a criminal proceeding focusing on past behavior with an individual who has of necessity already been found beyond a reasonable doubt to have criminally harmed society, and (2) unlike a civil commitment patient, an insanity acquittee has already been found to have committed a criminal offense because of a mental illness (by virtue of the insanity acquittee raising the insanity defense in the first place). The juxtaposition of these differences renders civil commitment patients and insanity acquittees dissimilar to each other in a fundamental way that amply justifies States in treating these two classes of individuals differently.

Justice Kennedy remarked as to the differences between civil commitment patients and insanity acquittees, noting that the protection of requiring proof beyond a reasonable doubt that the insanity acquittee committed the crime before moving on to the issue of

insanity accords insanity acquittees protections under the law far surpassing civil commitment patients, and that in keeping with the difference between civil and criminal proceedings, the past finding of insanity in a criminal case and the past finding of criminal conduct "possess intrinsic and ultimate significance." *Foucha*, 504 U.S. at 95-97, Kennedy, J., dissenting. Justice Thomas further noted the importance of deference to the States given that a determination of when an individual has "regained sanity" is by nature imprecise, and indeed despite advancements in psychiatry since a plurality of this Court decided *Foucha* in 1992, one often cannot readily say that a mental illness, as opposed to a physical illness, has been "cured." *Foucha*, 504 U.S. at 109, Thomas, J., dissenting. As discussed above, an insanity acquittee essentially stipulates that he is insane by raising the insanity defense in the first place, and this concession, juxtaposed against the fact that (unlike a civil commitment patient) an insanity acquittee has already been found beyond a reasonable doubt to have criminally harmed society, counsels that insanity acquittees are distinct from civil commitment patients for the purposes of allowing them to be governed by different standards for continued commitment.

These safeguards further counsel the wisdom of allowing States to attach consequences to an insanity plea so as to avoid its abuse, and indeed, Justice Thomas rightly expressed a concern that "the citizenry would not long tolerate the insanity defense if a serial killer who convinces a jury that he is not guilty by

reason of insanity is returned to the streets immediately after trial by convincing a different factfinder that he is not in fact insane." *Id.* at 111-112. This concern, again, is eerily indicative of what likely happened in the instant case (and what likely happened in *Foucha* itself). An insanity acquittee is thus constitutionally dissimilar from a civil commitment patient.

iii. Insanity acquittees are not similarly situated to convicted criminals who are still dangerous at the end of their prison terms

One may next seek to superficially compare an insanity acquittee to a convicted criminal who is nearing the end of his sentence but who is still dangerous, and may question whether overruling *Foucha* would expose that convicted criminal to "indefinite" detention based upon dangerousness even though he has never been found mentally ill. The *Foucha* plurality expressed this concern, observing that many convicted criminals have the same personality disorder that the defendant in *Foucha* (and the instant Respondent) have. Respectfully, this comparison overlooks the fact that, again, an insanity acquittee has already been found to be insane by his own stipulation in raising the insanity defense in the first place, whereas the same is not true of a convicted criminal. Put another way, the insanity acquittee has essentially stipulated to having some sort of mental defect, whereas the convicted criminal has made no such stipulation. This, coupled with the fact that, as discussed above, determining whether someone has "regained sanity" is a perilously

imprecise venture, makes insanity acquittees and convicted criminals constitutionally dissimilar from each other.[8] As Justice Kennedy aptly summarized, "insanity acquittees are a special class of offenders proved dangerous **beyond their own ability to comprehend**." *Foucha*, 504 U.S. at 99, Kennedy, J., dissenting.

iv. Similarly, there is no substantive due process issue relative to any "fundamental right" at issue

Relative to any substantive due process issue, Justice Thomas pointed out that the *Foucha* plurality's reference to the right to "freedom from bodily restraints" assumes too much. *Foucha*, 504 U.S. at 116-117, Thomas, J., dissenting. Justice Thomas pointed out that finding a generally applicable fundamental right to freedom from bodily restraints would make all prison sentences subject to strict scrutiny, obviously an inappropriate result, and that to apply strict scrutiny to the commitment of the mentally ill or insane would be unheralded and would fly in the face of jurisprudence applying deferential review to such actions. *Id.* at 115-120. Similarly, Justice Thomas bemoaned the fact that the *Foucha* plurality did not set a clear

