REVISED

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 86-572

TITLE KENTUCKY, Petitioner V. SERGIO STINCER

PLACE Washington, D. C.

DATE April 22, 1987

PAGES 1 thru 51

(202) 628-9300

IN THE SUPREME COURT OF THE UNITED STATES

- -x

KENTUCKY :

Petitioner :

v. : No. 86-572

SERGIO STINCER :

:

- -x

Washington, D.C.

April 22, 1987

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 12:59 o'clock p.m.

APPEARANCES:

MRS. PENNY R. WARREN, Frankfort, Ky.;
Assistant Attorney General
of Kentucky
on behalf of Petitioner

MARK A. POSNANSKY, Frankfort, Ky.;
on behalf of Respondent

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C O N T E N T S

P R O C E E D I N G S

CHIEF JUSTICE REHNQUIST: Mrs. Warren, you may proceed whenever you're ready.

ORAL ARGUMENT OF

MRS. PENNY R. WARREN

ON BEHALF OF PETITIONER

MRS. WARREN: Mr. Chief Justice, and may it please the Court:

This case arises from the conviction of Stincer by a jury for first degree oral sodomy of two girls ages seven and eight. Both girls and a four year old boy testified at trial in Stincer's presence. All three described how he blindfolded them with socks and said he was feeding them a pickle.

The question in the case, whether he was denied his right of confrontation arises from an in chambers preliminary hearing in which the judge determined whether or not the children were competent to testify.

Stincer asked to personally attend that hearing. His request was denied. But counsel was present. On appeal, the Kentucky Supreme Court held that Stincer had an absolute right to be present at the competency hearing.

From the Sixth Amendment of the United States Constitution and Section 11, of the Kentucky

Constitution confrontation clauses. This Court granted Kentucky's request for review.

It is our position that the state court erroneously extended the right of confrontation in the Sixth Amendment to a non-adversarial preliminary hearing and that Stincer fails to meet the threshold requirements of due process for a right of presence under that clause.

We also believe that the state court erred by refusing to consider whether the alleged claims were harmless. It's first necessary to consider the nature of a competency hearing in Kentucky and in most other jurisdictions.

At this competency exam of the two girls that is in issue, it's a very limited hearing with a very limited purpose. There are no facts of the case discussed. Guilt or innocence is not an issue. There are only a dozen or so general questions. How old are you? Where do you live? Where do you go to school? Where do you go to Sunday School? Do you know your teacher's names?

The test is whether the children understand the difference between a truth and a lie, the obligation to tell the truth, and whether they are sufficiently intelligent to recall and relate past facts.

QUESTION: Mrs. Warren, you refer to this as a preliminary hearing?

MRS. WARREN: Yes, Your Honor.

QUESTION: I take it from the way you describe it. It isn't the sort of preliminary hearing that one had in Arizona (inaudible) where it's to decide whether you should be bound over for trial.

MRS. WARREN: No, Your Honor, I meant preliminary only in that --

QUESTION: Pre-trial.

MRS. WARREN: -- it's a threshold, I'm sorry Justice White, I didn't hear your comment.

QUESTION: Pre-trial.

MRS. WARREN: Pre-trial. Respondent has challenged the term pre-trial although he used it in describing it in a state court, in that the jury was sworn. But an initial determination, if you will, of the children's (inaudible).

QUESTION: And it could happen before the trial, it could happen during the trial. The judge holds --

MRS. WARREN: During trial. Anytime. It typically is a couple of weeks before, a couple of days before. In this instance it was before any evidence was received at all. But, after the jury was sworn in a

short recess and motion practice beginning the case.

In the competency hearing, the children are not witnesses. They are potential witnesses, but if they're declared incompetent, certainly they would never be a witness. They're not witnesses in the sense of the Sixth Amendment right of confrontation. Nor, is their testimony against him, as the Confrontation Clause requires when it begins to attach.

The decision is a very limited one for the trial court. It is, really a substitute for an oath, if you will, for an adult. Counsel was present and in this case allowed to question the children after the court concluded its questions. At trial, Stincer was present. The children were present when they testified. He was able to communicate with counsel.

The trial court placed no restrictions on his opportunity to cross examine. At that point, his full right of confrontation was satisfied. When it did attach, no new or different information came out at trial when he was asking many of the same competency questions.

QUESTION: Mrs. Warren, may I ask if you would take the same position if the defendant were representing himself?

MRS. WARREN: Your Honor, if the defendant is

representing himself, then clearly he has a right to counsel and there would need to be a balancing of interests and a special showing of necessity. To preclude him at that point would be a violation of his right to represent himself. But that is not the issue in this case at all.

QUESTION: No, I understand. But if he had elected not to have a lawyer then you would --

MRS. WARREN: I would --

QUESTION: -- agree that he had a constitutional right to be present during this --

MRS. WARREN: To represent himself and that necessitates being present. Certainly.

QUESTION: But as a lawyer, not as --

QUESTION: His right to counsel, yeah.

MRS. WARREN: Yes.

QUESTION: Not confrontation?

MRS. WARREN: That's right, Your Honor.

QUESTION: Mrs. Warren, assuming that you didn't have a separate hearing to qualify the witnesses and you did it at the regular trial, --

MRS. WARREN: Yes, Your Honor.

QUESTION: -- you couldn't exclude him then, could you?

