

No. _____

IN THE
Supreme Court of the United States

ADAN SANDOVAL DOMINGUEZ,

Petitioner,

v.

M.E. SPEARMAN,

Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

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Petitioner, by his undersigned counsel, asks leave to file the attached Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit without prepayment of costs and to proceed *in forma pauperis*. Petitioner is indigent and the Office of the Federal Public Defender for the Central District of California was appointed by the United States District Court for the Central District of California to represent him under the authority of 18 U.S.C. § 3599 and the Criminal Justice Act of 1964, 18 U.S.C. § 3006A(b), and this appointment continued on appeal to the Ninth Circuit.

This motion is brought pursuant to Rule 39.1 of the Rules of the Supreme Court of the United States.

Respectfully submitted,
HILARY POTASHNER
Federal Public Defender

DATED: October 10, 2018

By /s/ Young J. Kim
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**Counsel of Record*

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NON CAPITAL CASE
QUESTION PRESENTED

Did defendant meet the competency requirement to stand trial set forth in *Godinez v. Moran*, 509 U.S. 389 (1993), which states a defendant must have “sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding” and must have “a rational as well as factual understanding of the proceedings against him” in spite of defendant’s diagnosis of major depressive disorder?

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Adan Sandoval Dominguez (“Sandoval”) respectfully petitions this Court for a Writ of Certiorari to review the judgment of the Court of Appeals for the Ninth Circuit in *Dominguez v. Spearman*, No. 18-55089.

I. OPINIONS BELOW

The Ninth Circuit’s order denying certificate of appealability was not reported. Petitioner’s Appendix (“Pet. App.”) 1. The district court’s order denying relief without granting discovery or an evidentiary hearing and entering judgment is unreported. Pet. App. 2. The California Supreme Court’s summary denials on habeas are not reported. Pet. App. 3.

II. JURISDICTION

The Ninth Circuit’s order denying certificate of appealability was filed on July 12, 2018. The Court’s jurisdiction is timely invoked under 28 U.S.C. § 1254(1).

III. CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. Const., Amend. XIV

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

Title 28 U.S.C. § 2254(d)

“An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any

claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.”

IV. STATEMENT OF THE CASE

On February 6, 2013, Sandoval’s left foot and his leg up to his knee was amputated after it became infected and was left untreated while in custody. (RT at 59-61, 186.) A little more than two weeks later on February 22, 2013, Sandoval’s trial was suspended when his trial counsel, Deputy Public Defender Nicole Williams declared doubt as to his competency. (RT at 26.) At the competency hearing held on April 15, 2013, before the Honorable Mac R. Fisher (“Competency Court”), Sandoval called three witnesses and the prosecution called none. (RT at 46, 89, 166, 191.) After testimony and argument, the Competency Court found that although Sandoval suffered from a major depressive disorder, he was competent to stand trial. (RT at 199-200.)

A. Crime and Trial

The State contends that on numerous occasions Sandoval molested his three nieces at family parties and in his vehicle, that Sandoval admitted these allegations to the police, and reported all three girls to be his nieces. While in prison awaiting trial, on February 6, 2013, Sandoval’s left foot and his leg up to his knee was amputated after it became infected and was left untreated while in custody. (RT at 59-61, 186.) Due to this unfortunate amputation, Sandoval lacked the competence to

stand trial because he suffers from major depressive disorder. Prior to Sandoval's trial, appointed defense counsel Deputy Public Defender Nicole Williams declared doubt as to his competency. Dominique Sherrell Manning, Dr. Kenneth Burton Kaisch, and Ms. Williams, all testified on behalf of Sandoval's competency.

i. Testimony of Dominique Sherrell Manning

Dominique Sherrell Manning, a clinical therapist at Robert Presley Detention Center, conducted a behavioral health assessment on Petitioner on February 22, 2013. (RT at 47, 49-50.) Manning diagnosed Petitioner with major depressive disorder. (RT at 51, 68.) According to Manning, major depressive disorder requires two or more major depressive episodes along with depressed mood most of the day, loss of interest or pleasure in all or most activities, insomnia, trouble sleeping, fatigue, loss of energy, diminished ability to think or concentrate, excessive guilt or worry, worthlessness, and hopelessness. (RT at 52.) Petitioner reported that he found it difficult to sleep through the night, had a depressed mood, reported crying spells, and he had crying spells during the assessment. (RT at 53.) Petitioner was depressed because he had lost a limb and would no longer be able resume his lengthy career as a truck driver if he was released from custody because he could not hold a Class A driver's license. (RT at 53, 55.) Petitioner explained that his right big toe became infected when he was first taken to jail and attempted to get treatment for 110 days before the toe was eventually amputated. (RT at 59.) Later, Petitioner's left foot became infected and his foot and leg had to be amputated. (RT at 59-61.)

