

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE
THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: TERRY FOUCHA, Petitioner v. LOUISIANA

CASE NO: 90-5844

PLACE: Washington, D.C.

DATE: November 4, 1991

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IN THE SUPREME COURT OF THE UNITED STATES

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TERRY FOUCHA, :
Petitioner :
v. : No. 90-5844
LOUISIANA :
- - - - -X

Washington, D.C.

Monday, November 4, 1991

The above-entitled matter came on for oral
argument before the Supreme Court of the United States at
1:00 p.m.

APPEARANCES:

JAMES P. MANASSEH, ESQ., Baton Rouge, Louisiana; on behalf
of the Petitioner.

PAMELA S. MORAN, ESQ., Assistant District Attorney, Parish
of Orleans, New Orleans, Louisiana; on behalf of the
Respondent.

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4 On behalf of the Petitioner

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1 PROCEEDINGS

2 (1:00 p.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 now on No. 90-5844, Terry Foucha v. Louisiana.

5 Mr. Manasseh.

6 ORAL ARGUMENT OF JAMES P. MANASSEH

7 ON BEHALF OF THE PETITIONER

8 MR. MANASSEH: Mr. Chief Justice, and may it
9 please the Court:

10 Once an insanity acquittee has regained his
11 sanity, may the Government continue to confine him in a
12 mental institution indefinitely solely on the basis that
13 he cannot prove that he is no longer a danger to society?

14 Terry Foucha was found not guilty by reason of
15 insanity back in 1984. Since that time he has since
16 regained his sanity. And it was established at a release
17 hearing back in 1988. The Louisiana supreme court has
18 answered in the affirmative that once an individual has
19 been found not guilty by reason of insanity, he must, in
20 order to gain release, prove that he is no longer a danger
21 to himself or to society.

22 We ask this Court to reverse the 4-3 majority of
23 the Louisiana supreme court by finding that such a
24 statutory scheme violates the Fourteenth Amendment due
25 process clause and equal protection clause.

1 Terry Foucha's plea was accepted pursuant to a
2 statute in Louisiana that allowed the judge to accept his
3 plea with the concurrence of the respondent's office.
4 Since that time, as I said, he's regained his sanity. And
5 that's been established at the release hearing in 1988.
6 He has since remained in limbo because the statutory
7 scheme in Louisiana requires that in order to gain release
8 the individual must prove that he is not a danger to
9 himself or society.

10 The problem is that the statute makes irrelevant
11 his present mental condition. It does not consider
12 whether he is mentally healthy or whether he's not. It
13 makes that determination irrelevant to whether he can
14 regain, whether he can ever gain release from the mental
15 institution.

16 In Jones v. United States, this Court stated
17 that the Constitution permits the Government to continue
18 confinement indefinitely of an insanity acquittee until
19 such time as the individual regains his sanity or is no
20 longer a danger to himself or to others.

21 We believe that once he regains his sanity, the
22 indefinite custodial confinement of this insanity
23 acquittee must cease and cannot be based any further on
24 his finding of not guilty by reason of insanity.

25 QUESTION: In Jones, the Court was dealing with

1 a statute, was it not, that required both of those
2 findings?

3 MR. MANASSEH: Your Honor, it did deal with a
4 statute that required both of those findings. And that's
5 the way the Louisiana supreme court differed and found, as
6 opposed to our position, that the insanity acquittee is
7 entitled to release once one of those two things is
8 established.

9 QUESTION: Do you think Jones supports your
10 position or is simply neutral?

11 MR. MANASSEH: Your Honor, I think that Jones
12 supports our condition because Jones specifically says
13 that the Constitution -- and the Louisiana supreme court
14 ignored the reference to the Constitution in that
15 particular holding.

16 In addition, I would suggest --

17 QUESTION: But in Jones, the Court was dealing
18 with a statute that required both of those. And it said
19 that statute is constitutional.

20 MR. MANASSEH: Yes.

21 QUESTION: It doesn't necessarily follow, I
22 would think, the statute which required less from the
23 State than the Jones statute is unconstitutional.

24 MR. MANASSEH: Your Honor, I would suggest that
25 the statute, the reasoning in Jones specifically

1 said -- and I'm not here to tell the Court what the Court
2 meant in Jones -- but if the nature and the duration of
3 confinement must be reasonably related to the purpose of
4 initial confinement, and his initial confinement is based
5 upon the fact that he was found not guilty by reason of
6 insanity, and therefore, his confinement must continue
7 because he is continuing to be mentally ill and dangerous,
8 once he establishes that he is no longer
9 dangerous -- excuse me.

10 Once he establishes that he's regained his
11 sanity, then the finding of dangerousness that the
12 Louisiana statute allows is not related to the mental
13 illness for which he was originally committed for.

14 QUESTION: Mr. Manasseh, what about a statute
15 like in the State of Washington that, for someone who is
16 acquitted in a criminal case as not guilty by reason of
17 insanity and is then committed to a mental institution for
18 a specific term of years that might, for example, be
19 related to some equivalent penalty for the offense.

20 Do you think that under circumstances such as in
21 this case that such an individual likewise would have to
22 be released?

23 MR. MANASSEH: Your Honor, I believe that there
24 can be certain circumstances, if a statute is narrowly
25 tailored and specifically defined such as the situation of

1 a regulatory detention, that the State could have
2 interests that outweigh the individual's liberty interest.

3 QUESTION: Well, do you concede that a statutory
4 scheme such as Washington State's is valid?

5 MR. MANASSEH: Do I concede that it is valid?

6 QUESTION: Yes.

7 MR. MANASSEH: I do not necessarily concede that
8 it is valid. I don't think this Court has ruled on that
9 issue as of this time.

10 But the Washington statute is different than
11 Louisiana's, Your Honor. The Washington statute deals
12 with whether the individual is fit to be released. It
13 doesn't deal with just a dangerousness test as the
14 Louisiana supreme court indicated in their opinion. It
15 dealt with whether the individual could show that he was
16 fit for release.

17 QUESTION: Let's put it this way. Suppose
18 Louisiana were to put a cap on the period of time in which
19 someone could be held and put a limitation on it. Would
20 you still be here?

21 MR. MANASSEH: Your Honor, we may not be. In
22 that situation the Government's interest with a narrowly
23 tailored, specifically defined statutory scheme
24 might -- in those circumstances, the Government's interest
25 in societal protection might outweigh the individual's

1 liberty interest.

2 But the statute we have here requires an
3 indefinite confinement, perhaps a lifetime confinement,
4 for all insanity acquittees, no matter what their charge.

5 QUESTION: Counsel, if you prevail here what
6 happens? Is he released? Or is there another what you
7 call contradictory hearing?