MRS. WARREN: That's correct.

QUESTION: So if this is merely for the purpose of excluding him, there would be a problem wouldn't there?

MRS. WARREN: I'm sorry, Your Honor. I don't believe I'm following your question. There is no constitutional right to a competency hearing.

QUESTION: Well, is this always done in Kentucky?

MRS. WARREN: That a defendant is not permitted to attend a competency hearing?

QUESTION: No. That you always qualify witnesses before the hearing?

MRS. WARREN: Your Honor, I'm not aware of any case in which they were not qualified prior to the hearing.

QUESTION: But there is no law on it at all, it's just practice?

MRS. WARREN: There are a number of cases that say when the child is young enough, or when the defense challenges competency there will be a competency determination outside the presence of the jury. So, unlike the federal rules there's not an absolute presumption of competency where the child does go into the court room and is challenged there for the first time.

The issue in the competency hearing in Kentucky is competency, not honesty, not the ability to retain composure. It is a very limited issue of competency. It is our position that the Sixth Amendment Right of Confrontation does not attach to this kind of proceeding. It's --

QUESTION: What about a due process concern? Do you think that there might be situations where the proceeding like this might have a substantial relationship to the opportunity of the defendant to be better prepared for his defense?

MRS. WARREN: In the typical proceeding, that should not be the case. But, we certainly acknowledge if the proceeding, let's say, were to exceed its normal scope and it's an advantage of counsel being present. Counsel can say, Your Honor, we object. This is beginning to bear a substantial relation to his opportunity to defend and he has a right to be here.

In that instance, he would have a right of presence. We believe that Stincer has failed to meet that threshold requirement under due process --

QUESTION: And you don't think that a defendant might be in a position to suggest appropriate questions or question certain responses with the attorney that would be helpful even at that qualification hearing?

MRS. WARREN: Your Honor, the defendant might suggest --

QUESTION: There's no evidence in this case perhaps, I mean --

MRS. WARREN: That's true.

QUESTION: -- it might be harmless error. But, I'm worried about the due process right to be present.

MRS. WARREN: Your Honor, there are a number of remedies for that concern and we acknowledge that a defendant may have certain facts. Most of those facts, however, do go to the question of honesty rather than the question of competency.

Just as he could not challenge an adult, because that adult had lied in the past, or you know, and preclude an adult from taking the oath, then a child cannot be challenged on pure honesty. That's the question before the trier of fact and that's when his confrontation right fully protects him.

If there are questions that he wishes for the court to ask, again, those can be submitted to counsel in advance, if you like qualifying or validating questions. There also are opportunities to move in limine for the trial court to ask only general questions to which everyone would know the answer. And some of those kinds of questions were asked in this case. Do

you know who Jesus is?

QUESTION: What if the state used a video tape for example in these situations, do you think the defendant would have no right to be in a position to view the video taping with the lawyer so that he could participate.

MRS. WARREN: The video tape statute in Kentucky applies to testimony. I think there's a question of whether it would apply to this kind of proceeding. Then if a video were used certainly the concern of this state of the trauma to the child from the defendant's present would be minimized. However, video taping is not available throughout the state by any stretch of the imagination, much less in a number of other jurisdictions.

I would also note that to the extent the argument is that he may know certain facts that he may wish to raise and challenge the child's answers, that almost suggests a stranger, then, would have no reason to be there. He wouldn't know those facts and would not have a right to be present. We don't think that (inaudible).

QUESTION: Your rule doesn't apply just to strangers. It would apply, say it was a custody case or something where it was a minor child was going to

testify and one of the parents wanted to be present. You could exclude the parent, I suppose. Or maybe it wouldn't be, I've got a civil example, but say it was a --

MRS. WARREN: Yes.

QUESTION: -- criminal charge against the parent of the child for this very thing we have in this case?

MRS. WARREN: That's right, Your Honor.

QUESTION: But you would say that that parent could also be excluded (inaudible).

MRS. WARREN: That's right. Our position is that there is --

QUESTION: So, you would say they would be excluded even though it might be quite likely that they would have suggestions to make to the lawyer that might help find out whether the child was accurate in what he was saying.

MRS. WARREN: Those suggestions can all be made at trial where honesty or credibility is an issue.

QUESTION: Is competency also at issue in the trial. Could counsel for the defendant, or the defendant himself, challenge the competency even though the court had allowed the child to testify?

MRS. WARREN: Yes, Your Honor. And that's why

I said a preliminary consideration. If new or different information were disclosed as in an example where the person knew certain facts then certainly the defendant can ask the court to reconsider its decision.

Counsel in this particular case asked the court to reconsider the competency determination on the four year old boy. That testimony is not reproduced in our appendix, but it's on page 126 of the transcript. Ask the court to reconsider --

QUESTION: (Inaudible) to being given?

MRS. WARREN: During trial, yes Your Honor. He asked the court to reconsider. So that --

QUESTION: And the court could of.

MRS. WARREN: And the court certainly could of.

QUESTION: Based on the conduct of the witness.

MRS. WARREN: The information that came out at trial that would suggest that that initial assessment was inaccurate.

QUESTION: Would counsel necessarily be permitted to ask competency type questions at trial?

MRS. WARREN: Yes, Your Honor. And they are asked. And they were asked here. There's no problem at all --

QUESTION: Because the jury has to make it's own assessment of competency as well. I gather the

judge's is just a threshold determination, right? Close enough to get to the jury, but the jury could reject the child's testimony in its view as coming from an incompetent child.