Manning testified that Petitioner no longer had interest in activities he previously enjoyed. (RT at 57, 64.) Petitioner stated, "I have no more fight left in me, I can't do it anymore." (RT at 57.) Also during the interview, Petitioner stated,

that "living is one of the most precious gifts." (RT at 69.) During the assessment, Petitioner had difficulty concentrating, and Manning had to repeat herself. (RT at 62, 71.) Manning explained that when a person is hopeless or has extreme worthlessness, it can affect decision making, living plans, appropriate living skills, and thought process due to not having the capacity to take care of oneself. (RT at 64, 66.) Further, a person may be unable to eat, unable to get out of bed, unable to interact with others, unable to communicate, talk, answer even the most basic questions, and take their medications. (RT at 66.) Although not offering an opinion on Petitioner's competency, Manning opined that Petitioner suffers from major depressive disorder and has active symptoms, which could impact his ability to make decisions for himself, and communicate and interact with others.

ii. Testimony of Dr. Kenneth Burton Kaisch

Dr. Kenneth Burton Kaisch was appointed to evaluate Petitioner and met with him for 60 minutes on March 7, 2013. (RT at 90.) Kaisch performed a mental status examination and a structured interview for depressive disorders. (RT at 91, 129.) Kaisch opined that Petitioner was presently incompetent because he cannot rationally assist in his defense. (RT 105-106.) Kaisch concluded that Petitioner "is almost a textbook example for a major depressive disorder," meaning he has all of the symptoms with the exception of one (thoughts of death or suicide). (RT at 91, 99.) Petitioner has severe major depression. (RT at 92, 99.) According to Kaisch, during the hour long interview, Petitioner had a flat affect and exhibited psychomotor retardation, including remaining in the same, uncomfortable position the entire interview and exhibited slowed speech. (RT at 93-94, 100, 133.) Also, Petitioner had lost a significant amount of weight, 25% of his premorbid body weight, which is consistent in a loss of interest in things that give pleasure or satisfaction. (RT at 101-102.) Petitioner also made very little effort to get treatment

for his left leg injury compared to his attempt to get treatment for his earlier toe injury, demonstrating that his normal self-protective instinct was being overridden by his depression. (RT at 110-113.)

Kaisch opined that Petitioner's thought functioning appeared to be lower than his level of intelligence and his thinking was very concrete. (RT at 94-95.) Further, Petitioner was also unable to successfully complete the serial seven subtraction indicating that he was unable to hold something in his mind and work with the information. (RT at 96.) Petitioner was also unable to successfully spell his last name backward, indicating that he was very impaired. (RT at 98.) Depression with psychomotor retardation causes everything to slow and the ability to process mentally slows down. (RT at 96, 152.) In Petitioner's case, his ability to process slowed significantly. (RT at 96.)

According to Kaisch, Petitioner would have a very difficult time, if not an impossible time, holding in mind the relevant evidence, the testimony being presented, comparing the two in terms of what is factual and what is not, and communicating the information to his attorney. (RT at 97.) Petitioner's loss of interest would affect his ability to listen to evidence at trial because he does not care and has no interest in consulting with an attorney. (RT at 103.) Kaisch would not expect a person with loss of interest to be engaged in their trial, listen attentively to testimony, and consult with their attorney about information elicited in court or how to present a better defense. (RT at 105, 114, 116.)

Kaisch did not believe that Petitioner could rationally assist in his defense or engage in self-protective behavior. (RT at 106.) Kaisch explained, when a person is severely depressed, there is not much thinking going on; rather, the person is just existing. (RT at 115.) Petitioner also suffers from insomnia and fatigue, which

manifests during the day where Petitioner has fallen asleep without warning. (RT at 117.)

Kaisch opined that Petitioner's ability to pay attention to the evidence at trial, and remember evidence at trial is minimal. (RT at 116.) Petitioner, however, was aware of the charges and aware of the roles of the prosecutor, defense counsel and the judge. (RT at 149-150.) Petitioner was able to provide information about his job history, minimal information about his family history, information about his arrest and jail placement, and information about his medical conditions. (RT at 134-136, 139.)

