In the

Supreme Court of the United States

JAMES EDWARD DROPE,

Petitioner,

v.

THE STATE OF MISSOURI

Respondent.

No. 73-6038

Washington, D. C.
November 13, 1974

Pages 1 thru 52

HOOVER REPORTING COMPANY, INC.
Official Reporters
Washington, D. C.
546-6666

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Wednesday, November 13, 1974

The above-entitled matter came on for argument at 11:45 a.m.,

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM O. DOUGLAS, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice

APPEARANCES:

THOMAS C. WALSH, ESQ., 500 North Broadway, St. Louis, Missouri 63102, for the Petitioner.

NEIL MacFARLANE, ESQ., Assistant Attorney General of Missouri, St. Louis, Missouri, for the Respondent.

C O N T E N T S

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear argument next in No. 73-6038, Drope against Missouri.

Mr. Walsh, you may proceed whenever you are ready.

ORAL ARGUMENT OF THOMAS C. WALSH

ON BEHALF OF THE PETITIONER

MR. WALSH: Mr. Chief Justice, and may it please the Court, this in forma pauperis case comes to this Court on certiorari to the Missouri State court system. This is a State court post-conviction proceeding in which the petitioner, James Drope, is challenging the life sentence imposed upon him in 1969 by the Circuit Court of the City of St. Louis for the somewnat bizarre and improbable crime of raping his own wife.

There are two issues presented by our petition in this case. First is whether the petitioner was unconstitutionally denied his right to a psychiatric exam to determine his competency to proceed with his trial, in accordance with this Court's decision of Pate v. Robinson, particularly in light of his mental history and his attempted suicide during the course of the trial.

The second question is whether he was unconstitutionally tried in absentia following this suicide attempt which caused him to be hospitalized for surgery and therefore to miss the remainder of the trial.

QUESTION: Did the Missouri Court of Appeals from

which you have certiorari now regard both of those issues as open for its consideration?

MR. WALSH: Yes, it did, Mr. Justice, absolutely.

It is our position that to state the facts of this case is to resolve the first issue presented. It's unnecessary, I think, to dwell upon the somewhat sordid details of the crime itself. Suffice it to say that the petitioner and four of his so-called friends were charged with raping petitioner's wife in January of 1969.

The record is perfectly clear that, first of all, his wife thought that the petitioner was mentally ill and she signed a statement to the effect that she did not want to prosecute him and she thought he should have psychiatric care.

QUESTION: You acknowledge, I suppose, that a person could be mentally ill, seriously insane, whatever that term means, and still be competent to stand trial.

MR. WALSH: Well, the question here, your Honor, is whether there was a reasonable doubt about the competency to stand trial in accordance --

QUESTION: I am just talking now about the distinction between the two.

MR. WALSH: I think there is grounds for claiming there is a distinction.

QUESTION: In fact, we are not so -- you would have

some problem about every verdict that was not guilty by reason of insanity, because if you reasoned that way, then the verdict would demonstrate that the person shouldn't have been tried in the first place.

MR. WALSH: Tried in the first place, yes, sir.

But the question here on the first point is whether there is a reasonable doubt under Pate v. Robinson.

Now, in addition to the wife's testimony, before the court at the time of the trial was the report of the psychiatrist which was made within a month of the transaction, the occurrence which was the subject of the prosecution. Dr. Shuman was the psychiatrist who was seen by the petitioner at the suggestion of his counsel. That report is reproduced in the appendix at pages 8 to 13.

I think it's important to analyze what Dr. Shuman said. He examined the petitioner for an hour and a half, and he found that the petitioner was markedly agitated. He was suffering from marked anxiety; he was having difficulty in talking. He told the doctor that he heard voices from time to time, he saw visions of dead people, and he sometimes had conversations with them. He had a difficult time relating, he was circumstantial and irrelevant in his speech, and he certainly needs the aid of a psychiatrist, said Dr. Shuman. He was found to be a very neurotic individual with a socio-pathic personality suffering from sexual perversion, borderline

mental deficiency, and chronic anxiety reaction with depression.

QUESTION: And what was the date of that examination in relation to the trial, Mr. Walsh?

MR. WALSH: That examination was on February 20; the trial was in June.

This report was attached to a motion for continuance for the purpose of obtaining a psychiatric examination under Missouri Chapter 552. However, when the case was assigned for trial -- I might add the State of Missouri consented to that motion, consented to an exam. But when the case was assigned for trial there was some misunderstanding about the trial date. Petitioner's counsel indicated that he thought that the motion had been granted and the case was going to be continued to the September term. However, it was on the docket in June, it was called and assigned to division, and when it was assigned, petitioner's counsel was not there. He showed up later that day, and the trial judge,who was plainly irritated at counsel, refused at that point to grant a continuance or a psychiatric exam and ordered the trial to begin immediately.

At that point, counsel in the record specifically stated that he was protesting against going to trial under those circumstances because his client was not fit to proceed and should be given a psychiatric exam.

QUESTION: Who was the State judge?

MR. WALSH: The State judge was David McMullan of the Circuit Court of the city of St. Louis.

And at that point a specific record was made by counsel against proceeding, but the trial commenced at that point.

Now, at the trial, which started in the afternoon of June 23rd with the swearing of the jury, the evidence was begun on the 24th of June. The victim, the petitioner's wife, testified about the details of the rape, and she also testified from the stand that she felt that her husband was mentally sick and in need of psychiatric care.

She testified that from time to time when he didn't get his way he would roll down the stairs to manifest his displeasure.

The State's case was not concluded on the 24th, and on the morning of the 25th, the next day, when court convened, the petitioner was not there. He was on bond, and the court was advised, evidently by telephone, that he had been shot, he had shot himself, with a 22 that morning and had been taken to City Hospital in St. Louis and was undergoing surgery. It was called at that time a suicide attempt.

QUESTION: Had the trial been going on a bit at this time?

MR. WALSH: The trial began afternoon of the 23rd with the swearing of the jury. Evidence had been taken on the

24th, and this was the morning of the 25th. The State had not concluded its case.

QUESTION: This was when he apprehended that he might have to appear, that day, was it, or --

MR. WALSH: Well, the State still had four witnesses to go. What he apprehended, I am not quite sure, Mr. Justice. But in any event he shot himself in the morning, and was obviously unable to attend the rest of the trial.

QUESTION: How long was he in the hospital after that?

MR. WALSH: Twenty-one days, Mr. Justice. He was operated on twice, and he was 21 days in the hospital before he was released.