MRS. WARREN: Or, certainly the jury could reject that the child is a credible witness and could reject the evidence given by the child. Yes, Your Honor, that's true.

QUESTION: Let me be sure I understand you. At the trial, under your view, could the defendant and his lawyer ask to go over the same ground that was gone over in the competency hearing? Ask the same questions. If the answer is yes, then why is it any more burdensome to have it in a ten minute session once and an hour later, than having an hour and a ten minute session? I don't understand.

MRS. WARREN: The answer to your first question is, may they ask the same questions? Yes they may and they did here. The second question, what is the --

QUESTION: If they had not been excluded from the first hearing they might not found it necessary to ask them a second time.

MRS. WARREN: Those questions are typically asked. They were asked here by the prosecutor initially. Just partly even if for no other reason, to

calm the child down. They are easy questions, you know, what is your birth date? What is your age? But they are giving the jury some indication of this child's level of intelligence.

What is the harm of doing it twice, if I understand your question, or of doing it earlier. The child is going to confront the defendant at trial. The evidence is that additional confrontations, and the greatest fear of a victim, and particularly a child sex abuse victim, is confronting that defendant, that additional confrontations compound that potential trauma to the child and particularly when you're in the close proximity of judge's chambers, the defendant is sitting a few inches away, if you will. There is the judge, the prosecutor, the defense attorney, the defendant and the court reporter, and one very small child. The defendant's presence at that time --

QUESTION: Well of course, if that's a concern you could find a bigger room I suppose. I mean you don't have to do it in the judge's chambers if you --

MRS. WARREN: That's right, Your Honor, but nonetheless you are requiring the child to confront the defendant one more time. And our question is, for what purpose, when his rights are fully protected at trial. And the due process protection is certainly adequate to

give him the right to be present if he can show reasonably substantial relation to his defense. At trial the confrontation right attaches.

QUESTION: Do you deny the possibility, and I'm not suggesting it's true in this case, that the presence of the adult defendant might enable the lawyer at the time of the initial competency examination to suggest questions that might be relevant and helpful to making the right decision?

MRS. WARREN: Your Honor, certainly the presence of the defendant could suggest questions. The counsel himself could suggest questions. He could ask the defendant ahead of time, are there questions that I might need to ask?

QUESTION: But you may not know what the child can attest to until he's heard the testimony. He might not know. The child might tell some story that the adult knows all about and knows it's inaccurate, or something. And didn't anticipate it coming up.

MRS. WARREN: Your Honor, again I see the questioning going to the issue of credibility or honesty rather than pure competency. The trial court asks limited, general questions to establish minimal competency to testify at trial.

QUESTION: Well then you are saying there's

just no possibility that the adult could suggest any useful question.

MRS. WARREN: No, Your Honor, and I'm not suggesting that it might not be helpful to him to be here. What I'm saying is that the right of confrontation does not extend to that kind of proceeding unless he can show a reasonably substantial relationship to his ability to defend, or that that fair hearing would be thwarted by his presence, then due process does not give him a right to be present. And the concern, if this Court --

QUESTION: In other words, what you're saying is, even if it's highly prejudicial, it's just too bad because he has no confrontation right except during the trial. That's what you're saying, I guess.

MRS. WARREN: Your Honor, I'm saying that any potential prejudice, and again, if he's able to show prejudice his due process right to presence is going to get him there. But any potential prejudice is obviated by his rights at trial. And that the Sixth Amendment right of confrontation should not attach until there are witnesses whose testimony against him --

QUESTION: Well wait a minute. I understand your position on that is we don't care about prejudice because it's not part of the trial.

MRS. WARREN: Right.

QUESTION: Then you just say as a matter of due process he has to make an affirmative showing of actual prejudice in the case in order to prevail.

MRS. WARREN: Show reasonably substantial relationship to his ability to defend.

QUESTION: I assume you're also saying that, well I'm not sure, at least it's very unlikely that there can be substantial prejudice, if not impossible that there can be substantial prejudice in as much as he can do the same thing at trial.

MRS. WARREN: That's right, Your Honor.

QUESTION: If what you've told us is true. That you could repeat the same process --

MRS. WARREN: That's right.

QUESTION: -- at trial, it's very difficult to imagine how there could be substantial prejudice.

MRS. WARREN: That's our position, Your Honor.

QUESTION: If that's true, I don't know why you even need the lawyer there. It seems to me the judge could call the witnesses in chambers and say I think I'll just talk to these young girls by myself and make up a preliminary determination.

MRS. WARREN: Your Honor, no one has ever questioned the right of counsel at that point. But I

agree there could be an argument. But, --

QUESTION: But if there is a right of counsel --

MRS. WARREN: -- if counsel is there.

QUESTION: If there's a right of counsel it's because it is a critical stage of the proceeding.

MRS. WARREN: Your Honor, critical stage for purposes of right to counsel --

QUESTION: Right.

MRS. WARREN: -- and critical stage for purposes of confrontation, critical stage for purposes of compulsory process all attach at different times. And, as in the Wade lineup there's a right to counsel, but not confrontation.

QUESTION: Well, can the first --

QUESTION: Moreover the fact, I'm sorry.