8 MR. MANASSEH: Your Honor, I believe that what
9 would happen would be the matter would be sent back to the
10 district court to make a specific finding -- factual
11 finding whether he is in fact not mentally ill or not.

12 The testimony at the release hearing, by the
13 State's own witness, indicated that he was no longer
14 mentally ill. The trial judge, though, did not
15 specifically state on the record that he found that he was
16 no longer mentally ill. But that evidence was
17 uncontroverted in the record.

18 But that would be a factual determination for
19 the trial court to make.

20 QUESTION: Is your argument based on the
21 assumption that he can be held only for treatment and not
22 for preventative purposes? Doesn't that underlie your
23 argument?

24 MR. MANASSEH: That would underlie the argument
25 under one phase of a substantive due process argument that

1 once an individual has proven himself to no longer be
2 mentally ill, he could no longer be indefinitely confined
3 in a mental institution.

4 QUESTION: Suppose he's dangerous.

5 MR. MANASSEH: Under those circumstances, Your
6 Honor, just as I said, the Government may be able to
7 fashion a statutory scheme similar to a Salerno situation
8 that in those circumstances the Government interest would
9 outweigh the individual's liberty interest.

10 I'm not here to give the Louisiana legislature
11 any --

12 QUESTION: But I take it then that you must be
13 saying that without some subsequent hearing, an acquittal
14 by reason of insanity permits the State only to treat the
15 insanity and not to incarcerate in order to prevent danger
16 to others or to himself.

17 MR. MANASSEH: No, Your Honor. I'm sorry,
18 respectfully, but that is not necessarily what I'm saying.

19 The dangerousness that Louisiana commits an
20 individual who has been found not guilty by reason of
21 insanity is because he's insane and that finding, as Jones
22 points out, is sufficient to establish continuing mental
23 illness and his dangerousness. But once his mental
24 illness is cleared up, then the dangerousness should not
25 be just a uniform, any sort of dangerousness. It should

1 be some sort of a dangerousness related to his mental
2 illness.

3 QUESTION: Well, what's your authority for that?

4 MR. MANASSEH: Your Honor, at that point I would
5 suggest that an Addington-type hearing should be called
6 for in order for the Government to make some sort of a
7 showing that he is, in fact, dangerous, that it's not
8 related necessarily to the mental illness to justify his
9 continued confinement.

10 QUESTION: Well, why can't the Government base
11 it on his conviction, but for insanity, of aggravated
12 burglary?

13 MR. MANASSEH: I'm sorry, Your Honor, I'm not
14 sure I understand your question.

15 QUESTION: Well, as I understand the Louisiana
16 procedure is found not guilty by reason of insanity, which
17 means that the jury found he did commit the aggravated
18 burglary.

19 MR. MANASSEH: As I pointed out before, Your
20 Honor, there was not a jury in this situation.

21 QUESTION: Well, the judge, the judge found he
22 committed --

23 MR. MANASSEH: The trial, the trial
24 judge -- yes, Your Honor.

25 QUESTION: Why can't they use that as a basis

1 for finding him dangerous?

2 MR. MANASSEH: Your Honor, they have. And he's
3 been committed. And he's been indefinitely held in the
4 mental institution.

5 But now, once he's regained his sanity, his
6 mental -- his dangerousness is not related to the mental
7 illness which he had.

8 QUESTION: Why does it have to be? Why can't
9 Louisiana simply say this man committed an aggravated
10 burglary and we're going to confine him?

11 MR. MANASSEH: At that point, Your Honor, I'm
12 not saying that the Government could not make that sort of
13 a showing, but it seems as though that procedural due
14 process would require that the Government make that
15 showing pursuant to Addington because the burden of the
16 individual trying to prove nondangerousness is a untenable
17 type of burden to maintain.

18 QUESTION: But the Government did once sustain
19 that burden in the criminal proceeding.

20 MR. MANASSEH: Your Honor, he was found not
21 guilty by reason of insanity.

22 QUESTION: But doesn't that mean that he was
23 found to have committed the crime, but was not culpable by
24 reason of insanity?

25 MR. MANASSEH: Theoretically, that's what that

1 means. If the Court looks at the judgment on page, I
2 believe, it's 5 of the Joint Appendix, the judgment
3 indicates that the court accepted a not guilty and not
4 guilty by reason of insanity judgment. So it is unclear
5 from looking at that judgment and looking at the record
6 whether the trial court actually made a factual
7 determination that he was in fact guilty of a criminal
8 offense at that time.

9 QUESTION: Well, then, is this case simply a
10 sport? I mean, a peculiar fact situation? I thought we
11 took the case to decide whether someone who was found not
12 guilty by reason of insanity could be confined after they
13 were no longer ill.

14 MR. MANASSEH: Yes, Your Honor. I believe
15 that's why the case was accepted.

16 My point is is that it's -- you're unable to
17 make the determination by looking at the record whether
18 the individual actually committed a criminal offense to
19 begin with.

20 QUESTION: Well, what assumption did the supreme
21 court of Louisiana go on?

22 MR. MANASSEH: They made the assumption that the
23 theoretical basis of a not guilty by reason of insanity
24 plea is guilty, but insane.

25 QUESTION: Yes, well, I think we would probably

1 go on that same assumption.

2 MR. MANASSEH: Yes, Your Honor.

3 QUESTION: Mr. Manasseh, in what way are the
4 conditions of confinement in a mental institution more
5 restrictive or oppressive than the kind of confinement
6 this Court upheld in Salerno, pretrial detention?

7 MR. MANASSEH: Well, for one thing, Your Honor,
8 the detention in this case is indefinite. It can be a
9 lifetime confinement. In Salerno it was for a very
10 limited duration based upon the Speedy Trial Act.

11 Secondly, Your Honor, the Salerno act targeted
12 only the most dangerous of criminals. This act allows for
13 any insanity acquittee, no matter what sort of offense
14 that he committed, whether it's a DWI, a minor misdemeanor
15 theft, or whether it's a first-degree murder situation,
16 any insanity acquittee is refused to be released unless he
17 can prove himself not to be a danger.

18 QUESTION: Does your equal protection claim add
19 anything to the due process claim? Do they really merge
20 and amount to the same thing?

21 MR. MANASSEH: They do to some extent, Your
22 Honor. I don't necessarily know if they amount to the
23 same thing.

24 Under Louisiana civil statutes, an individual
25 can only be continued to be confined if he is dangerous as

1 a result of his mental illness. We would suggest that
2 it's a violation of equal protection to have a dual
3 finding in a civil commitment statute, but only to require
4 and allow the Government to confine an individual
5 criminally if he fails to prove himself nondangerous, even
6 after he's shown to be not mentally ill.