Now, at this point counsel for the petitioner moved for a mistrial saying he had no client and he could not continue with the trial. But the trial judge without a hearing or without any examination of the situation other than the telephone call he had received summarily ruled that the petitioner had brought this on himself and that the trial will proceed. And the trial did proceed over this objection. The State called four more witnesses. The State put on proof of the petitioner's prior 1958 conviction for burglary. There was argument, of course, and instruction of the jury,and a finding of guilty was returned by the jury. And subsequent to that, under the Missouri second offender statute, the

court imposed a life sentence upon the petitioner.

That conviction was affirmed by the Missouri Supreme Court on direct appeal, and then petitioner filed this proceeding under a Missouri State post-conviction law which is Missouri Rule 27.26, the counterpart of habeas corpus, and counsel was appointed to represent him at that stage.

At the hearing on the 27.26 motion, we brought in two psychiatrists to testify that a person having the symptoms and behaving like the petitioner did was in need of psychiatric care and that there was at least a reasonable doubt about his ability to proceed with trial and to understand the nature of the proceedings.

QUESTION: Their examination was how long after the trial?

MR. WALSH: They never actually examined him. This was on hypothetical.

QUESTION: I see.

MR. WALSH: They didn't examine him before and we had to proceed hypothetically.

Nevertheless, in spite of this rather abundant record, I think, of at least a doubt about his competency both to proceed and to excuse himself from the trial, the same trial judge who ruled on trial matters overruled the motion under Rule 27.26 for post-conviction relief, and that decision was affirmed by the Missouri Court of Appeals. It is that

decision which is here for review today.

The first point as to the reasonable doubt about his competency to proceed, we think, is squarely ruled by this Court's decision in Pate v. Robinson. As I said, if there is a bona fide doubt about competency, then a hearing must be had to determine whether he is fit to proceed. And the test of competency is set forth in this Court's Dusky opinion, Dusky v. United States, and it's twofold: Does he have sufficient ability to consult with his lawyer with a reasonable degree of understanding? And, secondly, does he have a rational and a factual understanding of the proceedings?

Now, this record is full of denials by the trial judge of specific requests for a psychiatric exam. He ignored the report of Dr. Shuman. He ignored his wife's testimony that this man needed psychiatric help. And finally, he ignored the suicide attempt as it bore upon his mental state.

QUESTION: Again, counsel, let's try to keep these things separate. A person could be very much in need of psychiatric help and still be competent to stand trial, don't you concede that?

MR. WALSH: I don't think so, Mr. Chief Justice. If he is in need of psychiatric help, I think you have to ask a psychiatrist to determine whether he is in fact competent to proceed. Whatever is wrong with him will prevent him from understanding the nature of the proceedings and assisting

counsel.

QUESTION: There are countless cases, hundreds of them, where psychiatrists have reported in pretrial the defendant is mentally sick, he is in need of psychiatric care, but he is competent to stand trial.

MR. WALSH: That may well be, your Honor, but we should have had that opportunity here to have a psychiatrist tell us that.

QUESTION: I'm only going to the standard now. Are you suggesting the wife's view of the matter as a point that should have alerted the court to order the examination?

MR. WALSH: Absolutely, one of many, Mr. Chief Justice.

QUESTION: Do you contend that if anyone is said to be in need of psychiatric help, the trial can't proceed until a psychiatrist gives his O.K.?

MR. WALSH: Well, as a general rule I don't know -- I think that is the practice in the Federal courts, if a motion is made for a psychiatric exam, I think one is ordered to avoid problems just like that which we have here.

On the facts of this case, there are much more than that. We have a psychiatrist's report saying this man has a difficult time relating, circumstantial and irrelevant in his speech. He has trouble talking. That certainly should have alerted the court that he's going to have trouble

communicating with counsel and understanding what's going on.

The question again -- I hate to keep harping on this - but this is the rule of Pate, it's a question whether there's a doubt. And I think when a charge is made that a man is mentally ill and needs the help of a psychiatrist, I don't think the trial judge himself can resolve the question of whether the defect this man has prevents him from being able to proceed or not. I think that is for the psychiatrist to determine. I think that's what Pate holds. And the Moore case in the Ninth Circuit says that when this doubt is --

QUESTION: There are cases where psychiatric testimony is on one side and lay testimony on the other and the court has decided in favor of the lay testimony and non-appeal has been upheld. This Dusky itself in a later chapter.

MR. WALSH: That's right, Mr. Justice. But, again, he is entitled constitutionally to that psychiatric exam.

QUESTION: Your emphasis is only on whether the circumstances were such as to require that hearing an examination by a psychiatrist to determine his competency to stand trial.

MR. WALSH: Absolutely.

QUESTION: You don't suggest that every time someone needs a psychiatrist that means automatically there has to be such a determination.

MR. WALSH: Well, I don't think we have to get to that in this case.

QUESTION: Dusky is also out of Missouri.

MR. WALSH: I am not aware of it. I don't know.

QUESTION: The other end, Kansas City.

(Whereupon, at 12 noon, a recess was taken until 1 p.m. the same day.)

AFTERNOON SESSION

(1:02 p.m.)

MR. CHIEF JUSTICE BURGER: Counsel, you may resume.

ORAL ARGUMENT OF THOMAS C. WALSH

ON BEHALF OF THE PETITIONER (Continued)

MR. WALSH: Mr. Chief Justice.

The second issue presented by this cases arises under the confrontation clause of the sixth amendment as made applicable to the States through the fourteenth amendment and arises out of the problem created by the continuation of the trial in petitioner's absence after his attempted suicide on the morning of June 25, 1969.

The petitioner was on trial, as I mentioned, for rape which is punishable by death in the State of Missouri and was punishable by death at that time, being prior to this Court's decision in Furman v. Georgia, and the death penalty had not been waived by the State. Therefore, our position is that since this was a capital case, according to the decisions of this Court dating back to the 1800's, the right to be present and to confront one's witnesses in a capital case cannot be waived and, therefore, to continue the trial in the petitioner's absence was a violation of his constitutional rights.

To my knowledge, this Court has never upheld the conviction of a defendant who was absent in a capital case

during a major portion of his trial. And as it will be recalled, here the defendant missed the testimony of four witnesses, the proof of his prior conviction, the final arguments, the instructions, and the verdict itself.