QUESTION: -- Kentucky could grant the right of counsel without feeling the constitution compelled it. Just because traditionally when judges go into chambers to talk, make some examination of the case, they generally bring the lawyers with them. They may not of thought it through that it's a constitutional right of (inaudible).

MRS. WARREN: That's right, Your Honor. And again, it has not been questioned in Kentucky, that counsel does have a right to be there.

QUESTION: Well, I suppose if the witness is found not to be competent, the child as a witness, then the witness would not be permitted to testify at trial.

MRS. WARREN: That's right.

QUESTION: So, it could be quite critical. Because the witness might be the only witness available to convict a defendant.

MRS. WARREN: It is (inaudible) --

QUESTION: As was the case here.

MRS. WARREN: In this case there were three children.

QUESTION: Well, take them one at a time.

MRS. WARREN: If I might clarify --

QUESTION: I assume there were three separate charges.

MRS. WARREN: That's right and there's been no challenge to the third child as to presence.

QUESTION: Significant to a defendant, to be able to persuade a judge that a witness is not competent.

MRS. WARREN: Certainly, Your Honor, there are many important decisions made prior to trial and after trial.

QUESTION: Well, Mrs. Warren, supposing that the child was initially determined competent under these Kentucky procedures and then the same questions were

asked in open court and the judge was persuaded to change his mind.

MRS. WARREN: Yes, Your Honor.

QUESTION: Would the child's testimony then be stricken from the record?

MRS. WARREN: Yes, Your Honor, if the child were incompetent. And I would think they would never ever be testimony other than the initial competency assessment, but if the trial court were persuaded that she was so incompetent, certainly it would construe --

QUESTION: But did I hear, did you say earlier, Mrs. Warren, that the trial judge might nevertheless not decide it himself, but let the jury decide the question of competency.

MRS. WARREN: No, Your Honor, the trial court --

QUESTION: He would.

MRS. WARREN: It is the decision for the trial judge. But the decision can be reconsidered. The jury's question is one of credibility of the witness. And again, the honesty.

QUESTION: So it's really two separate questions we're dealing with. And it is a rather critical stage, isn't it, to determine whether a witness is competent to testify?

MRS. WARREN: It is important, but no different

than many other important decisions, such as the Grand Jury decision to indict, or the witness's decision in a lineup, that this is the person. That does not necessarily extend the right of confrontation to this proceeding.

The appellate decision that the conviction would be reversed also is a very important decision and outcome determinative. But that does not carry with it the safeguards for an adversary proceeding. This is not an adversary proceeding. Counsel would like to make it into one. Perhaps even have compulsory process of witnesses and question this child in advance.

But just as this Court said in Watkins v. Souders, that counsel has no right through due process to question an identification witness prior to trial, and to cross examine that identification witness on suggestiveness; it is our position that where there is no reasonable relation to the opportunity to defend, there is no right of presence in these cases.

Should this Court decide that there is a right of presence, then of course, there would be a need to balance the competing interests of the defendant and the state.

I've discussed very briefly Stincer's interests. They are primarily that incremental

contribution that he might make above and beyond that of counsel and above and beyond that which he might make at trial, an incremental contribution he might make to the reliability by being present at the competency hearing. He says, you know, he may know when the child is not telling the truth and we appreciate that. And, it might be helpful to him, but just as in Pennsylvania v. Ritchey, it would have been helpful to him to personally examine the documents there.

That does not grant the right of confrontation or due process, the right of presence. His rights are protected at trial. The best evidence of his lack of contribution is what happened at trial.

Nothing different at all came out and there was never any challenge either at the conclusion of the hearing or at trial or on appeal as to the competency of these two witnesses. In terms of Kentucky's interest it is to provide that maximum possible psychological shelter for a child victim consistent with the constitution. And again, we are concerned with the protection of defendant's rights.

The nature of the crime, typically a trusted adult, there are often threats. The greatest fear of the child is facing the abuser again. Common sense tells us that child will be frightened. And each

additional confrontation will frighten that child more.

It is our position that how the child is treated initially may well affect the outcome. In this case, the first child as she went into the competency hearing and defendant was excluded, after a few question said, I'm not afraid anymore. Me and my sister were afraid about who would come up here, but I'm not afraid anymore.

The child was in an atmosphere in which she wasn't confronted by the defendant and began to calm down. Then later during the trial, potentially because of many reasons she again said she was scared. She was scared of everyone there.

If you will, this is a narrowly tailored and a well calculated procedure to minimize the damage to the child while fully preserving the defendant's constitutional rights. And we --

QUESTION: Mrs. Warren, do you know if most states, you could conceivably do this by dispensing with the preliminary hearing entirely and just bringing the child on at the trial and conduct the competency inquiry then. It would make the trial longer I suppose. You would assert that, wouldn't you?

MRS. WARREN: Certainly our legislature and our courts have not adopted a (inaudible) --

QUESTION: What do other states do? Do you have any idea what the practice is in other states? Do most of them have such a preliminary hearing whenever there are juveniles?

MRS. WARREN: I believe the majority do. I do know about 20 states have adopted the federal rule where the child simply appears at trial and is there questioned. The majority of states I believe do pre-trial.

QUESTION: Mrs. Warren, could I ask you on another issue, the Kentucky Supreme Court as I recall it said, their Section 11 or Article 11 of your state constitution was the basis for its decision as well as the Sixth Amendment.