[8] Justice Thomas further pointed out in his dissent that confining a still dangerous convicted criminal after the expiration of his prison term would create an ex post facto issue, whereas confining a still dangerous insanity acquittee would not, given that the order issued relative to an insanity acquittee is simply that he shall be confined until he meets the statutory criteria for release. *Foucha*, 504 U.S. at n.16, Thomas, J., dissenting.

standard of review; this garbled uncertainty calls for this Court's clarification. *Id.*

Furthermore, while the *Foucha* plurality referenced an observation in *Jones v. United States*, 463 U.S. 354 (1983) to the effect that an insanity acquittee is entitled to release once he either regains his sanity or is no longer dangerous, as Justice Thomas pointed out, "[w]e specifically noted in *Jones* that no issue regarding the standards for the release of insanity acquittees was before us." *Id.* at 120-121 (citing *Jones*, 463 U.S. at 368, n.11). The Louisiana Supreme Court noted below in *State v. Foucha*, 563 So.2d 1138, 1141-1142 (La. 1990), n.11 that this Court in *Jones* was merely commenting on District of Columbia statutory law. As such, this observation in *Jones* is either irrelevant or is at most dicta. In any event, to whatever extent that *Jones* itself stands for the proposition that an insanity acquittee may only be held in continued commitment as long as he is both mentally ill and dangerous, this Court should overrule or at least substantially modify that small portion of *Jones* for the same reasons that this Court should with the *Foucha* plurality opinion.

b. Subsequent jurisprudence only highlights the error in *Foucha*

While the above discussion in itself makes the error of the *Foucha* plurality plain, subsequent jurisprudence has only highlighted this error. In *Kansas v. Hendricks*, 521 U.S. 346 (1997), this Court considered the constitutionality of the Kansas Sexually Violent

Predator Act, which established procedures for the civil commitment of persons who, due to a mental abnormality or a personality disorder, are likely to engage in predatory acts of sexual violence. The Kansas Supreme Court invalidated the Act based upon the argument that civil commitment must be predicated upon a finding of a mental illness and that the Act's definition of mental abnormality, which included personality disorders, did not qualify.[9]

This Court found the Act to be constitutional, noting that the Act "unambiguously requires a finding of dangerousness either to one's self or to others as a prerequisite to involuntary confinement" which "requires proof of more than a mere predisposition to violence; rather, it requires evidence of past sexually violent behavior and a present mental condition that creates a likelihood of such conduct in the future if the person is not incapacitated." *Hendricks*, 521 U.S. at 357-358. This Court pointed out that "[a] finding of dangerousness, standing alone, is ordinarily not a sufficient ground upon which to justify indefinite involuntary commitment," but that the addition of the requirement of a "mental abnormality" or "personality disorder" sufficiently narrowed the ambit of the Act such that it passes constitutional muster. *Id.* at 358. Relative to the defendant's argument in *Hendricks* that, referencing *Foucha*, a "mental abnormality" or "personality

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[9] The Act applied, among other things, to those convicted and to those found not guilty by reason of insanity of a sexually violent offense, and provided for a dangerousness determination in advance of release (which placed the burden upon the State).

disorder" is not equivalent to a "mental illness," this Court noted the vast discretion of States in adopting definitions and nomenclature relative to mental health issues, noting more broadly that legal definitions need not mirror medical definitions. *Id.* at 358-359. Relative to the argument that the defendant's condition is not amenable to treatment, this Court pointed out that "we have never held that the Constitution prevents a State from civilly detaining those for whom no treatment is available." *Id.* at 366.

The Act at issue in *Hendricks* allows the commitment of those found to have committed criminal acts who are still determined to be dangerous based in part upon personality disorders. However, *Foucha* suggested the exact opposite: that a personality disorder is not tantamount to a mental illness and is thus not a sound reason to hold a still dangerous insanity acquittee. *Hendricks* allowed States wide latitude in defining mental abnormality to include personality disorders for the purpose of commitment, latitude that the *Foucha* plurality denied States. *Hendricks*, decided only five years after *Foucha*, cannot be readily reconciled with *Foucha* and counsels that this Court should revisit *Foucha*.[10]

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[10] In taking this position, the State does not suggest that this Court would need to substantially modify its jurisprudence relative to civil commitment. The Act at issue in *Hendricks*, while in the context of civil commitment, was also in the context of offenders who have actually violated the criminal law, and as such *Hendricks* is more instructive for insanity acquittees than for