7 QUESTION: But even where the statute provided
8 for a limit, say, of 2 years on any confinement which
9 could be maintained after the mental illness has
10 disappeared and if the Government had the burden, say, by
11 clear and convincing evidence to prove continued
12 dangerousness after that point, would you find a
13 constitutional infirmity in that?

14 MR. MANASSEH: Your Honor, at that point, again,
15 I would say that I believe that the Government may, under
16 certain circumstances --

17 QUESTION: Well, how about the circumstances I
18 just gave you?

19 MR. MANASSEH: I would have to look more deeply
20 into the circumstances, Your Honor. I don't necessarily
21 know that that would -- that that would be
22 unconstitutional pursuant to Salerno.

23 QUESTION: All right. If that is the case would
24 you also agree -- let's assume that the dangerousness here
25 relates to dangerousness in terms of likely physical

1 violence rather than, say, dangerousness in some belated
2 sense of just committing further crimes like
3 check-writing, say, real dangerousness to the health or
4 safety of other human beings.

5 By the same principle that you, I think, have
6 just conceded, could the Government not confine
7 individuals for periods of 2 years without there being any
8 preceding criminal charge and without there ever being any
9 finding of insanity? Could the Government, in other
10 words, simply say we're going to round up dangerous
11 individuals and if we can prove by clear and convincing
12 evidence that they are dangerous, we will confine them for
13 2 years subject to a renewable commitment with the burden
14 being on us? Would that be constitutional?

15 MR. MANASSEH: Your Honor, I don't necessarily
16 know that that would be constitutional.

17 QUESTION: What's the difference between that
18 case and the case that I gave you in which the insanity
19 had been cured and the Government could keep the person in
20 for 2 more years subject to the burden of proof?

21 MR. MANASSEH: Your Honor, of course there's a
22 distinction when the Government has shown that the
23 individual has at one time committed a criminal act.

24 QUESTION: And is that distinction because the
25 proof of dangerousness is more reliable?

1 MR. MANASSEH: Your Honor, I don't know
2 necessarily that it's more reliable. Once his mental
3 illness has subsided --

4 QUESTION: Then what is the distinction?

5 MR. MANASSEH: Your Honor, because once the
6 criminal act had occurred the individual is not
7 necessarily in a position to prove that he cannot at some
8 point not present a danger.

9 QUESTION: No, but in my -- in the example that
10 I'm giving, in each instance the mental illness is cured
11 or disappeared. A period of 2 years go by. The
12 Government has a burden at that point either to release
13 the person or to prove by clear and convincing evidence
14 that the person remains dangerous.

15 And I thought your answer was that if that
16 situation arose following a not guilty by insanity plea,
17 it could be constitutional for the Government to keep the
18 person in for another 2 years, to renew the commitment.

19 But I thought you were saying that if there had
20 not been a preceding NGI or a preceding offense giving
21 rise to that, that the Government could not do that
22 constitutionally. And I want to know why you can do it in
23 the one instance and not in the other.

24 MR. MANASSEH: I believe in the situation where
25 the act has already occurred the Government can make a

1 limited, carefully drawn, regulatory detention.

2 QUESTION: I know that's the conclusion that you
3 come to, but why do you come to it? Is it because the
4 fact of the preceding criminal offense lends a greater
5 weight to the soundness of the finding of dangerousness
6 which it subsequently makes? Or is there some other
7 reason?

8 MR. MANASSEH: Yes. It's because of the fact
9 that the Government has already shown that in certain
10 circumstances while he is mentally ill he may in fact be a
11 danger.

12 QUESTION: Yes, but on my hypothesis, he's not
13 mentally ill anymore.

14 MR. MANASSEH: Your Honor, again, the reason
15 being is because the fact that the individual had suffered
16 from a mental illness and was dangerous at one time may
17 support that sort of a finding.

18 The Louisiana district attorney's office out of
19 Orleans Parish suggests that the Government's interest in
20 societal protection is legitimate and a compelling
21 interest.

22 This Court has stated that just because the
23 invocation of a legitimate purpose is made by the
24 Government, that it cannot support all such restraints.
25 The court looks at whether the restriction is excessive in

1 relationship to the Government interest.

2 This particular restraint, the indefinite
3 custodial confinement in a mental institution of someone
4 who's been found to no longer be mentally ill certainly
5 must fall within the grounds of excessiveness.

6 QUESTION: Well, you say indefinite, there's a
7 hearing every 6 months?

8 MR. MANASSEH: Your Honor, there's a hearing and
9 he's entitled to a litany of different hearings. The
10 problem is is that when the burden is on the individual to
11 prove nondangerousness, he can have a hearing every day,
12 every other day, and it is not going to make that burden
13 any more reasonable for the individual to meet.

14 QUESTION: Well, I recognize that there's some
15 negative aspects to it, but the statute is fairly
16 specific. There has to be behavior or significant threats
17 that support a reasonable expectation of a substantial
18 risk that he will inflict physical harm upon another
19 person in the near future. Isn't that the standard that
20 has to be met every 6 months?

21 MR. MANASSEH: But, Your Honor --

22 QUESTION: Given he has the burden of proof.
23 And maybe you're going to tell us that that's impossible.
24 But it seems to me that he can show that during that
25 period of time there's been no significant behavior or

1 threats.

2 MR. MANASSEH: Your Honor, when the individual
3 has already committed an act and the judge can rely upon
4 the testimony of a doctor who has seen him for just a
5 short period of time to testify that he refuses to certify
6 that the individual is not a danger, this doctor will
7 never certify that he's not a danger.

8 If this Court does not reverse the Louisiana
9 supreme court, Terry Foucha will, in all likelihood,
10 remain at that mental institution for the rest of his life
11 because Dr. Ritter is never going to certify, and no
12 doctor will ever certify, that anyone will not be a
13 danger.

14 And Dr. Ritter --

15 QUESTION: Is it clear that that finding would
16 have been made if there had been no showing of the
17 specific incident, I think he put a pencil or an object
18 through another inmate's hand? Are you saying that that's
19 just irrelevant based on the rationale adopted by the
20 trial court?

21 MR. MANASSEH: I'm not saying that that's
22 irrelevant, Your Honor. But I am saying that there was no
23 specific -- the facts given by Dr. Ritter about the fact
24 that he jabbed -- somebody was jabbed with a pen doesn't
25 indicate whether Terry Foucha jabbed the person with the

1 pen or whether he was provoked or what the circumstance
2 was.

3 He is a sane person in a mental institution with
4 lots of insane people. There are going to be incidents at
5 the mental institution regarding different problems. The
6 doctor indicates that he's paranoid and he's not
7 the -- he's not the nicest -- he's had some problems with
8 management. I would suggest that anyone who was confined
9 in a mental institution who knows that he is not insane
10 and has had six specific doctors tell him that he's not
11 insane, a little paranoia is probably justified in that
12 circumstance.