And, has there been decision in Kentucky as to whether that provision of the state constitution is co-extensive with the right of confrontation, because they just rely on a Kentucky case that says, every phase of the trial, rather than --

MRS. WARREN: Your Honor, there was a decision within three weeks of this case, Commonwealth v. Willis, which is cited in our brief. The very issue in that case was whether the right of confrontation under the Kentucky Constitution is more strict than under the Sixth Amendment and the court rejected that claim and

said they are basically the same. There is no authority for holding the Kentucky Constitution is more strict.

QUESTION: No difference between the two.

MRS. WARREN: So they are construed identically. We would ask this Court to hold that the Sixth Amendment right of confrontation does not extend to a non-adversarial proceeding such as this and that Stincer has failed to show that he meets the threshold requirement to entitle him to a due process right of presence.

QUESTION: Thank you, Mrs. Warren. We'll hear now from you Mr. Posnansky.

ORAL ARGUMENT OF

MARK A. POSNANSKY

ON BEHALF OF RESPONDENT

MR. POSNANSKY: Mr. Chief Justice, and may it please the Court:

Though it is not articulated specifically anywhere in the constitution, the right to be present at ones own trial is one of the most fundamental of all the rights that we have in our society. And it has been held to be an implicit part of the right of confrontation in the case of Illinois v. Allen. And, it has been held to be implicit in the right of due process in the case of Snyder v. Massachusetts.

By excluding the defendant from this important, critical hearing which the Supreme Court of Kentucky deemed critical, this important right, the right to be present was violated, which resulted in a denial of confrontation, denial of due process and also a denial of the right to effective assistance of counsel.

This Court has held that we must, at all times, be alert to factors which can undermine the fairness of the fact-finding process. This was brought out in Estelle v. Williams. In this case, what was done directly undermined the fairness of the fact-finding process. That being the fact of whether these witnesses were competent.

QUESTION: Mr. Posnansky, the constitutional right is the right to confront the witnesses against him. The right of a defendant to confront the witnesses against him and I presume that means to confront him when they are testifying against him. It certainly doesn't mean he has a right to confront them whenever he wants to come to their house and confront them or anything.

MR. POSNANSKY: No, certainly not.

QUESTION: When they are testifying against him. And the point made by Mrs. Warren is that in this hearing, the child is not testifying against your

client.

MR. POSNANSKY: Your Honor, the child, we submit, is testifying. And he is testifying as to the very critical factor in the case and that is whether this witness who is making the charges against the defendant is competent to testify.

QUESTION: Not yet a witness. I mean, the whole purpose is to determine whether this child will be a witness.

MR. POSNANSKY: Well, the Kentucky Supreme Court in their decisions regarding child competency use the term that when the competency of an infant is challenged the procedure is that the court will conduct, the duty of the trial court is to carefully examine the witness in order to ascertain whether he or she is sufficiently intelligent to observe, recollect and narrate the facts and has the moral sense of obligation to speak the truth.

The court uses the term "the witness". We submit that in this situation, the judge is acting as a trier of fact. And there is a right of confrontation. This is a witness who is providing live testimony, live testimony to the trier of fact on a very critical factor in the case. I don't thing that this --

QUESTION: The factor though is whether the

child shall be or shall not be a witness. And, if and when it's determined that the child shall be a witness, there is time enough to confront the witness. But up until that point you don't know that the child is going to be a witness against your client.

MR. POSNANSKY: There isn't time to confront the witness. That is the only time to confront the witness on the issue of competency. We disagree with Mrs. Warren's assertion that confronting the child in front of the jury is sufficient in that situation. That's a separate proceeding.

The competency proceeding occurs once. The purpose of determining competency occurs one time in front of the trier of fact. At that time, the issue is the admissibility of the evidence. The admissibility of the testimony. Not the credibility. Credibility is in front of the jury.

Before that we're talking about admissibility. That is the only time when the defendant has the opportunity to confront these witnesses, we submit, when the issue is competency. That is the only time. If it later comes out that the child appears to be incompetent the defendant would have to make another motion at that time.

QUESTION: Counsel did that here. Didn't

counsel challenge the competency here?

MR. POSNANSKY: He did challenge it.

QUESTION: So it can be raised at the trial proceeding.

MR. POSNANSKY: But it, it can be raised, Your Honor, but it's very impractical to expect that in that situation, that the judge is going to declare, after a witness has given live testimony in front of the jury on these very important, inflammatory points, that he's going to strike the testimony of that witness.

We submit that in that situation and most times a mistrial would be the only possible relief. And it is impractical to expect the judges are going to do that. And furthermore it's not necessary that inconvenience and impracticality occur if the defendant is permitted to be present at the competency hearing.

QUESTION: You don't doubt, Mr. Posnansky, do you that Kentucky could go the way of some other states and not have a preliminary competency determination out of the presence of jury?

MR. POSNANSKY: I believe that that's possible that they could go that way. There is, at the present time, case law which I have just alluded to and that is the procedure under Kentucky law.

But, I don't think that there would be any bar

to going, to doing away with the hearing as such as some other states have done. But, I would like to point out that this Court has held that when a state elects to opt for a certain procedure, even though that procedure may not be federally, constitutionally required, that due process applies under Ebbits v. Lucy.