According to Kaisch, Petitioner also suffers from diabetes for which he is insulin dependent. (RT at 119.) Petitioner has had bouts where he is dizzy, confused and falls asleep, which is consistent with his diabetes not being properly controlled. (RT at 119, 121.) With insulin dependent diabetes, a person can go through periods of hypoglycemia where they can lose consciousness and die. (RT at 110.) Petitioner fears eating snacks provided to him for court, fearing he will get diarrhea and because he is not ambulatory will not be able to get to the restroom. (RT at 121.)

iii. Testimony of Deputy Public Defender Nicole Williams

Deputy Public Defender Nicole Williams testified that she was assigned to represent Petitioner in March 2012. (RT at 167.) When she was first assigned, Petitioner was receptive to conversation and able to communicate with her about the case, things that needed to be done on the case and information about himself. (RT at 168.) In February 2013, Williams noted a significant change in Petitioner's demeanor. (RT at 168.) Petitioner was no longer as responsive to communication with Williams, he appeared lethargic at times, she had to wake him up to speak with him, he was no longer able to retain information like he previously was, and he

appeared to be in substantial pain or discomfort. (RT at 168.) On February 22, 2013, when they were sent to Judge Fisher for trial, Petitioner was lethargic, in pain, slumped over in his wheelchair, despondent and cried. (RT at 169, 172, 182.) Petitioner fell asleep in court that day and had fallen asleep a couple of times before that date. (RT at 169-170, 177.) Williams did not feel comfortable going to trial with Petitioner in his condition and declared a doubt as to his competency. (RT at 169, 182.)

Williams spoke with the jail staff regarding Petitioner and asked for assistance maintaining Petitioner's blood sugar throughout the day. The jail stated that it could provide a snack. (RT at 170.) The first snack provided was wheat bread, peanut butter packets, an apple and a beverage. (RT at 170.) Petitioner could not eat the snack because he is allergic to peanut butter. (RT at 171.) Petitioner's trial was scheduled to last four to six days. (*Id.*) The trial day would last from 8:30 to 4:30 or 9:00 to 4:30. (*Id.*) Inmates are woken up for court at 4:30 a.m. (*Id.*) Petitioner would be in the court for eight hours and additional time for transportation. (*Id.* at 171-172.) Williams was concerned about Petitioner's ability to assist her with voir dire, at trial, deciding whether to testify or waiving his right to testify, and testifying if he decided to do so. (RT at 172.)

B. Sandoval's Mental Impairments

Because of his major depressive disorder, illnesses and impairments, Sandoval lacked “sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding” and “a rational as well as factual understanding of the proceedings against him.” *Godinez v. Moran*, 509 U.S. 389, 396 (1993) (quoting *Dusky v. United States*, 362 U.S. 402 (1960) (per curiam)); see also *Drope v. Missouri*, 420 U.S. 162, 171(1975); *Pate v. Robinson*, 383 U.S. 375, 385 (1966).

V. REASONS FOR GRANTING THE WRIT

“Certiorari is appropriate when ‘a United States court of appeals ... has so far departed from the accepted and usual course of judicial proceedings ... as to call for an exercise of this Court’s supervisory power.’” *Kalamazzo County Road Com’n v. Deleon*, 135 S. Ct. 783, 783 (2015) (Alito, J. dissenting from the denial of certiorari) (quoting Supreme Court Rule 10(a)).

In this case, the lower courts ignored much of the evidence that Sandoval presented in support of his competency defense. Based on the testimony in the lower courts, the court’s actions were unreasonable. Sandoval knew he was in court, but he was unaware of the nature of the proceedings, and was unable to help his defense counsel with his defense.

A. Sandoval Lacked Capacity to Stand Trial

“It has long been accepted that a person whose mental condition is such that he lacks the capacity to understand the nature and object of the proceedings against him, to consult with counsel, and to assist in preparing his defense may not be subjected to a trial.” *Drope*, 420 U.S. at 171. A criminal defendant is incompetent if he lacks “sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding” and “a rational as well as factual understanding of the proceedings against him.” *Godinez*, 509 U.S. at 396. “[A] defendant lacks the requisite rational understanding if his mental condition precludes him from perceiving accurately, interpreting, and/or responding appropriately to the world around him.” *Lafferty v. Cook*, 949 F.2d 1546, 1551 (10th Cir. 1992). The Ninth Circuit has recognized these competency standards as clearly establish federal law. *Maxwell v. Roe*, 606 F.3d 561, 568 (9th Cir. 2010).