13 One of the problems that I think procedurally
14 the case has is this unbridled discretion that the trial
15 judge is given to disregard the recommendation of the
16 superintendent, the recommendation of the review panel who
17 recommended specifically at page 10 of the Joint Appendix
18 that he could be released, he is no longer insane, and
19 that he could be released without danger to himself or to
20 others.

21 The doctor, Dr. Ritter, comes in and testifies,
22 well, I'm afraid I don't feel comfortable in certifying
23 that he wouldn't be a danger to himself or to others. The
24 judge basically is given unbridled discretion because the
25 statute does not give specific considerations for him to

1 consider, such as the statute did in Salerno.

2 And, again, and this point is very important,
3 the Government may be able to come in and make a carefully
4 limited and narrowly drawn statutory requirement that
5 allows for the indefinite confinement of an insanity
6 acquittee even if he's regained his sanity.

7 But this type of indefinite confinement based
8 upon his failure to be able to prove nondangerousness
9 is -- is clearly the most excessive type of restraint that
10 Louisiana can fashion. It is in no way related or closely
11 akin to the type of restriction in Salerno.

12 Salerno was specific, that it was a narrow set
13 of factual circumstances that led to that opinion. It was
14 a brief period of time, of detention. The Government had
15 the burden of proving clear and convincing evidence that
16 there were no circumstances under which the individual
17 could be released without endangering society.

18 The statute specifically specified the most
19 dangerous types of criminals, major drug offenders,
20 murderers, and those types of individuals.

21 In addition, the court, the legislature laid out
22 specific factors that the Government was to consider and
23 the judge was to consider in making the determination
24 whether a limited duration regulatory confinement could be
25 instituted in that situation.

1 Louisiana's statute isn't close. It has a
2 possible lifetime confinement in a mental institution by
3 an insanity acquittee. It involves all insanity
4 acquittees with no relation to the -- to the facts. It
5 gives the court no factors to consider in making its
6 decision. And there's no showing necessary by the
7 Government to prove the different circumstances for his
8 release.

9 Your Honor, the Government wants this Court to
10 look at these statutes and to apply these factors in a
11 very mechanicalistic fashion, the regulatory detention
12 circumstances, very mechanicalistically. I would suggest
13 that those sort of mechanical applications cannot be
14 applied in this sort of situation where an individual is
15 looking at -- his liberty interests are involved.

16 As far as the equal protection argument goes,
17 this Court stated that in Baxstrom that the fact that a
18 person has suffered and been convicted and was sentenced
19 to a specific sentence, that that was not, that was
20 insufficient to justify giving him less protection than
21 those given to individuals who are civilly committed.

22 I would certainly suggest that an individual
23 who's been found not guilty by reason of insanity should
24 also not be given less procedural and substantive
25 protections as those afforded to other civil committees in

1 Louisiana.

2 Even convicted felons are not put in the
3 position that insanity acquittees are put in in Louisiana.
4 A convicted felon, when his term of sentence is up, he is
5 entitled to release and it has nothing --

6 QUESTION: Even though he may be dangerous?

7 MR. MANASSEH: Even though he may be dangerous,
8 Your Honor, he is entitled to release once his sentence is
9 up.

10 QUESTION: There are a lot of dangerous people
11 out there, aren't there?

12 MR. MANASSEH: There certainly are, Your Honor.

13 But the dangerousness of my client is not -- for
14 which he was originally sentenced for was because he was
15 dangerous in relationship because he was mentally ill.
16 Once his mental illness has been cured, then the
17 dangerousness that's related to the mental illness is
18 irrelevant to the fact of whether they're going to try to
19 confine him at this particular point.

20 QUESTION: You say he was dangerous because of
21 his mental illness. Why do you deduce that conclusion?

22 MR. MANASSEH: Your Honor, I would suggest that
23 the nature -- because the nature and duration is, of
24 confinement, is related to the reason that he has
25 committed, that his dangerousness was related to his

1 mental illness. And that was the reason that an insanity
2 acquittee -- an insanity acquittal --

3 QUESTION: Does that necessarily follow, though?
4 I mean, an insanity acquittal, what, in Louisiana means
5 that you weren't able to appreciate the consequences of
6 your act?

7 MR. MANASSEH: It means that you did not
8 understand right from wrong, Your Honor.

9 QUESTION: Well, but does that necessarily
10 explain why the defendant did, committed this particular
11 crime? That doesn't go to his motivation.

12 MR. MANASSEH: No, Your Honor. The reason it
13 doesn't go to his motivation is because a person who is
14 found not guilty by reason of insanity has no criminal
15 intent to commit a crime, just as an individual who maybe
16 makes a mistake and commits a criminal act or who doesn't
17 act in self-defense --

18 QUESTION: Now, is that Louisiana law or is that
19 your speculation about what it might mean? Because it
20 certainly isn't accepted everywhere that someone who is
21 found not guilty by reason of insanity lacks the intent.

22 I think in many States that is regarded, not
23 guilty by reason of insanity, is an affirmative
24 defense -- that the State can make out all the other
25 elements including intent, and you can still say you have

1 an affirmative defense, not guilty by reason of insanity.
2 So in many States it does not negate intent.

3 MR. MANASSEH: Your Honor, in Louisiana it means
4 that they didn't understand right from wrong. And if they
5 didn't understand right from wrong --

6 QUESTION: But that's a non sequitur to say that
7 they didn't understand right from wrong, therefore, they
8 didn't have the necessary intent.

9 MR. MANASSEH: Your Honor, I would suggest that
10 is someone doesn't understand what's right from wrong,
11 then they couldn't have criminal intent to commit a
12 criminal act.

13 QUESTION: If the State of Louisiana in its
14 aggravated burglary statute requires that the State show
15 that a person entered a dwelling in the nighttime with the
16 intent to enter in order to commit a felony, it seems to
17 me the State could prove every one of those elements, and
18 including the intent, the intent to enter the dwelling
19 with intent to commit a felony.

20 And you -- the fact that a person didn't know
21 right from wrong would be, would go to insanity. It
22 wouldn't go to the lack of intent at all.

23 MR. MANASSEH: I will respectfully note the
24 Court's opinion.

25 Your Honors, there is something that is holy and

1 just about a situation in which the Government can tell a
2 young man that he's not guilty because he was sick,
3 because he was ill, and then refuse to release him from a
4 mental institution --

5 QUESTION: Did the Government have to tell him
6 that? Could the State simply disallow the defense of
7 insanity if it wanted to?