This Court held even though a state may opt for a certain procedure that's not constitutionally required if they elect to utilize that procedure, which is what Kentucky has done, due process applies. In this case, the prosecutor was given the right to question the witness, the children, at the competency hearing.

The prosecutor was allowed to question them. He was allowed to argue that they're competent. He was allowed to help show why they were competent.

QUESTION: Even your client was allowed to question, too, wasn't he?

MR. POSNANSKY: Yes, Your Honor, but without the presence --

QUESTION: Both lawyers were.

MR. POSNANSKY: Without, right. But without the presence of the defendant the lawyer was severely hampered. There was a lot of things that the defendant in that situation could have done to assist his counsel.

QUESTION: Well what?

MR. POSNANSKY: He could, the competency hearing, Your Honor, --

QUESTION: I mean, what questions were in fact asked at the competency hearing.

MR. POSNANSKY: The questions at the competency hearing on the two little girls went to only Sunday School, do you go to church, do you believe in God, what happens if you tell a lie, that sort of thing.

QUESTION: And you're saying that the defendant could have furnished valuable information to his lawyer in what, cross examining these girls in their answers to those questions?

MR. POSNANSKY: That is possible certainly. But also, he could have suggested --

QUESTION: How would that be possible?

MR. POSNANSKY: If the children were lying about some of these things, the defendant may very well have been in a position to know. Even if they weren't lying on such things as Sunday School and teachers, which is unlikely, the critical thing under Kentucky law is whether they are sufficiently intelligent to observe, recollect and narrate the facts and have the moral sense of obligation to tell the truth.

Two things are important to competency and the defendant is frequently in a position to know some facts

directly relating to --

QUESTION: (Inaudible).

MR. POSNANSKY: The facts of the crime are admissible to get into there, certainly, because it says that --

QUESTION: They weren't asked about the facts of the crime, and I think they never are in these competency hearings. They are asked, how old are you, do you know right from wrong, do you know what it is to tell a lie. They're not asked about the facts of the crime.

MR. POSNANSKY: Justice Scalia, in this very case, the two little girls, they didn't get into the facts, but the little four year old boy, they did, in the competency hearing. They got into the facts on him. And they went into all of this stuff. And he was allowed to testify in front of the jury and gave very damaging testimony. In fact, he even said that his mother was present when these acts occurred.

QUESTION: Well, he was subject to cross examination on his testimony before the jury, too.

MR. POSNANSKY: He was subject to cross-examination in front of the jury, but as I said the competency issue is a separate proceeding and it is not sufficient.

QUESTION: Well, the fact that his testimony may have been damaging doesn't mean it should be excluded. Presumably all testimony introduced by the prosecutor, it's intended to damage.

MR. POSNANSKY: That's certainly correct, Your Honor, however the issue is whether or not the child's testimony was admissible to begin with.

QUESTION: But counsel, isn't the real trouble, the prosecutor could ask him any question he wanted to while talking to him. To probably, your point, I would think would be that you object to it being held in the court before a judge. Or, are you saying that the prosecutor couldn't talk to the witness?

MR. POSNANSKY: The prosecutor was present at the competency hearing.

QUESTION: But couldn't the prosecutor of held a competency hearing in his own office and talked to the person?

MR. POSNANSKY: Certainly.

QUESTION: So, your objection was that it was done in the court room.

MR. POSNANSKY: It was done in front of the judge. It was done --

QUESTION: That's your only complaint.

MR. POSNANSKY: It doesn't make any difference

whether it's in chambers or whether it's in the court room --

QUESTION: It was done by the judge.

MR. POSNANSKY: -- it was done by the judge and the judge was --

QUESTION: A part of the judicial proceeding.

MR. POSNANSKY: Correct.

QUESTION: Well that's (inaudible) --

MR. POSNANSKY: And that's exactly right.

QUESTION: -- prosecutor is doing this. He can ask the witness anything. The only person who can't ask him is the defense counsel.

Mr. Posnansky, how was your client actually harmed in this case? I haven't seen any hint or suggestion yet of what would have been done differently had your client been present at the competency hearing.

MR. POSNANSKY: Justice O'Connor, I think in this case we have to look to the testimony of these children later in front of the jury.

QUESTION: Yes, I've read it and I just don't understand how the presence of your client would have made any difference in this case. How was he harmed?

MR. POSNANSKY: In this case, just as in any case, the defendant is in a position, is likely to be in a position to bring out certain facts to the attorney.

QUESTION: I have a transcript now and there are no suggested additions that your client would have made. There is nothing that you have brought forward that would indicate to me how he could possibly have been harmed, even if there was a right to his presence.

MR. POSNANSKY: There was no avowal made as to specific questions. But when you look to the testimony of the little girls, some of the things that were brought out are so clearly indicative of a problem with competency. The one little girl testified, the term was used, the sexual term concerning the penis, and she did not even know what it meant. That goes to competency.

If the competency hearing had been conducted properly, the defendant could have brought out facts which would have shown --

QUESTION: But your client has not suggested a single thing that he would have done that would have altered this result.

MR. POSNANSKY: I don't think in this case --

QUESTION: Don't you think he has an obligation to suggest how he might have altered the outcome or how his presence might have made a difference?

MR. POSNANSKY: Your Honor, not in a case where it's involving the presence of the defendant. That is a core confrontation violation, we submit, and there are

no cases holding that where a person is denied presence --

QUESTION: What if we think it is not a Sixth Amendment violation and all you are left with is a due process argument?