The rule of Diaz v. United States from 1912 recognizes the necessity of the defendant's right to confront his witnesses in a capital case --

QUESTION: Are you suggesting that no matter what the circumstances, if it's a capital case, if one leaves the courtroom, disappears, that the trial can't go on?

MR. WALSH: Well, I think that's the state of the law as I understand it today, Mr. Justice. I recognize that Illinois v. Allen made some inroads perhaps on that rule.

QUESTION: Inroads or improvements?

(Laughter.)

MR. WALSH: Well, that's a different case, actually, because you don't have a situation here where you have a contemptable defendant --

QUESTION: Of course, even in .. there were circumstances under which there was a presence of sorts. He might have been in his cell on closed-circuit television.

MR. WALSH: Right. And as your concurring opinion mentioned, he had the right to reclaim his right to be present at any time he indicated his willingness.

QUESTION: But you do go so far as to suggest that

our cases really hold that if it's a capital crime, the defendant absents himself, even though he just leaves the courtroom and disappears, that the trial aborts until they bring him back.

MR. WALSH: I think that's my understanding of the state of the law. And Common Law Rule 43, I think, recognizes that as its dictum from Diaz, I concede that. But the Hopt case in the 1880's and the Lewis case of that era, I think, stand squarely for that proposition and it has never been overruled.

QUESTION: Those early cases were in a day when no capital defendant was ever on bail, too, isn't that true?

MR. WALSH: Well, I don't know that to be a fact.

QUESTION: Well, were they, until recently?

MR. WALSH: I just don't know. But I don't think the wording of the Diaz opinion indicates that that was the major consideration. There were really two cases in which the defendant was not deemed capable of waiving his right. One was when he was in custody,under Diaz, and the other was when he was on trial for a capital crime. And it said, I think the language said usually in custody, but I don't know whether --

QUESTION: Mr. Walsh, do you have to go as far as to say under any circumstances? Suppose a man goes out to lunch and he has one too many drinks and he's drunk. What happens?

MR. WALSH: Well, in those circumstances I think if it's a capital case, there are procedures whereby the case can be continued for a day, perhaps, to allow him to regain his senses.

QUESTION: You say "can" or "must"?

MR. WALSH: Well, I think "should," "must", under those circumstances.

I recognize that's --

QUESTION: Well, in any case, I'm trying to say in this case you don't have to go that far.

MR. WALSH: That's correct. I think even if --

QUESTION: Why bite off more than you need to?

MR. WALSH: Well, I think, even in this case, Mr. Justice, if we assume that the right is waivable -- now, I'm not prepared to do that -- and still we contend that the petitioner here was denied his right to be present because (a) there was no meaningful evaluation made of whether his absence from the courtroom was voluntary or involuntary, and (b) the Missouri State courts placed the burden on him of proving that it was involuntary.

QUESTION: The petition, I take it, if I understood you earlier, you submit there had to be a determination whether he was capable of a knowing and intelligent --

MR. WALSH: Precisely. Yes, Mr. Justice.

The State courts presumed that his absence was

voluntary and held therefore that it was voluntary without giving him -- held it was voluntary because he had not sustained the burden of showing that it wasn't. And all this was done without reference to his mental state and an inquiry as to whether in fact he was capable of making a conscious, knowing, voluntary choice not to be present and to waive his right.

QUESTION: Do you think it would have been feasible to continue to suspend this trial and hold the jury somewhere for 21 days at least while he was in the hospital and probably a longer period than that?

MR. WALSH: Well, I think what should have been done is a mistrial should have been declared and --

QUESTION: Was it asked for?

MR. WALSH: It was asked for, yes, sir, and I think it should have been declared under these circumstances. All the court did was say, well, he shot himself; he made the choice not to be here, let's go.

QUESTION: I take it you might not be here either if the court had refused the continuance, gone on with the trial, but then immediately at the termination of the trial just as soon as it was feasible, had the kind of a hearing that covered the factor that you wanted, and then it was found that he was competent to stand trial?

MR. WALSH: I have to say I think that would be a reasonable procedure, if the burden were appropriately placed

and the presumptions were correct and his mental state was inquired into. Yes, Mr. Justice.

QUESTION: But the fact is that the hearing held after trial didn't go into that phase of the matter.

MR. WALSH: There was no examination of his ability to make a choice.

QUESTION: Yes.

MR. WALSH: But the Court did find it was voluntary, having erroneously reversed the burden.

QUESTION: Yes.

MR. WALSH: We think under Schneckloth v.Bustamonte and Johnson v. Zerbst the Court has said that courts should indulge every reasonable presumption against the waiver of constitutional rights,and the right of confrontation, of course, is squarely included among those. And without a finding that he intentionally and knowingly waived his right, it was error to proceed to try him --

QUESTION: What sort of a factual inquiry would that be? Supposing that a man on trial for a capital offense simply jumps bail and absconds. Now, will he be heard to say when he gets back that although he knew he was leaving the court and he wouldn't be there for trial, he really didn't intend to waive his right of confrontation?

MR. WALSH: Well, your Honor, I think if the defendant just disappears from the courtroom and doesn't come

back, I think the court has to take some steps to find him before any determination can be made of whether his absence is voluntary or involuntary. He could have had a heart attack, he could have been hit by a car.

QUESTION: O.K., but how long do you hold the jury in a case like that?

MR. WALSH: Well, that's a difficult question.

QUESTION: It's a very difficult question. I am interested in your answer to it.

MR. WALSH: Well, I would think that until a determination can be made whether his absence is voluntary or involuntary, you have to hold the jury, and if that's going to require too much time, you have to declare a mistrial.

QUESTION: So that simply by absconding, he can abort the trial.

MR. WALSH: I am talking about a capital case, now.

QUESTION: Yes. In a capital case, by absconding, he can abort the trial?

MR. WALSH: That would be my position. I recognize that Taylor v. United States, in a noncapital case, said that that's not correct. But there it was conceded that his absence was voluntary. But in the absence of any determination or any ability to make a determination whether it's voluntary or involuntary, I don't think the trial can proceed, unless perhaps the procedure suggested by Mr. Justice White for a

hearing immediately after the trial would suffice.

QUESTION: Mr. Walsh, all these .. were Federal cases, weren't they? Diaz and Taylor.

MR. WALSH: Yes, Mr. Justice. The Diaz case arose in the Philippines, but as I read it, it is a Federal constitutional case.

QUESTION: Is it clear that they were decided on constitutional grounds?