Furthermore, and while the dissents in *Foucha* referenced the vast discretion given to States in legislating their insanity defenses, this discretion has by now come full circle. In *Kahler v. Kansas*, 140 S.Ct. 1021 (2020), this Court found that the Due Process Clause does not even require a State to exonerate a criminal defendant who could not tell right from wrong at the time of the crime; put another way, this Court found that States need not even offer the insanity defense at all.[11] If a State may constitutionally tell an individual that notwithstanding his inability to tell right from wrong he is still criminally responsible, it defies logic to say that a State is unable to confine an insanity acquittee who is clearly still dangerous. Indeed, Justice Kennedy lamented this dichotomy, noting that "[n]or should we entertain the proposition that this case differs from a conviction of guilty because petitioner has been adjudged 'not guilty by reason of insanity,' rather than 'guilty but insane.'" *Foucha*, 504 U.S. at 94, Kennedy, J., dissenting. Justice Thomas in a footnote suggested that the term "conviction" need not be accorded talismanic significance in this regard and that accordingly "[o]nce a State proves beyond a reasonable doubt that an individual has committed a crime, it is, at a minimum, not obviously a matter of federal constitutional concern whether the State proceeds to label that

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"ordinary" civil commitment patients (which of course only bolsters the State's position).

[11] The State does note that Kansas provided a limited defense whereby a defendant could show that a mental disease or defect precluded him from having the culpable mental state required for a crime.

individual 'guilty,' 'guilty but insane,' or 'not guilty by reason of insanity'" and "[i]t is surely rather odd to have rules of federal constitutional law turn entirely upon the label chosen by a State." *Foucha*, 504 U.S. at n.13, Thomas, J., dissenting. Put another way, if the Respondent could have been, consistent with the Due Process Clause, convicted of second degree murder under La. R.S. 14:30.1 and sentenced to life without parole notwithstanding his "insanity," it is illogical to say that, because Louisiana has offered a defense that it is not constitutionally required to offer (and that presupposes actual guilt), the Respondent, upon qualifying for that defense, may not now be committed despite his clear dangerousness. These jurisprudential developments make clear the error in *Foucha*, which this Court alone has the power to correct.

c. Overruling *Foucha* will not result in truly "indefinite" commitment, especially not under the State's suggested rule

Justice Thomas pointed out that "it is somewhat misleading to describe Louisiana's scheme as providing for the 'indefinite' commitment of insanity acquittees" because insanity acquittees, even under the pre-*Foucha* system, were entitled to regular hearings to have an opportunity to prove that they were no longer dangerous and thus entitled to release. *Foucha*, 504 U.S. at 123-124, Thomas, J., dissenting. This would be even more true under the State's suggested rule such that to continue to hold an insanity acquittee, the State bears the burden of proving by clear and convincing

evidence that the insanity acquittee is still dangerous (without requiring the State to prove present mental illness), and that to so prove, the State may not rely solely upon either the nature of the crime or the presence of any personality disorder. Under this standard, commitment would end once the State is no longer able to meet this lofty burden.

Indeed, it is arguable that the core constitutional defect that concerned this Court in *Foucha* was not making dangerousness the linchpin, but rather placing the burden of proving lack of dangerousness upon the insanity acquittee. In his concurrence in part and dissent in part in *Demore v. Kim*, 538 U.S. 510 (2003), Justice Souter expressed concerns about placing the burden upon a defendant and noted that "[t]he statutory deficiency was the same in *Foucha*, where we held that Louisiana's civil commitment statute failed due process because the individual was denied an 'adversary hearing' at which the State must prove by clear and convincing evidence that he is demonstrably dangerous to the community." *Demore*, 538 U.S. at 550, Souter, J., concurring in part and dissenting in part. In this vein, the State's suggested rule strikes a fair and constitutional balance in ensuring that an insanity acquittee's due process rights are honored while simultaneously respecting the vast discretion afforded to States in their treatment of insanity and the critical duty of States to protect society from still-dangerous insanity acquittees like the Respondent.

The State reiterates that the Louisiana Supreme Court in this case denied the State's writ application

"reluctantly" and "with trepidation," and "urge[ed] the United States Supreme Court to reexamine this area of law" given the clear dangerousness of the Respondent and given the hole in the law left behind by *Foucha*. For the above reasons and for any other reasons occurring to this Court, so too the State of Louisiana urges this Court to grant certiorari to consider overruling or at least substantially modifying its plurality opinion in *Foucha*.

CONCLUSION

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

Respectfully submitted,

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