MR. POSNANSKY: I know of no cases where a due process violation has occurred where a person has been kept out of the court room, where witnesses are testifying, where a harmless error analysis has been made. I think it is fundamentally unfair in that situation to require the defendant to show on the record precisely what he would have done to change the outcome of the competency hearing.

Some errors are so clear and to try to precisely point to the prejudice is impossible. In right to presence cases, that is inherently a problem. We don't know precisely what he would have brought out. In terms of harmless error, we do know that the children showed very marginal competency later when they testified in front of the jury. The basic unfairness of the whole procedure was that this man was denied confrontation at the competency hearing and he was later given an inadequate opportunity in front of the jury.

QUESTION: What if the judge were to determine that the physical presence of the defendant would have

so frightened the children that they would not make proper responses and that therefore he was to be excluded? Does that violate your client's constitutional --

MR. POSNANSKY: I believe that the proper standard should be the same standard as it is under Illinois v Allen. I think that if the court can show a specific objective factor, that the defendant has done something, and I am not referring to the fact that he has been charged, because there is still a presumption of innocence as to the guilt of the defendant, but if there can be shown evidence that he has affirmatively done something to intimidate the children, to scare them, to threaten them, --

QUESTION: What about the question I asked? Would you answer that: if the judge determines that the presence of the defendant would so frighten the children they would be unable to give proper responses to the questions.

MR. POSNANSKY: In that situation, Your Honor, I think that there are alternative remedies available short of absolutely barring the defendant. I don't believe that simply because the children would be afraid, the defendant could be totally excluded. That's why we now have statutes such as the Closed Circuit

Television, which we have in Kentucky. I disagree with Mrs. Warren. There is nothing in that statute to indicate that it would not apply to this situation. The Closed Circuit Television has been upheld; the constitutionality of that has been upheld in Kentucky.

There are other alternatives available short of totally excluding the defendant. The brief of the American Civil Liberties Union, amicus brief, talks about some of the alternatives: a mirror, closed circuit television, an intercom system.

What is so fundamental is that the defendant have an opportunity to consult with his attorney. Now, if it can be shown that the defendant has done something to warrant his exclusion, such as the Illinois v Allen rationale, then I think he can constitutionally be excluded. But I think the court should then utilize some alternative means, if possible, so that he can at least consult with his attorney and know what is going on in that competency hearing.

And I want to point out that in this case, there was no factual finding whatsoever by anyone that the defendant was going to frighten those children, that they were frightened of him. The judge merely said at the beginning of the hearing, "I think we have to exclude the defendant at this point"; no finding

whatsoever by the court.

We would submit that the confrontation clearly applies at the hearing. These are witnesses testifying before the trier of fact on a critical phase of this trial. Also I would like to point out again --

QUESTION: Excuse me. Was it before the trier of fact? I thought it was a jury trial, wasn't it?

MR. POSNANSKY: No, Your Honor, the judge is the trier of fact as to competency. That is very important.

QUESTION: Not the trier of fact on the charge?

MR. POSNANSKY: Not the trier of fact as to guilt or innocence, but the issue is competency and it is a factual determination. The judge makes a legal determination based on the facts. It is a mixed question of fact and law. And the witnesses are giving factual answers to specific questions. From those the judge determines whether they're competent and the judge is the trier of fact on the issue of competency, not the jury.

QUESTION: Does the jury know about this?

MR. POSNANSKY: I beg your pardon?

QUESTION: Did the jury know that they had been found competent?

MR. POSNANSKY: No, the jury is not informed of

that, Your Honor. They merely testify in front of the jury.

QUESTION: But they don't know anything about that other hearing?

MR. POSNANSKY: No, Sir. No, Sir. I also want to stress again that it is no answer to the problem that the defendant was given the opportunity to cross examine the witnesses in front of the jury. It's a separate proceeding.

Competency goes to admissibility and in front of the jury it goes to credibility. I don't believe that this Court would hold that a person could be excluded from a suppression hearing on the issue of suppressing evidence where a live witness is testifying. That is also in front of the trier of fact, the judge.

QUESTION: Excuse me. You say before the jury, it goes only to credibility; that's not what I understood Mrs. Warren to say. I understood that at the trial if it should appear on the basis of the examination by counsel for the defendant that the infant is not competent, at that point the infant would be excused and the jury instructed to disregard whatever testimony had preceded. Now, that doesn't go to credibility, that goes to competency.

MR. POSNANSKY: Well, Your Honor.

QUESTION: To admissibility, right?

MR. POSNANSKY: Certainly the judge would have the opportunity at the trial to excuse the witness then. But the judge is still the trier of fact as to that issue and the judge --

QUESTION: And again, you asked the judge to do that.

MR. POSNANSKY: Yes, you have to ask the judge to do that at that point --

QUESTION: And that happened in this case.

MR. POSNANSKY: Pardon me?

QUESTION: And that happened in this case.

MR. POSNANSKY: It happened in this case as to the little boy, yes it did. But, the important point on the competency hearing versus the testimony in front of the trial is that when the jury is present the testimony being given in front of the jury as to the jury goes to credibility.