MR. WALSH: As I read them, it is. I think there is some grounds for difference of opinion. There is a lot of reference to Filipino law in there. And it's not completely clear, frankly.

QUESTION: You wouldn't be making this argument in a State where there was no capital punishment?

MR. WALSH: Not the absolute nonwaivability argument, no, Mr. Justice.

QUESTION: Would you be making the same argument with respect to the necessity for a hearing as to competence?

MR. WALSH: Yes, absolutely. As to the question of whether or not the right is absolutely nonwaivable, we would not make that argument if this were not a capital --

QUESTION: I hope your case doesn't turn on that.

MR. WALSH: In summary, we Missourians are proud of our Missouri State court system, and justifiably so. But in this case we think something went radically wrong with

justice. The Missouri courts in their anxiety to keep this petitioner off the streets, stepped on his constitutional rights. And we think the remedy of this Court in the Pate case is the appropriate disposition of this matter, namely, to reverse and remand the judgment with orders to vacate the conviction and to discharge the petitioner unless he can be retried within a reasonable time.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Walsh.

ORAL ARGUMENT OF NEIL MacFARLANE

ON BEHALF OF THE RESPONDENT

MR. MacFARLANE: Mr. Chief Justice, and may it please the Court: I believe petitioner's counsel, Mr. Walsh, has set forth the issues very adequately and also most of the fact situations.

I would like to address myself, first, to point No. 1, and that, of course, is whether or not the trial court erred in not granting petitioner a psychiatric hearing or examination prior to trial to determine his competency.

Pate, of course, required such a hearing or examination whenever a bona fide doubt of that person's competency exists. I think it is necessary to determine or to define what bona fide doubt of a person's competency to proceed is.

QUESTION: Wasn't the court in Pate when using the word "bona fide doubt" simply referring to a provision in the

Illinois statute? The bona fide doubt wasn't imposed as a constitutional test, was it?

MR. MacFARLANE: I believe that's right, your Honor. But the lower Federal courts have gone on to define it as substantial facts challenging one's competency or also reasonable cause to believe one might not be competent. Reasonable cause, incidentally, is the language used by Missouri statutes.

I think the real key here, and what I want to emphasize on behalf of the State of Missouri, is the phrase "competency to proceed." It is not a mental disease or defect; it is whether or not the person can consult with counsel, assist in his defense, and whether he has a rational as well as factual understanding of the proceedings.

Having set the tone for the argument and saying that it is simply a matter of applying the facts in this case to the Pate test, I would like to discuss the facts relied on by the petitioner. First, in his brief he contends that the very nature of the crime should point to incompetency to proceed. And as he stated, the crime involved a rape. At the time of the crime, the petitioner was intoxicated or at least had been drinking for several hours. So you have intoxication, you have a sexual perversion involved in the crime. These elements or these mental diseases are specifically exempted under Missouri statute as being cause to believe a man is not competent to proceed.

Logically, I see no reason why a man's sexual perversion or intoxication means that he cannot consult with his counsel in a rational manner.

Two other factors are that the petitioner's counsel, trial counsel, secured a psychiatric examination for him, and also the report handed down by the psychiatrist.

I would like to quote from that report, on pages 8 through 12 or 13 of the appendix. On page 11 the psychiatrist states: "There was no sign as to the presence of any delusions, illusions, hallucinations, obsessions, ideas of reference, compulsions or phobias." He goes on to state that "Mr. Drope was well oriented in all spheres." He knew what time it was, obviously, he knew where he was, he knew what he was doing. The psychiatrist went on to state that Mr. Drope"was able,without trouble,to answer questions testing judgment." He also said that he did not find any strong signs of psychosis.

QUESTION: I don't find that on page 11.

MR. MacFARLANE: The psychosis statement, your Honor, is on page 12, three-fourths of the way down the page.

Slightly before the last statement in the middle of the page the psychiatrist states that "Apparently, abnormal sexual acts are part of Mr. Drope's own culture." And he concludes that Mr. Drope is a neurotic individual, he is a Sociopath, he has sexual perversions, and that he should be under the care of a psychiatrist.

But I do want to emphasize the statements by the psychiatrist that he was able without trouble to answer questions testing judgment, that he was oriented in all spheres, and that he was not under any delusions, these factors, I believe, go to the competency of Mr. Drope to proceed with trial, they go to the competency of him to consult with counsel, to reason, to assist in his own defense.

I think on the whole the psychiatric report in effect substantiates the fact that Mr. Drope was competent rather than suggest he was incompetent.

Another factor relied on by the petitioner is that his counsel moved for a continuance and asked for a psychiatric examination. The motion for the continuance is found on page 7 of the appendix, and a close reading of that motion indicates that he is simply asking for a psychiatric evaluation based on the psychiatrist's report, wherein the psychiatrist said he should be under a psychiatrist's care.

Petitioner's counsel did not state that he felt that petitioner should have psychiatric help. He did not state anywhere in the record that he ever felt petitioner could not communicate with him, that he could not assist him, or that he was not assisting or consulting or helping him in his defense.

QUESTION: This reading of the psychiatrist's report, it is not a typical report on an examination directed to

determine competency to stand trial. It seems almost to avoid that issue.

MR. MacFARLANE: Right, Mr. Chief Justice, it does not address itself to that problem.

QUESTION: Where is the request? Where is the direction from the court? Do you have any specific directions as to the scope and purpose of the examination?

MR. MacFARLANE: No, sir. This examination, your Honor, was undertaken merely by petitioner's counsel. I don't think the court was ever aware that the examination was being held.

QUESTION: I see. And he had no specific directions so far as this record shows from the counsel?

MR. MacFARLANE: No, your Honor, he did not. And it is quite obvious from the report that he did not proceed under the Missouri statute which sets out certain requirements and certain findings that must be made in a psychiatric report.

I would also like to point out that the motion for continuance has really all the earmarks of a dilatory motion rather than one where the counsel was truly concerned with his client's competency to proceed. The trial was initially set on April -- late in April and continued 'till May 26. This motion was filed on May 27th. The record does not indicate why there was a one-day difference. But the report, at any rate, came three months after the psychiatrist had

handed his report to the petitioner's counsel. And at the beginning of the trial, there was a colloquy between the court and counsel wherein the court informed counsel that the assignment division, another division of the Circuit Court where pretrial motions are held, had advised petitioner's counsel that if he was truly serious about the motion, he should file it in proper form.