8 MR. MANASSEH: Yes, sir, they could, Your Honor.

9 QUESTION: And could the State impose a sentence
10 for life for aggravated burglary if it wanted to?

11 MR. MANASSEH: I believe that the Government
12 could.

13 QUESTION: So why can't the State say, look, we
14 don't have to give you this insanity defense, but here's
15 the deal. If you choose to use it, you simply, you simply
16 don't get out of prison until we're sure you're no longer
17 a danger to society. They are not conditioning any
18 constitutional right upon this. You just told me he
19 doesn't have a constitutional right to plead not guilty by
20 reason of insanity. So the State says, this is the deal.
21 If you choose to take it, you go in and you have to stay
22 there until you're no longer a danger.

23 MR. MANASSEH: If he had chosen to take it at
24 that particular point, he would. But this situation, he's
25 been found not guilty by reason of insanity and he should

1 be released once he establishes that his insanity is no
2 longer relevant.

3 I would reserve the balance of my time for
4 rebuttal, Your Honor.

5 QUESTION: This was clear but then I began to
6 wonder, Louisiana does require proof not only of insanity,
7 but of dangerousness as a separate element prior to the
8 original commitment. Is that correct?

9 MR. MANASSEH: That is correct.

10 QUESTION: Okay.

11 MR. MANASSEH: That is correct.

12 QUESTION: Very well, Mr. Manasseh.

13 Ms. Moran, we'll hear from you.

14 ORAL ARGUMENT OF PAMELA S. MORAN

15 ON BEHALF OF THE RESPONDENT

16 MS. MORAN: Mr. Chief Justice, and may it please
17 the Court:

18 The State has a legitimate and compelling
19 interest in conferring in an insanity acquittee who
20 continues to present a danger to society, even though that
21 acquittee may have regained his sanity.

22 The question that we have before us, I think, is
23 preventative detention. We know that preventative
24 detention is allowed in cases such as Shaw v. Martin,
25 which this court determined that juveniles can be

1 detained, postarrest, pretrial.

2 Also the case of U.S. v. Salerno, where you have
3 a postarrest detention situation where a dangerous
4 defendant may be detained simply based on his
5 dangerousness.

6 QUESTION: We don't know that this defendant is
7 dangerous, though. That's the difference.

8 MS. MORAN: Well, I --

9 QUESTION: We just don't have a psychiatrist
10 who's willing to come in and say, you know, he's not
11 dangerous. I mean, the burden -- isn't that a significant
12 difference?

13 MS. MORAN: I beg to differ with you on this
14 point, Justice Scalia. Based on the hearing, lunacy
15 hearing, that was conducted on November of 1988, certain
16 facts came out which indicated that Mr. Foucha remained a
17 danger.

18 At one point, the three -- three-doctor review
19 panel at the Feliciana Forensic Facility recommended that
20 he be released.

21 Since that report came out, subsequent to that
22 report, Mr. Foucha was detained in the maximum security
23 section of the hospital. That's in the Joint Appendix,
24 page 18. Joint Appendix, page 15, Dr. Ritter indicated
25 that he got into a lot of difficulties. He had trouble

1 with Feliciana. He had altercations with other patients,
2 and it appears that he stabbed a prison guard with an ink
3 pen.

4 QUESTION: How do you really prove
5 dangerousness? Future dangerousness?

6 MS. MORAN: It's inexact.

7 QUESTION: It's what?

8 MS. MORAN: It's an inexact science, just as
9 psychiatry is inexact.

10 QUESTION: Well, not very long ago, the American
11 Medical Association issued a paper saying that the
12 prognosis of future dangerousness is wrong more times than
13 it is correct. Does that bother you?

14 MS. MORAN: Not in terms of this petitioner, Mr.
15 Foucha.

16 QUESTION: It has been cited in an opinion in
17 this Court.

18 MS. MORAN: It does not -- it does not bother me
19 because I still feel that the State has a legitimate
20 overwhelming interest in protecting the community from
21 individuals such as Mr. Foucha who remain dangerous.

22 QUESTION: Well, I think it is true that medical
23 opinion often says that a murderer, incarcerated, will
24 never commit another crime. Some. Therefore, I say, I
25 think your estimates of future dangerousness are always on

1 very dangerous ground.

2 MS. MORAN: Well, some people -- people may hold
3 that view, but I feel that in this particular case, and in
4 other cases as well, it must be looked at on a
5 case-by-case basis based on what the individual has done.
6 The first dangerous act the petitioner did was to take a
7 .357 Magnum and burglarize a home, an inhabited dwelling.
8 Also, criminal discharge of a firearm. That act in itself
9 indicates a dangerous individual.

10 QUESTION: No, but is it not fair to infer that
11 the reason he did it was that he was mentally unbalanced
12 at the time of the act? And that is why the finding of
13 not guilty was returned.

14 MS. MORAN: Well, then, again, you come back to
15 the inexact science of psychiatry. At the outset --

16 QUESTION: Well, if it's an inexact science,
17 then what you're saying is that as long as one is unclear,
18 and we don't know whether the person is dangerous or not,
19 which is probably true of most individuals, then the
20 individual cannot sustain the burden of proving
21 beyond -- by a preponderance of the evidence that he's not
22 dangerous.

23 MS. MORAN: Well, he can't --

24 QUESTION: So the uncertain -- in all uncertain
25 cases, the person must remain incarcerated forever.

1 MS. MORAN: No, that's not what I'm saying. I
2 think that Mr. Foucha and other insanity acquittees are
3 able to carry that burden of proving that they are no
4 longer dangerous.

5 QUESTION: Yes, but if psychiatrists are all
6 uncertain, because of his past history, and are unwilling
7 to say, I certify this man is no longer dangerous, then he
8 loses, doesn't he?

9 MS. MORAN: No, because, you see, dangerousness
10 is not a medical determination. It's a judicial
11 determination.

12 QUESTION: Well, but, what is there in judicial
13 history that determines dangerousness from some source
14 other than prior criminal acts on the one hand or mental
15 disease on the other? What is this other category of
16 dangerousness that's unrelated to mental illness and
17 unrelated to wrongdoing?

18 MS. MORAN: Well, not necessarily unrelated to
19 wrongdoing, but in Mr. Foucha's case, he was diagnosed as
20 having an antisocial personality disorder, which Dr.
21 Ritter indicated cannot be cured. And he does not
22 classify that --

23 QUESTION: But then -- but you say -- then would
24 you not win on the ground that he is still mentally ill?
25 Are there personality disorders that are unrelated to

1 mental illness?

