SUPREME COURT OF THE UNITED STATES

No. 90–5844

TERRY FOUCHA, PETITIONER *v.* LOUISIANA

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF LOUISIANA

[May 18, 1992]

JUSTICE O'CONNOR, concurring in part and concurring in the judgment.

Louisiana asserts that it may indefinitely confine Terry Foucha in a mental facility because, although not mentally ill, he might be dangerous to himself or to others if released. For the reasons given in Part II of the Court's opinion, this contention should be rejected. I write separately, however, to emphasize that the Court's opinion addresses only the specific statutory scheme before us, which broadly permits indefinite confinement of sane insanity acquittees in psychiatric facilities. This case does not require us to pass judgment on more narrowly drawn laws that provide for detention of insanity acquittees, or on statutes that provide for punishment of persons who commit crimes while mentally ill.

I do not understand the Court to hold that Louisiana may never confine dangerous insanity acquittees after they regain mental health. Under Louisiana law, defendants who carry the burden of proving insanity by a preponderance of the evidence will ``escape punishment,'' but this affirmative defense becomes relevant only after the prosecution establishes beyond a reasonable doubt that the defendant committed criminal acts with the required level of criminal intent. *State* v. *Marmillion*, 339 So. 2d 788, 796 (La. 1976). Although insanity acquittees may not be incarcerated as criminals or penalized for asserting the

insanity defense, see *Jones* v. *United States*, 463 U. S. 354, 368–369, and n. 18 (1983), this finding of criminal conduct sets them apart from ordinary citizens.

We noted in *Jones* that a judicial determination of criminal conduct provides ``concrete evidence'' of dangerousness. *Id.*, at 364. By contrast, ```[t]he only certain thing that can be said about the present state of knowledge and therapy regarding mental disease is that science has not reached finality of judgment . . . .''' *Id.*, at 365, n. 13 (quoting *Greenwood* v. *United States*, 350 U. S. 366, 375 (1956)). Given this uncertainty, ``courts should pay particular deference to reasonable legislative judgments'' about the relationship between dangerous behavior and mental illness. *Jones*, *supra*, at 365, n. 13. Louisiana evidently has determined that the inference of dangerousness drawn from a verdict of not guilty by reason of insanity continues even after a clinical finding of sanity, and that judgment merits judicial deference.

It might therefore be permissible for Louisiana to confine an insanity acquittee who has regained sanity if, unlike the situation in this case, the nature and duration of detention were tailored to reflect pressing public safety concerns related to the acquittee's continuing dangerousness. See *United States* v. *Salerno*, 481 U. S. 739, 747–751 (1987); *Schall* v. *Martin*, 467 U. S. 253, 264–271 (1984); *Jackson* v. *Indiana*, 406 U. S. 715, 738 (1972). Although the dissenters apparently disagree, see *post*, at 11 (KENNEDY, J., dissenting); *post*, at 24 (THOMAS, J., dissenting), I think it clear that acquittees could not be confined as mental patients absent some medical justification for doing so; in such a case the necessary connection between the nature and purposes of confinement would be absent. See *Vitek* v. *Jones*, 445 U. S. 480, 491–494 (1980) (discussing infringements upon liberty unique to commitment to a mental

hospital); *Jones*, *supra*, at 384–385 (Brennan, J., dissenting) (same). Nor would it be permissible to treat all acquittees alike, without regard for their particular crimes. For example, the strong interest in liberty of a person acquitted by reason of insanity but later found sane might well outweigh the governmental interest in detention where the only evidence of dangerousness is that the acquittee committed a non-violent or relatively minor crime. Cf. *Salerno*, *supra*, at 750 (interest in pretrial detention is ``overwhelming'' where only individuals arrested for ``a specific category of extremely serious offenses'' are detained and ``Congress specifically found that these individuals are far more likely to be responsible for dangerous acts in the community after arrest''). Equal protection principles may set additional limits on the confinement of sane but dangerous acquittees. Although I think it unnecessary to reach equal protection issues on the facts before us, the permissibility of holding an acquittee who is not mentally ill longer than a person convicted of the same crimes could be imprisoned is open to serious question.

The second point to be made about the Court's holding is that it places no new restriction on the States' freedom to determine whether and to what extent mental illness should excuse criminal behavior. The Court does not indicate that States must make the insanity defense available. See Idaho Code §18–207(a) (1987) (mental condition not a defense to criminal charges); Mont. Code Ann. §46–14–102 (1991) (evidence of mental illness admissible to prove absence of state of mind that is an element of the offense). It likewise casts no doubt on laws providing for prison terms after verdicts of ``guilty but mentally ill.'' See, *e.g.*, Del. Code Ann., Tit. 11, §408(b) (1987); Ill. Rev. Stat., ch. 38, ¶1005–2–6 (1989); Ind. Code §35–36–2–5 (Supp. 1991). If a State concludes that mental illness is best considered in the context of

criminal sentencing, the holding of this case erects no bar to implementing that judgment.

Finally, it should be noted that the great majority of States have adopted policies consistent with the Court's holding. JUSTICE THOMAS claims that 11 States have laws comparable to Louisiana's, see *post*, at 11–12, n. 9, but even this number overstates the case. Two of the States JUSTICE THOMAS mentions have already amended their laws to provide for the release of acquittees who do not suffer from mental illness but may be dangerous. See Cal. Penal Code Ann. §1026.2 (West Supp. 1992) (effective Jan. 1, 1994); Va. Code §19.2–182.5 (Supp. 1991) (effective July 1, 1992). Three others limit the maximum duration of criminal commitment to reflect the acquittee's specific crimes and hold acquittees in facilities appropriate to their mental condition. See N. J. Stat. Ann. §§2C:4–8(b)(3) (West 1982), 30:4–24.2 (West 1981); Wash. Rev. Code §§10.77.020(3), 10.77.110(1) (1990); Wis. Stat. §§971.17(1), (3)(c) (Supp. 1991). I do not understand the Court's opinion to render such laws necessarily invalid.

Of the remaining six States, two do not condition commitment upon proof of every element of a crime. Kan. Stat. Ann. §22–3428(1) (Supp. 1990) (``A finding of not guilty by reason of insanity shall constitute a finding that the acquitted person committed an act constituting the offense charged . . . , except that the person did not possess the requisite criminal intent''); Mont. Code Ann. §46–14–301(1) (1991) (allowing commitment of persons ``found not guilty for the reason that due to a mental disease or defect the defendant could not have a particular state of mind that is an essential element of the offense charged''). Such laws might well fail even under the dissenters' theories. See *post*, at 2–5 (KENNEDY, J., dissenting); *post*, at 2 (THOMAS, J., dissenting).

Today's holding follows directly from our precedents and leaves the States appropriate latitude to care for

insanity acquittees in a way consistent with public welfare. Accordingly, I concur in Parts I and II of the Court's opinion and in the judgment of the Court.