Now, petitioner's counsel on this appeal or on this certiorari has challenged that statement by saying what is proper form? The State contends that proper form would be a motion stating that the man could not communicate or consult and that he did not follow the Dusky path. In other words, he could not assist in his own defense.

Another fact relied on by petitioner is that the State of Missouri acquiesced in a motion for continuance and request for psychiatric examination. This is simply office policy. There is no decision whether or not to do it; it is simply done in all cases by the Circuit Attorney's office.

Petitioner's wife testified that at times petitioner would roll down a flight of stairs when he didn't get his way. He did this three or four times in a period of eight to ten years. As the Court of Appeals stated, this simply demonstrates the childish nature of the petitioner at times, but it does not point to any incompetency.

Also, petitioner's wife signed a statement at one

time saying she felt the petitioner was mentally ill, should not go to trial. This was refuted during the trial. She said she signed that statement because she wanted petitioner to be on the street so he could help support the children. Her care and concern was for her children. And in direct answer to a question by the petitioner's trial counsel as to whether or not she felt petitioner was mentally ill, after she had talked to the psychiatrist, she said, no, she did not.

The most troublesome fact, of course, in this case is the shooting incident wherein the petitioner apparently attempted to commit suicide, or at least shot himself on the morning of the third day of trial. This in and of itself, of course, does not establish incompetency to proceed. And I think the facts surrounding this shooting are very important. The petitioner had sat through the previous day testimony by his wife alleging, testifying to all the facts of the crime itself, and he also heard testimony from people who were at the police station the day following the incident in which he confessed to the crime and contended that it had started out as a joke. I think at that point he was well aware that there was overwhelming evidence against him and that he would probably be convicted. In such he was in quite desperate straits. But it does show that he was very aware of the situation.

Petitioner has cited in a footnote several cases and

asked this Court to compare the fact situations therein, all going to the question of competency to proceed, with the fact situation here. The States also invites the Court to do this. There is no general rule that can be garnered from those cases, but I think if the Court will compare them, they will find that in many of those cases the defendants had a long history of mental illness, often coupled with violence. In one case there were five repeated acts of suicide. In two more cases there was legal adjudication of insanity at one time or another. In several there was incarceration in an asylum, and in several also the counsel for those defendants felt that the defendant could not proceed to trial and could not assist him and consult with him in a rational manner.

I think it is also important in this case to consider the evidence appearing before the court and what time it appeared. And I say this because the trial court had the opportunity to observe the appellant, or the petitioner, during a day and a half of trial before the man shot himself. The trial court had the opportunity to observe him consulting with his counsel and to observe him as he appeared in the courtroom. I think at that point it would take a little bit more evidence to suggest a bona fide doubt of incompetency. And this, of course, occurred just before the shooting incident.

Following the trial in a collateral attack on his

conviction, the motion under Missouri Supreme Court Rule 27.26, two psychiatrists testified, and in effect they were asked hypothetical questions and both stated that under these facts they felt the man should have been psychiatrically examined.

I would like to point out that those were hypothetical questions. While one psychiatrist had examined the petitioner about four months before trial, and that is the examination contained in the report, neither tested him for the purpose of competency. I think a lay witness, if it could be called a witness,in this case, the trial judge,was in a better position to observe that man and to tell whether or not he could meet the Dusky test.

QUESTION: What about the defense counsel? I don't recall whether I saw anything in the record about his views on the matter. Is there something here?

MR. MacFARLANE: Mr. Chief Justice, his testimony is conspicuous by its absence, but I think petitioner's counsel at this stage attempted to get in touch with Mr. Watson and was unable to do so. At the time of the 27.26 hearing, Mr. Watson was quite ill. There was some suggestion that he be deposed, but that never happened. And his thoughts as to whether or not the petitioner was incompetent or whether or not there was a bona fide doubt as to his competency does not appear in the record.

In summary of point one, I would like to emphasize

that here we are concerned not with mental illness or mental abnormalities or sexual perversions, or sociopathic tendencies, but we are concerned with the ability of the petitioner to understand the charge against him, the facts against him, to understand the proceedings against him, to consult with his counsel, to communicate, and to assist and aid in his defense. And I think if you look through the facts brought forth by petitioner's counsel, which at first blush might suggest a bona fide doubt as to petitioner's competency to proceed, a close analysis of those facts indicate --

QUESTION: Mr. MacFarlane, I suppose the easiest thing to do would have been to give him the examination promptly at the close of the trial, as Chief Justice White suggests. Then we wouldn't have a case here.

MR. MacFARLANE: Your Honor, he was given a hearing at the motion for new trial on his motion for a new trial which went only to absence from the trial, did not go into his mental competency at all. That perhaps would have been a better way to proceed would be to give him a mental examination, a psychiatric examination.

QUESTION: Did the State oppose it at that time. The statement was made that the State was willing to have the examination pretrial. Has this always been the State's position?

MR. MacFARLANE: This has been the position of the

Circuit Attorney's office in the city of St. Louis. The prosecuting attorney's office do not follow this policy. But there is nothing in the record to indicate they would oppose it.

QUESTION: Do they have a staff psychiatrist on this court?

MR. MacFARLANE: The court does not have a staff psychiatrist that I know of. But there are several State hospitals where persons are sent.

QUESTION: It could have been done very easily.

MR. MacFARLANE: Without too much trouble, your Honor.

QUESTION: Did Dr. Lum testify at the post-trial hearing, or --

MR. MacFARLANE: Yes, he did, your Honor. His testimony begins on page 154 of the appendix.

QUESTION: 150, I think it is. I just couldn't identify in what context that testimony occurred.

MR. MacFARLANE: Right. It was at the hearing on the collateral attack 27.26 motion. And it appears that he did examine the petitioner some four or five years previously for some --

QUESTION: I notice he repeats three or four times that a man who has conducted himself the way this petitioner had conducted himself is in serious psychiatric condition and

needs psychiatric help. Does he anywhere in that testimony express an opinion as to his competence to stand trial? I couldn't put my finger on it.

MR. MacFARLANE: Your Honor, I think he does, and the reason for this may be that Dr. Lum is, or was at that time, an employee of the State working at Malcolm Bliss Hospital, and he would test people, test defendants for competency, so he would be much more aware of the standards to be applied.

He does say on 154 that the suicide attempt does indicate poor insight and judgment. I don't know if he does state at any place --

QUESTION: Neither of those goes directly to the competency to stand trial.