2 MS. MORAN: This appears to be the case, from
3 what I can ascertain from Dr. Ritter's testimony.

4 QUESTION: Do you think he could -- if you think
5 he's got a personality disorder unrelated to mental
6 illness, but nevertheless makes him dangerous, could you
7 commit him if he had -- never been found not guilty by
8 reason of insanity? Say you just find a man out in the
9 street who meets the very characteristics that you
10 assigned to this man. Could he be put away for preventive
11 purposes?

12 MS. MORAN: No, not -- not civilly.

13 QUESTION: Why not?

14 MS. MORAN: Because the man on the street has
15 not done a dangerous act. The whole thing that started
16 the ball rolling was the act that Mr. Foucha --

17 QUESTION: Well, suppose you had a man on the
18 street who did the same act that this man did, served 5
19 years in the penitentiary, which would be the maximum
20 sentence for it, and then you say, we think he's still
21 dangerous, and we can prove he has the kind of difficulty
22 that you described as to him. Could you put him away?

23 MS. MORAN: No, because --

24 QUESTION: Why not?

25 MS. MORAN: Because he has served his 5 years in

1 the penitentiary, and under --

2 QUESTION: But he poses precisely the same
3 threat to society.

4 MS. MORAN: Well --

5 QUESTION: He has the same history, and the same
6 kind of mental problem -- mental -- what do you call
7 it -- personality disorder.

8 MS. MORAN: I'm not saying that I'm happy to see
9 this person get out, and that may possibly be why
10 Louisiana has some of the longest prison sentences in the
11 country.

12 (Laughter.)

13 MS. MORAN: But we are trying to protect our
14 citizens. We know that we have people that go --

15 QUESTION: Yes, but how do you differentiate my
16 case --

17 MS. MORAN: -- and are dangerous.

18 QUESTION: -- a man who admittedly committed the
19 crime on the one hand and was sentenced for the maximum
20 term, yet when he gets out, the warden thinks he's still
21 dangerous and he could perhaps prove he's -- he may do it
22 again, and the man before us today.

23 MS. MORAN: Louisiana law does not allow that.

24 QUESTION: Pardon me?

25 MS. MORAN: Louisiana law does not --

1 QUESTION: But Louisiana law could allow it, do
2 you think?

3 MS. MORAN: No. No, sir.

4 QUESTION: I'm confused. You told Justice
5 Stevens that dangerousness is not a medical concept. And
6 yet the trial judge, I think it's a fair reading of the
7 trial court's opinion, found dangerousness based on the
8 doctor's refusal to certify. That seems to me quite
9 inconsistent.

10 MS. MORAN: No, I think that dangerousness is a
11 medical concept, but it is still a judicial determination.
12 The judge can look at what the doctors say. In this
13 particular instance, Judge Wimberly was able to look at
14 the report of the doctors at Feliciana. He was able to
15 listen to the testimony of Dr. Ritter.

16 But he, as the judge, with experience that, in
17 sitting on the bench, if these people come through on a
18 regular basis, has to look at all the facts, weigh the
19 facts, and then make a determination. That is the way to
20 set up under Louisiana law. If it were not that way, if
21 the legislature had wanted, they could have just allowed
22 the doctors at Feliciana to allow the release.

23 QUESTION: Well, suppose the judge says, in this
24 type of case, I simply am not going to make a finding of
25 nondangerousness without supporting medical opinion.

1 That's going to be my policy here in this court. And the
2 doctors say, as a medical matter, we simply cannot give
3 you that certification. What result?

4 MS. MORAN: The results that you have here in
5 the instance case.

6 QUESTION: That's close to this case, is it not?

7 MS. MORAN: Close.

8 QUESTION: Ms. Moran, you're saying that the
9 State can keep this individual in the mental institution
10 indefinitely, even though he no longer has a mental
11 illness. Right? That's okay?

12 MS. MORAN: Based on dangerousness.

13 QUESTION: Based on dangerousness. Could it, at
14 the outset, commit somebody to mental institution for
15 having committed a crime, even though he is not mentally
16 ill? I mean, there are some States that do that.
17 It's -- we --

18 MS. MORAN: No, that -- that --

19 QUESTION: We have not generally considered it's
20 a good idea.

21 MS. MORAN: No, the person who commits a crime
22 and is not mentally ill should go to prison.

23 QUESTION: Why? You don't think this fellow
24 should go to -- you don't think this fellow should be in
25 prison. You think he should be in a mental institution,

1 even though he is not mentally ill any more.

2 MS. MORAN: I'm not going to say that I --

3 QUESTION: Because he's dangerous. So why don't
4 we just put him there in the first place? Say, you know,
5 you committed a burglary, you're as sane as I am, but we
6 are going to put you in a mental institution.

7 MS. MORAN: No, if you are sane, and you commit
8 a burglary, then you go to prison, because
9 you -- you -- because --

10 QUESTION: But I'm saying, but could you change
11 it? I'm going to change the law, we're going to put you
12 in a mental institution instead, the way they used to do
13 in Russia.

14 MS. MORAN: No, because mental institutions are
15 not prisons. They have -- they serve a different purpose.

16 QUESTION: I see.

17 MS. MORAN: The idea is to rehabilitate the
18 individual --

19 QUESTION: Do you think there might -- do you
20 think there might be something unconstitutional about
21 committing someone to a mental institution for committing
22 a crime?

23 MS. MORAN: Not if he was found not guilty by
24 reason of insanity.

25 QUESTION: No, he was found guilty --

1 MS. MORAN: And he's --
2 QUESTION: Not insane, he's found guilty and the
3 law says, you go to a mental institution.
4 MS. MORAN: Yes, that's --
5 QUESTION: Would that be constitutional, do you
6 think?
7 MS. MORAN: No, because the State has no --
8 QUESTION: It would not.
9 MS. MORAN: The State has no legitimate interest
10 in putting --
11 QUESTION: Right.
12 MS. MORAN: -- such an individual in a mental
13 institution.
14 QUESTION: But it's okay to keep him there, once
15 you have him in the mental institution, even though he's
16 become sane?
17 MS. MORAN: They --
18 QUESTION: That doesn't pose any constitutional
19 problems?
20 MS. MORAN: No, based -- it does not, based on
21 the initial process by which this individual came to be in
22 that mental hospital, based upon that insanity plea. And
23 if his adjudication has been not guilty by reason of
24 insanity, it puts him in a different class.
25 QUESTION: I don't feel any better about the one

1 than I do about the other, I must say.

2 QUESTION: But even if it puts him in a
3 different class, because there is a higher degree of
4 soundness to the dangerousness prediction as a result of
5 having committed an act which would be a crime but for the
6 insanity and having been found insane? Is that how you
7 distinguish between the two cases?

8 MS. MORAN: Yes, I think there's a stronger
9 basis at the outset for committing the man to the mental
10 institution. And I feel also very strongly that the
11 system of checks and balances that we have in Louisiana
12 ensures that this individual receives due process under
13 the law.