“[I]t is not enough for the district judge to find that ‘the defendant [is] oriented to time and place and [has] some recollection of events,’ but that the ‘test

must be whether he has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding-and whether he has a rational as well as factual understanding of the proceedings against him.’ ” *Dusky*, 362 U.S. at 402. While the Supreme Court in *Dusky* did not set out the facts underlying its articulation of this element of the competency test, that evidence is recited in detail in the circuit opinion which the Supreme Court reversed. *See Dusky v. United States*, 271 F.2d 385, 387-89 (8th Cir.1959). In that case, as is here, the court held a competency hearing in which a medical expert testified that the defendant was oriented as to time, place and person, stating “[t]his means that he is able to know the day of the week, the hour, the place in which he finds himself geographically, and the circumstances of his present situation. He knows he is in a court room; he knows the day of the week and the day of the year, and he knows that you are his attorney and Judge Smith is the judge. This is the orientation to person. He knows it all.” *Id.* at 389. Yet, this medical expert found the defendant incompetent to stand trial stating, “I do not think that he can properly interpret the meaning of the things that have happened. I don't think he can convey full knowledge of his actual circumstances ... due to an inability to interpret reality from unreality ... to suspicions of what is going on ... to confused thinking which is part of his mental illness.” *Id.* Making lucid comments about simple facts and being able to follow proceedings during a hearing is not competency and those facts do not outweigh the testimony of Kaisch about Petitioner’s incompetence.

i. Testimony Regarding Major Depressive Disorder Cannot be Overlooked by the Court

Kaisch's testimony about Petitioner's major depressive disorder and its impact on Petitioner's competency was uncontradicted. Both Kaisch and Manning agreed that Petitioner had major depressive disorder. Kaisch also opined that

Petitioner's mental disease or disorder rendered Petitioner incompetent to proceed. Manning, while not being asked her opinion on Petitioner's competency, agreed that a major depressive disorder can effect decision making, living plans, appropriate living skills, impair the thought process due to not having the capacity to take care of oneself, and that a person may be unable to interact with others, unable to communicate, talk, answer even the most basic questions, and take their medications. (RT at 64, 66.) The fact that Petitioner momentarily paid attention and assisted his attorney, by stating a very simple fact, does not undermine the undisputed expert testimony that Petitioner had a major depressive disorder that rendered him incompetent nor does it evidence competency. As Kaisch explained, Petitioner's decision to answer a simple question did not undermine his opinion about Petitioner's ability to participate in trial and assist his attorney, but showed only that he was paying attention and had an interest in participating "at that moment." (RT at 126.) A person with a major depressive disorder does not forget important facts, but loses the ability to care about things, which is what occurred in Petitioner's case rendering him incompetent. (RT 152-153.) The state court in this case essentially used the fact that petitioner could recall a single basic fact—which of his toes was amputated—as proof of his competency. This approach runs directly contrary to *Dusky* or is, at a minimum, an unreasonable application of that clearly established federal law.

Major depressive disorder requires two or more major depressive episodes along with depressed mood most of the day, loss of interest or pleasure in all or most activities, insomnia, trouble sleeping, fatigue, loss of energy, diminished ability to think or concentrate, excessive guilt or worry, worthlessness, and hopelessness. (RT at 52.) Sandoval reported that he found it difficult to sleep

through the night, had a depressed mood, reported crying spells, and he had crying spells during the assessment with Manning. (RT at 53.)

Sandoval is depressed since he lost a limb and would no longer be able to resume his lengthy career as a truck driver if he was released from custody because he could not hold a Class A driver's license. (RT at 53, 55.) Sandoval stated, "I have no more fight left in me, I can't do it anymore." (RT at 57.) When a person is hopeless or has extreme worthlessness, it can effect decision making, living plans, appropriate living skills, and thought process due to not having the capacity to take care of oneself. (RT at 64, 66.) It is incumbent on this Court to remand this case to the Ninth Circuit to consider Sandoval's claim.

CONCLUSION

The Petition for a writ of certiorari should be granted.

Respectfully submitted,

HILARY POTASHNER
Federal Public Defender

DATED: October 10, 2018

By: /s/ Young J. Kim
Young J. Kim*
Deputy Federal Public Defender
Attorneys for Petitioner
**Counsel of Record*

CERTIFICATE OF WORD COUNT

As required by Supreme Court Rule 33.1(h), I certify that the document contains 3846 words, excluding the parts of the document that are exempted by Supreme Court Rule 33.1(d).

I declare under penalty of perjury that the foregoing is true and correct.

Executed on October 10, 2018.

/s/ Young J. Kim

Young J. Kim*

Deputy Federal Public Defender

Attorneys for Petitioner

Adan Sandoval Dominguez

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CERTIFICATE OF SERVICE

I, Young J. Kim, do swear or declare that on this date, October 10, 2018, as required by Supreme Court Rule 29, I have served the enclosed Motion for Leave to Proceed in Forma Pauperis and Petition for a Writ of Certiorari, were mailed, postage-prepaid, to the Solicitor General of the United States, United States Department of Justice, 950 Pennsylvania Avenue, N.W., Room 5614, Washington, DC 20530-0001, counsel for the Respondent.

DATED: October 10, 2018

/s/ Young J. Kim
Young J. Kim*
Deputy Federal Public Defender

Attorneys for Petitioner
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