MR. MacFARLANE: No, of course, it does not, your Honor, and that is the point of the State of Missouri that there is really nothing in the record that points to lack of ability of the petitioner to assist his counsel and to proceed in a rational manner.

And point No. 2, of course, concerns the absence of the petitioner from the trial. On the morning of the third day at approximately 8 o'clock in the morning, the testimony shows that petitioner went to his brother's house to get some clothes and he went to the basement to get his clothing and apparently there was a rifle there and he picked it up and

shot himself.

Before proceeding with trial, the court did contact the hospital to check out the explanation of petitioner's absence as given by his counsel. They called the police, I believe, and the police checked and found out he had shot himself, apparently had attempted suicide. The court did make an effort --

QUESTION: How do you know that? Was that part of the proceedings in open court?

MR. MacFARLANE: On page 63, and this was during the trial --there is very little on page 63. It just said the court has already decided that the matter would proceed for trial. But then on the motion for new trial, it came out that the court had called the police and the police had checked out the story of petitioner's trial counsel, and they found out that he had indeed shot himself and was in the hospital. And one policeman inquired of him, asked him some questions at the hospital, and he indicated that he said he would rather be dead than proceed with the trial.

QUESTION: Are the proceedings on the motion for new trial here?

MR. MacFARLANE: Yes, they are, your Honor.

QUESTION: Where is that?

MR. MacFARLANE: It begins on page 67. I'm not sure exactly on which page.

QUESTION: That's all right.

MR. MacFARLANE: At any rate, the court was aware of the reason why the petitioner was absent from trial before proceeding.

Now, first in this point, the question must be answered as to whether or not a person in a capital case can ever waive his constitutional right to be present --

QUESTION: Define a capital case.

MR. MacFARLANE: In this case, your Honor, because he could have been sent to the death sentence, I think this would be a capital offense.

QUESTION: One where a death penalty might be imposed under the statute.

MR. McFARLANE: Right.

QUESTION: The foundation case relied on by petitioner is the Diaz case, a 1912 case from this Court. And the rule from that case is dicta because that was not a capital case. It was not necessary for the court to answer the question whether or not his absence in a capital case would violate his constitutional rights. There are many, many cases interpreting Diaz, but they are all based on the dicta from that case. In that case, the .. from that case reads that a man who is in custody cannot be held to voluntarily absent himself from the trial. Nor can one who is charged with a capital offense because he is deemed to suffer the

constraint naturally incident to an apprehension of the awful penalty that would follow conviction. I am not sure what the constraint incident to an apprehension of obviously the death penalty is that would prevent him from going to trial. At any rate, in this case I think if petitioner had asked his counsel, he would have been well aware that the death penalty while technically could have been imposed, as a practical matter it would not be. And I say this simply because of my experience with the people who are on death row in the Missouri State penitentiary prior to the Furman decision, and there were no people on there who had not committed very atrocious acts of homicide, killing policemen. One person killed 12 people at one time, and so on. The death penalty, while a technical possibility, was not practical, and in that respect I don't think there was any apprehension of the death penalty.

I must admit that is pure conjecture, but I think it is accurate conjecture.

Furthermore, there is no logical reason to differentiate between the person who can absent himself during a noncapital offense and one who does during a capital offense. In either case the court would would be left at the whim or caprice of the defendant who could simply disrupt the proceedings and stop the proceedings by absencing himself from the courtroom.

Moreover, in this case, of course, the death penalty

was not assessed, so if he did not receive a capital sentence, it is hard to determine why the rule of Diaz should govern.

The second part of the question --

QUESTION: Do you have any case in which life imprisonment was given in absentia?

MR. MacFARLANE: No, your Honor, I do not.

Well, it could have been given in the Allen case, Illinois v. Allen.

QUESTION: Allen was a man in the courtroom wrecking the courtroom.

MR. MacFARLANE: Yes, I realize that, your Honor. In Allen he was charged with armed robbery which carries up to and including a life sentence. So life imprisonment could have been --

QUESTION: He didn't absent himself.

MR. MacFARLANE: No, but I think --

QUESTION: He was absented by the judge.

MR. MacFARLANE: Yes, I realize that, your Honor, but I think the holding of this Court would be that a man can be absent from the courtroom in a case where he could be sentenced to life imprisonment.

QUESTION: All this man did was he tried to commit suicide and he didn't do it. That's voluntarily giving up his right to be tried in his presence.

MR. MacFARLANE: Your Honor, I think it would be a

voluntary waiveer of that right. Of course, the act of shooting yourself must be physically a voluntary act. Of course, then it arises whether or not he had the mental processes and the mental powers to knowingly and voluntarily waive that right. I think it --

QUESTION: There's nothing in this record that shows that at all.

MR. MacFARLANE: No, there is not, your Honor. I think that --

QUESTION: Johnson v. Zerbst. Where is the intelligent waiver?

MR. MacFARLANE: Where is it?

QUESTION: Yes.

MR. MacFARLANE: I think, your Honor, this would turn on point No. 1. If he is competent to proceed with trial, if he was aware of his surroundings --

QUESTION: I'm talking about his waiver of his right to be present. Where did he conscientiously waive the right to be present at his own trial where he is going to get life imprisonment?

MR. MacFARLANE: Your Honor, simply by shooting himself, the act of shooting himself, he voluntarily --

QUESTION: He voluntarily shot himself. For what reason? You don't know, and your judge didn't know, and in this record all the judge said is "forget about it." He

didn't make any effort to find out whether the man wanted to try to be there or not.

QUESTION: Does Missouri ever apply the rule that a man is presumed to intend the natural consequences of his act?

MR. MacFARLANE: Yes, Missouri does, your Honor.

QUESTION: Was there not something in this record, a statement made by him in the hospital that he preferred to be dead than to be tried for this offense.

MR. MacFARLANE: Yes, there is, Your Honor. When the policeman questioned him, he said that he would rather be dead than go to --

QUESTION: Would it have been feasible -- can we tell from this record about his medical condition? Would it have been feasible to conduct this competency examination a day or two or three after he had shot himself ?

MR. MacFARLANE: The record is not clear on that, but he was unconscious during much of the first day when he was taken in and had surgery, and I think he had surgery again perhaps four or five days later. So probably he would not have been in a position or in the state of health to have a competency hearing.

Mr. Justice Marshall, there is some testimony in the record on the 27.26 hearing, on cross-examination of the psychiatrist, the --

QUESTION: I'm talking about what basis the judge had at the time that he decided to go without him, what did the judge have then? The answer is nothing but the statement the man had tried to commit suicide.