14 QUESTION: Except that you -- would you concede
15 that at some point the probative value of the initial act
16 or the probative value of the insanity finding, as itself,
17 some index of future dangerousness, weakens. Over time,
18 it tends to prove a lower and lower and lower likelihood
19 of future dangerousness, standing all by itself. Isn't
20 that true?

21 MS. MORAN: That's true. Possibly because I
22 think that you -- the reason that we haven't been brought
23 back on a yearly basis is to see how he's doing, how far
24 he's come since that point where he made that first
25 dangerous act. How far he's come along.

1 QUESTION: But if he wants to get out, the
2 burden is on him to prove that he is no longer dangerous,
3 right?

4 MS. MORAN: That's true, and in this particular
5 case, the petitioner did absolutely nothing to carry that
6 burden. He put on no witnesses, he could have put on his
7 own doctor. He could have called family members in, that
8 could say, well, we're going to help take care of him,
9 we're going to see that he's going to be okay and keep out
10 of trouble. He did nothing.

11 QUESTION: No, but supposing he did all that,
12 and the judge said, well, yes, but I'm still not sure.
13 After all, you had a fight with another inmate 9 years
14 ago, and I'm not sure. You haven't carried your burden.
15 I mean, there's always some risk, isn't there?

16 MS. MORAN: There is always some risk.

17 QUESTION: And these are people who have had
18 some problems in society.

19 MS. MORAN: There's always a risk. And the
20 system is set up to try and limit that risk of confining
21 people that should not be confined.

22 QUESTION: When in doubt, confine them. That's
23 the rule. That's exactly the rule, because the burden is
24 on him.

25 MS. MORAN: But --

1 QUESTION: When in doubt, he stays there
2 forever.

3 MS. MORAN: But unlike what the petitioner says,
4 he can meet that burden.

5 QUESTION: Yes, but not -- as long as there's
6 doubt, as long as there's doubt, he stays there.

7 MS. MORAN: As long as --

8 QUESTION: Is that the rule, by the way, with
9 your civil committees? If someone is committed civilly,
10 does that person have to prove both the lack of
11 dangerousness and recovery from the mental illness?

12 MS. MORAN: I think it is a two-tiered situation
13 there. He has to recover mentally and with the
14 dangerousness -- and not be a danger. He can be
15 maintained if he is still dangerous. But he has to be
16 mentally deficient also.

17 QUESTION: It has to be very expensive, Ms.
18 Moran. Why doesn't the State just take him out of the
19 mental institution, since he no longer has the mental
20 illness? I mean, they're spending a lot of money for
21 doctors and everything. They could just put him in a
22 regular jail, once he's recovered his sanity. Just put
23 him in a regular jail until somebody says he's no longer
24 dangerous.

25 MS. MORAN: Why should they --

1 QUESTION: Could they do that?

2 MS. MORAN: We cannot do that.

3 QUESTION: Why not?

4 MS. MORAN: We cannot do that because --

5 QUESTION: It would be a lot cheaper. You are
6 not treating as mental illness anymore. Why put him in an
7 insane asylum?

8 MS. MORAN: Because he has not been convicted of
9 a crime. And there's no way that we can put him in a jail
10 if he has not been convicted of a crime.

11 QUESTION: No, he has. I'm talking about this
12 defendant here. He has been convicted of a crime.

13 MS. MORAN: No, he's not been convicted of a
14 crime. He has been found not guilty by reason of
15 insanity.

16 QUESTION: I'm --

17 MS. MORAN: He's done a dangerous act. But
18 technically he's not been convicted and he cannot be put
19 into prison.

20 QUESTION: So you have to keep him in an insane
21 asylum?

22 MS. MORAN: He has to be kept someplace so that
23 people are not endangered by these types of individuals.
24 And right now, this is -- this is the State's solution to
25 this problem.

1 QUESTION: Do you think the State could make it
2 more difficult to plead and establish not guilty by reason
3 of insanity as an alternative?

4 MS. MORAN: I really don't know how the State
5 could make it more difficult. They could put more -- I
6 imagine they could put more guidelines and maybe require
7 the testimony of more doctors, because essentially what
8 the judge goes on is what the doctors recommend. In this
9 particular case Dr. Ritter testified that at the
10 time -- he submitted a report to the court saying that the
11 man was not aware of his actions at the time of the crime.
12 So based on that, the judge found him not guilty by reason
13 of insanity.

14 Perhaps if the legislature said what you have to
15 have is a certain number of doctors, perhaps if they did
16 away with Louisiana article -- it's Code of Criminal
17 Procedure article 558, which allows the court to make an
18 adjudication of not guilty by reason of insanity,
19 essentially without a trial. They essentially submit it
20 on the police reports and the medical reports, and he
21 looks at it and says, okay, not guilty by reason of
22 insanity.

23 If they required a full-blown trial in such
24 instances, there might be some things that could be done
25 to make it more difficult, but it wouldn't do away with

1 it. And that's one of the problems in Mr. Foucha's case.
2 Dr. Ritter at the November 29th, 1988 lunacy hearing at
3 one point indicates that -- he says, if this diagnosis was
4 correct, that he could never be certain whether or not the
5 petitioner had a drug-induced psychosis, or whether or not
6 he was malingering. And that part of the reason we have
7 the system set up the way it is to discourage people from
8 tendering false -- false insanity pleas.

9 This Court has repeatedly held -- in Salerno,
10 states that the Government's regulatory interest in
11 community safety can, in appropriate circumstances,
12 outweigh an individual's liberty interests. I think that
13 this is one of those situations where the good of the many
14 outweigh the needs of the few.

15 We have a situation here that, if you look at it
16 realistically, I know that the doctors at Feliciana
17 recommended a probationary discharge. They said, okay,
18 what we want you to do is, we want this man to stay off
19 drugs. We want this man to be gainfully employed or to be
20 seeking employment. Those were two of the requirements
21 for his probationary release.

22 But just from a realistic standpoint, you know,
23 as far as gainful employment, how difficult is it going to
24 be for this individual to find a job when he has this type
25 of background? And what is the guarantee of staying off

1 drugs? Dr. Ritter indicated in his testimony that should
2 the man get into contact with drugs or alcohol again, he
3 could again have a drug-induced psychosis. He could again
4 become even more dangerous.

5 QUESTION: Ms. Moran, suppose this -- suppose
6 this defendant has committed a crime. Do you think it
7 would be constitutional to give him an indeterminate
8 sentence, not 20 years, not 30 years, not life, but just,
9 we're going to put you in prison until we determine that
10 you are no longer dangerous. Do you think that would be
11 constitutional?