MR. MacFARLANE: That is all he had, your Honor, and I am sure he continued the trial --

QUESTION: And except for this, the judge says, "Just a minute. The Court has already decided that the matter would proceed for trial." Is that the way to hold a hearing? Where the judge has already made up his mind?

MR. MacFARLANE: I think, your Honor, if I can go to the facts. Petitioner's counsel --

QUESTION: I'm stuck with the facts on page 63. Do you have any others in the record on that date?

MR. MacFARLANE: Not on that date, your Honor, but --

QUESTION: That's what we are dealing with. The judge had before him to show that this man had voluntarily waived his rights. Is there anything as of that moment that told the judge that?

MR. MacFARLANE: Yes, but it's not in the record on page 63.

QUESTION: Was there conference in chambers at that time?

MR. MacFARLANE: Yes, I believe there was, your Honor, and during the motion for new trial there was testimony

that, I believe, petitioner's counsel came in and explained that petitioner had shot himself, and the court enlisted the help of the police to find out if this were true and where the man was and what his condition was. And the court undoubtedly knew that the man had shot himself seriously and could not appear. And at that point the trial court either had to continue with the trial or declare a mistrial. The trial court obviously felt the man voluntarily made himself absent, and he commenced with the trial. And, of course, I am sure he was under the impression that if a hearing was held later and it was determined the man did not have the ... By going ahead with the trial, the trial judge placed the State in this position: He was completing the trial if that was constitutional. And if it later turned out not to be, of course, there would have to be a new trial, but if he declared a mistrial, there would be no chance of in effect rescuing the trial and the previous testimony that had gone on before the court.

QUESTION: He could grant a mistrial and try him when he got out.

MR. MacFARLANE: Yes, he certainly could have, your Honor.

QUESTION: And the only thing Missouri would have lost was money.

MR. MacFARLANE: That is true, your Honor, as long

as the witnesses were still available.

QUESTION: Well, were they available 21 days later?

MR. MacFARLANE: The record doesn't indicate. I would think they probably would have been. But the petitioner might not have been able to go to trial for several months, either.

QUESTION: That would be the State's problem.

MR. MacFARLANE: Yes, your Honor, it would be.

QUESTION: He didn't even delay it one day.

MR. MacFARLANE: No, your Honor, he went directly ahead with the trial. At that point I think he just felt the petitioner had voluntarily made himself absent, and he felt he had waived his right to be there, and he continued with the trial.

QUESTION: I presume at that point there would have been utterly no point to delaying it for one day since the advice was that he wouldn't be out of the hospital for 21 days.

MR. MacFARLANE: That is definitely right, your Honor.

QUESTION: Where is it in the record that he wouldn't be out for 21 days?

MR. MacFARLANE: There is nothing in the record.

QUESTION: There is nothing in the record that says that.

MR. MacFARLANE: No, but there is something in the record that it was a serious wound. So it would be a matter of

at least several days.

QUESTION: Right.

MR. MacFARLANE: So it was in effect a matter of time when the jury could not be sent home and brought back. It was either a mistrial or continue.

QUESTION: He asked for a mistrial; that's what he asked for.

MR. MacFARLANE: Yes, he did, your Honor.

QUESTION: And that was denied.

MR. MacFARLANE: Um-hmm.

QUESTION: Who do you think had the burden at the motion for new trial to prove that absence from trial was voluntary or involuntary?

MR. MacFARLANE: If you would say that the State had the initial burden, your Honor, I think that shifted as soon as it was proven that the man shot himself. I think then the presumption of voluntary waiver, it was his own act that made him absent from the trial.

QUESTION: Well, I take it if the trial judge said the burden was on the defendant to prove involuntariness --

MR. MacFARLANE: I don't know if he expressly stated that, but that would be the --

QUESTION: Well, he did state that at that time.

QUESTION: He did. He said, "I have already made up my mind."

QUESTION: And that -- do you recall whether at the motion for new trial the defendant offered any evidence with respect to his mental history?

MR. MacFARLANE: Not so much as to his history; it would be more to -- the motion for new trial involved --

QUESTION: But he didn't offer to .. any psychiatrist, or doctors, or anything to go into the question of whether he was competent to make a voluntary choice.

MR. MacFARLANE: No. This was involved --

QUESTION: He had the opportunity to do so, I take it.

MR. MacFARLANE: Right. This was involved somewhat in the 27.26 motion, in the hearing.

QUESTION: But there was testimony, was there not, at the motion for new trial?

QUESTION: No, not at the motion for new trial.

MR. MacFARLANE: No, I don't believe so, your Honor.

QUESTION: When did Dr. Lum -- I thought you had just told me that Dr. Lum testified at the motion for new trial.

MR. MacFARLANE: There were two -- there was a motion for new trial hearing and then the 27.26 hearing which was a State habeas corpus. It was at the 27.26 hearing that Drs. Lum and Shuman testified.

QUESTION: This was several years later after affirment by --

MR. MacFARLANE: Two years later, your Honor.

QUESTION: -- after the affirments by the Supreme Court.

QUESTION: None of them testified at the motion for new trial, no medical testimony at all.

MR. MacFARLANE: Just from the hospital where he went.

QUESTION: But there was opportunity, I suppose.

MR. MacFARLANE: Yes, there was opportunity.

QUESTION: If the defendant had wanted to put on that kind of a case at that time, he could have.

MR. MacFARLANE: He certainly could have, your Honor.

QUESTION: He could in face of this "The Court already has decided that the matter would proceed to trial," you mean then he could have put on testimony? Is that what the court said?

MR. MacFARLANE: That was the statement by the court at the time.

QUESTION: Could you then have put on testimony after that statement by the judge?

MR. MacFARLANE: As a practical matter, there was no testimony put on at that time, of course.

QUESTION: Could it have been after the judge said, "I have already made up my mind."

MR. MacFARLANE: You mean later, your Honor, after

the trial?

QUESTION: Right then.

MR. MacFARLANE: I think the court would have allowed it if there was testimony to be --

QUESTION: After he said, "I have already made up my mind." When the judge says, "Ive already made up my mind," you sit down.

MR. MacFARLANE: He said that after having a discussion in chambers. So there would have been an opportunity prior to that statement.

QUESTION: The traditional way, even after the judge had spoken, would be to make an offer of proof, to say that if the court will permit, I will call two psychiatrists whose testimony will be substantially as follows. That's the traditional way of preserving the .. is it not?