12 MS. MORAN: No, I think he would need a
13 determinate term. I think that on a statute, a criminal
14 statute, you'd have to be aware of what you are looking
15 at. You have to know, well, if I commit this crime, this
16 is what's going to happen to me. And that can be vague.

17 QUESTION: But it's okay with respect to this
18 person who hasn't been convicted of a crime, as you say,
19 to keep this person put away on the -- on the same kind of
20 an indeterminate, indefinite basis. We're going to keep
21 you there until we decide that you are no longer
22 dangerous. It's okay now.

23 MS. MORAN: It's okay --

24 QUESTION: Even though he has not been convicted
25 of a crime, and the other person has.

1 MS. MORAN: This is our way of protecting
2 society. It -- it's a balancing test. Whose needs are
3 going to be met here?

4 QUESTION: Is it a permissible way, is what I'm
5 asking. If I put it to you straightforward in the
6 criminal context, it seems to you outrageous that society
7 should say somebody -- to somebody, we're going to keep
8 you locked up until we decide that you are no longer
9 dangerous, without a determinate sentence or not. Why
10 does it seem okay to do it to this person?

11 MS. MORAN: Because -- because of the position
12 that this person put himself in. By the fact that he had
13 tendered a plea not guilty by reason of insanity --

14 QUESTION: Insanity is out of the question.
15 We're -- he's -- I thought it's agreed by everyone that
16 the man no longer has a mental problem. That's out of the
17 question. So he's just like the criminal that I talked
18 about who's given a sentence for -- stay in jail until we
19 decide you're no longer dangerous. I don't think we'd
20 allow that, do you?

21 MS. MORAN: Not for a criminal, straight out
22 like that.

23 QUESTION: Justice Scalia's hypothetical sounds
24 very much like Jackson against Indiana in 406 U.S., and I
25 think your answer was not in line with that holding. You

1 do not cite Jackson against Indiana, and your opponents
2 do.

3 MS. MORAN: No.

4 QUESTION: Isn't it true that most psychiatrists
5 say that the best way to determine mental health and
6 emotional balance is to observe the defendant in a normal
7 environment?

8 MS. MORAN: I'm not familiar -- unfamiliar with
9 that. I assume that is correct.

10 QUESTION: And a prison is not a normal
11 environment, is it?

12 MS. MORAN: No, it's not.

13 I think that, given the fact that the State does
14 have an interest, a legitimate and compelling interest in
15 protecting society at large, that the due process
16 procedures are sufficient. If you look at the differences
17 between Salerno and Foucha, even though the Government has
18 the burden in Salerno and the petitioner has the burden in
19 this particular case, the evidence guideline is the same,
20 clear and convincing evidence. You need a judicial
21 officer to make a determination on the detention.

22 Under Salerno, the arrestee may be detained if
23 no conditions reasonably ensure the safety of the
24 community. In Mr. Foucha's case, the Court determined
25 that the conditions that were set forth by the review

1 panel at Feliciana, the probationary conditions, were
2 insufficient to reasonably protect the community.

3 In both cases, the individual can have counsel
4 at hearing. In both cases the individual can testify
5 himself. He can present witnesses, which Mr. Foucha did
6 not do. He can also present other evidence. He can
7 cross-examine the witnesses. In both cases, the
8 individuals are entitled to a written judgment and they
9 may seek appellate review or seek a writ in the next
10 higher court. ,

11 I think that Louisiana has provided a system of
12 checks and balances. I think that this idea of this being
13 an indefinite commitment is somewhat premature. This
14 individual could have received up to 30 years in prison
15 for an aggravated burglary. He has been at Feliciana now
16 for about 7 years. He has a long way to go before it
17 would even become indefinite. Every year he can come up
18 and try to persuade the court that he is no longer
19 dangerous. He has not succeeded in the times that he has
20 come up to this point. That is not to say that he cannot
21 succeed in the future under the Louisiana statutory
22 scheme.

23 On the issue of equal protection, this Court in
24 Jones held that the holding in the Jones case accords with
25 the widely and reasonably-held view that insanity

1 acquittees constitute a special class that should be
2 treated differently from other candidates for commitment.

3 So I feel that it has already been carved out a
4 little niche for insanity acquittees as opposed to how
5 civil acquittees are treated. And that is legitimate. I
6 think that the equal protection argument merges with the
7 due process argument. I think it is simply a matter of
8 how long can we apply standard preventive detention. How
9 long can we detain these people?

10 We've detained them before for, I think, a
11 maximum for 17 days under Shaw v. Martin, and for longer
12 times under Salerno -- maybe for a period of weeks. In
13 this case, even though it is a period of -- of years, it
14 can be several years, many years, still, I think the Court
15 has previously recognized an overwhelming State interest
16 in protecting the community.

17 What we are trying to prevent -- we are trying
18 to prevent a situation where an individual, an insanity
19 acquittee, is released and then goes out and commits
20 another crime. I know we can't prevent all crimes from
21 happening, it's impossible to do. But I think the State
22 has an interest in trying to do what it can in a situation
23 such as this, to prevent these people from getting out and
24 committing another crime, hurting another individual.

25 And I would ask the Court to keep in place

1 Louisiana's statutory scheme for the detainment of
2 insanity acquittees. Thank you.

3 QUESTION: Thank you, Ms. Moran.

4 Mr. Manasseh, you have a minute remaining.

5 REBUTTAL ARGUMENT OF JAMES P. MANASSEH

6 ON BEHALF OF THE PETITIONER

7 MR. MANASSEH: Thank you, Your Honor.

8 Terry Foucha is being harmed because he had a
9 good attorney to begin with that showed that he
10 was -- that proved himself to be insane at the time of the
11 incident, and he is being harmed now because he had a bad
12 attorney that was unable to prove that he was not a
13 danger. He would have been better off to have the bad
14 attorney to begin with, be found guilty, been sentenced to
15 a short period of time --

16 QUESTION: Your opponent says it would have 30
17 years.

18 MR. MANASSEH: Your Honor, it was a first
19 offense. He was 17 years old. In all likelihood, he
20 would have been sentenced to a short amount of time. Once
21 his time was up, he'd have been released without having to
22 try to prove nondangerousness. There is no way for him to
23 prove a negative proposition, that he would not be a
24 danger to himself or community.

25 We ask this Court to reverse.

1 CHIEF JUSTICE REHNQUIST: Thank you, Mr.
2 Manasseh.

3 The case is submitted.

4 (Whereupon, at 1:55 p.m., the case in the
5 above-entitled matter was submitted.)

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CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents and accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:

NO. 90-5844 - TERRY FOUCHA, Petitioner V. LOUISIANA

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BY alan friedman

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