MR. MacFARLANE: Yes, it certainly is, Mr. Justice.

QUESTION: But then at the close of the trial, when the motion was made for a new trial, did I understand you in responding to Mr. Justice White, to say there was no proffer of any testimony on the subject of his competence.

MR. MacFARLANE: No, your Honor. It simply went to his absence from trial, not as to his mental ability to voluntarily waive his right to be present.

Thank you.

MR. CHIEF JUSTICE BURGER: Mr. Walsh, you have a

few minutes left.

REBUTTAL ORAL ARGUMENT OF THOMAS C. WALSH

ON BEHALF OF THE PETITIONER

MR. WALSH: Thank you, Mr. Chief Justice.

First of all, with respect to the State's argument that the request for a psychiatric examination was not in proper form, the fact is that there is no form as such in Missouri law or Missouri practice. The counsel for the petitioner clearly stated in the record that he objected to going forward because his man was not competent to proceed and needed a psychiatric evaluation and a hearing.

Furthermore, in the Pate v. Robinson case, this Court noted that a motion isn't even necessary, but if facts come before the court which indicate a reasonable doubt, then the court sua sponte must order a hearing,under Missouri law an examination.

QUESTION: Very often the prosecutor initiates such a motion just as a protective measure, does he not?

MR. WALSH: Yes, sir. And here they, of course, had agreed that such an examination and hearing would be appropriate. Yet it was denied.

Secondly, the State in its brief and the Missouri Court of Appeals in its opinion failed to come to grips with the overall composite picture that was before the trial court as regards the defendant's mental state. They have isolated each

one of these incidents and tried to minimize its significance rather than looking at the overall picture which portrays something less than --

QUESTION: Do you think the defendant's motion, either during the trial or at the motion for new trial, ever said that the fact that he shot himself, plus all the other evidence with respect to his mental condition, indicates that he wasn't competent?

MR. WALSH: The issue of competency was not presented at the motion for new trial.

QUESTION: So neither during the trial nor at the motion for new trial did the defendant attempt to say that his shooting himself changes the whole picture with respect to his competency.

MR. WALSH: Well, the defendant's testimony was that he didn't remember shooting himself. He blacked out.

QUESTION: His attorney was there and he made no such contention.

MR. WALSH: That's correct, Mr. Justice, and I might add that that failure of his counsel was one of the grounds on which we asserted the incompetency of counsel on that matter and in the Missouri Supreme Court on direct appeal. That point has been abandoned in this Court, but we do feel that he seriously overlooked that point at that stage.

QUESTION: Mr. Walsh, if the motion for mistrial had

been made and granted by the court, would jeopardy have attached?

MR. WALSH: Not under any rule that I am aware of, Mr. Justice Powell. The Missouri Court of Appeals in its opinion felt that might be a problem, but it relied on the Jorm? case which pulls apart from this case and which was a case where the defense didn't even request a mistrial. But here if the mistrial was caused by the defendant's action, I don't think he's in a very good position to argue double jeopardy if he's reprosecuted.

QUESTION: Actually, the motion here was for an acquittal rather than for mistrial, as I read the record.

MR. WALSH: At the time the trial proceeded in his absence? No, I would characterize it as a motion for mistrial.

QUESTION: On page 63.

QUESTION: Put your finger on a motion for mistrial.

QUESTION: Middle of page 64.

MR. WALSH: Page 63, Mr. Justice, at the top, "Your Honor, at this time I am going to move for a mistrial in view of the fact that the defendant, I am informed, shot himself this morning."

QUESTION: Right. But if you look over at the next page, in the middle of the page, "Therefore, Defendant requests the Court for a Verdict of Acquittal."

MR. WALSH: That is a motion for a directed verdict

following the receipt of all the evidence.

QUESTION: You think that is different than the motion on 63?

MR. WALSH: Yes. There are about 30 pages of transcript deleted there between those two passages, of additional testimony.

One other point, if I may. There was no evidence in the record from which the court found or attempted to find that the petitioner was actively cooperating with his counsel during the course of this trial. The record is totally silent on that subject, and I think Pate v. Robinson minimizes any such finding, if one would have been made anyway.

QUESTION: What about defense counsel's view of the matter?

MR. WALSH: At the time when the 27.26 hearing was being held --

QUESTION: That confuses me a little. I don't know those numbers.

MR. WALSH: That is the post-conviction matter. It is habeas corpus.

QUESTION: But I am putting it back at the earlier stage. At the motion for new trial, did defense counsel file an affidavit or give testimony on the subject?

MR. WALSH: No, sir. That novel issue was not raised at that time.

QUESTION: He would certainly have been one of the most competent witnesses on the subject, would he not?

MR. WALSH: Well, presumably, and why he abandoned the competency issue --

QUESTION: Well he could have gone on the stand himself at the motion for new trial and presented him as a witness. And you say there wasn't any evidence of cooperation. Apparently there was at the motion for new trial.

MR. WALSH: Not of inability to communicate or to --

QUESTION: Do you see inability to communicate on the face of the record? It sounds to me like he was communicating.

MR. WALSH: Several months after the trial and after the shooting. Is that what you are referring to?

QUESTION: No. At the motion for new trial.

MR. WALSH: Yes. Which was --

QUESTION: How long was that after?

MR. WALSH: It was about three or four months, after he had healed and was out of the hospital.

QUESTION: But if the defense counsel had found difficulty in communicating with him in the first three days of trial, or in the weeks preceding the trial, preparing for trial, isn't it reasonable to assume that he would have filed an affidavit or taken the stand and testified to that effect?

MR. WALSH: Well, I think it is. And I don't understand why he didn't do that, frankly.

QUESTION: One explanation would be the one which you have abandoned, that he was ineffective. But another equally rational explanation would be that he could not give any such testimony.

MR. WALSH: That is correct. I think -- but there is a problem created in the record by the psychiatrist's report which specifically talked about this man's difficulty in communicating, having trouble when talking, being irrelevant, and not having a good memory, and that sort of thing. But I do not have an answer for why counsel did not raise it.

QUESTION: Mr. Walsh, you appeared in this case in the courts previously as a volunteer, and you have come here in that capacity. Thank you for your assistance to the Court, and, of course, your assistance to your client.

We thank you, Mr. Attorney General.

MR. WALSH: Our pleasure, Mr. Chief Justice.

(Whereupon, at 1:53 p.m., the oral argument in the above-entitled matter was concluded.)