The jury has no opportunity to exclude a witness' testimony based on competency. That is something for the judge. Furthermore, I want to point out, and there have been cases that have discussed this and it's in the brief, that it is fundamentally unfair to expect the defendant to go into these other

extraneous facts in front of the jury again.

Competency encompasses a whole range of things such as: everything in the child's background can be related to competency, in addition to the facts of the particular case. And it is impractical and it is unfair, we submit, to expect the defendant to have to go into it in front of the jury and he has to do this because he wasn't present at the competency hearing.

QUESTION: That's done in a lot of states. And I think that's the federal practice too, isn't it?

MR. POSNANSKY: I believe that is the federal practice, Your Honor. But, in this case Kentucky has a competency hearing for the purpose of determining competency and it is at that point that the defendant's constitutional right applies, and his due process right applies. And at that point, he has the opportunity to assist. And it is a practical problem.

It is a major, practical problem to expect the defendant to have to go into that again in front of the jury and risk alienating the jury, which I submit and there's case law discusses this, would happen in most cases to have to go into these other facts which are unrelated to the charge.

Certainly we also submit that there is a clear due process issue involved in this case. Under Snyder

v. Massachusetts the defendant has the right to be present wherever his presence bears a relation reasonably substantial to the fullness of his opportunity to defend against the charges.

Plainly in this case, as I've mentioned, the defendant is frequently the person, the only person who knows things about the child's background. Kentucky has a two part test for competency, the intelligence to observe, recollect and narrate the facts.

All kind of factors can go toward the intelligence of the child, toward the ability to remember and recollect the facts. There may be specific instances in the child's background which the defendant is aware of which directly show that he doesn't have the ability to recollect the facts or the answers he's giving at the competency hearing are not true.

The other part of the test concerns the ability to, the sacred obligation to tell the truth. If the defendant is aware of many instances in the background of the child where he has repeatedly exhibited a pattern of untruthfulness it's very possible to show that he really doesn't understand the difference between truth and falsity.

These are specific things the defendant can do and I would point out that in a case such as this, in

most cases of this type, child sex abuse cases, the defendant is well-acquainted with the family and the victims as he was in this case and he is in the position to know these facts.

Counsel is not in the position to know them. We can't expect the prosecutor to bring out these kind of things. It's the defendant and only the defendant who is in a position to know these things and the only way for him to be able to assist at the level of competency is to bring these, is for him to be present at the competency hearing and for him to have the opportunity to consult with counsel.

I've also raised the issue of effective assistance of counsel in the brief. We would submit that plainly the action of the court in excluding the defendant also relates to the issue of effective assistance of counsel.

This Court has held that any time a procedure of the court which interferes in certain ways with the ability of counsel to make independent decisions about how to conduct the defense, when that occurs a violation of the right to effective assistance of counsel has taken place under Strickland v. Washington.

That's precisely what happened in this case. The action of the trial court resulted in an ability on

the part of defense counsel to make independent decisions concerning cross examination and concerning lines of inquiry at the competency hearing.

This is like the Geders v. United States case out of this Court which limited the access of the attorney to the defendant. In this case their limiting the access of the attorney to the defendant again. And they're making it, we submit, impractically difficult if not impossible for the counsel to do their job under that situation.

As to the issue of harmless error, we submit that this type of violation should not be subject to a harmless error analysis. This represents a core confrontation violation. This is not like Snyder v. Massachusetts. It's not like other cases which don't involve live witnesses.

Snyder v. Massachusetts involved a jury view. This is live witnesses testifying before the trier of fact and it's an impractical if not impossible standard to be able to specifically show the prejudice. But this Court has never held where a person has been excluded, where live testimony has been given, that they need to show precisely the prejudice.

The prejudice is clear in this case and it's even more clear when you consider the very marginal

competency level of these witnesses that they later demonstrated at trial.

It's just basically unfair in this case for the defendant to have been excluded from the competency hearing and then not accorded the opportunity for effective cross examination because the witnesses may very well have been incompetent when they testified in front of the jury.

Furthermore, as to the issue of harmless error, in Russia v. Spain, this Court held that the error was harmless, was subject to a harmless error analysis. But again, that did not concern the defendant being absent during the testimony of live witnesses.

That only concerned an ex parte communication between a judge and a juror regarding a fear the juror had as to one of the witnesses in the case. There are no cases, I submit, where this Court has held it's harmless error to exclude the defendant where live testimony is being given.

QUESTION: (Inaudible).

MR. POSNANSKY: That's correct, Your Honor, but that's not a trier of fact in that situation.

QUESTION: Just don't make such broad sweeping statements.

MR. POSNANSKY: In conclusion, I would like to

strenuously urge, in fact, implore this Court not to substantially weaken both the confrontation and the due process clauses by holding that the defendant can be excluded without any showing of cause from a procedure where witnesses are testifying before the trier of fact.

To do so would be to do great harm to one of the most precious of our rights and that is the right to be present when one's liberty is being decided.

QUESTION: I suppose you would take the same position if in some states competency was decided by, not by the trier of fact, but by a magistrate or just some separate person?

MR. POSNANSKY: That's correct, Your Honor, we'll take the same position, where the trier of fact.

QUESTION: So you say that anybody who determines competency is a trier of the fact?

MR. POSNANSKY: As to that issue. The crime that was charged in this case was unquestionably a most heinous crime, a reprehensible crime and I don't want to minimize that in any respect.

But, the right to be present at one's own trial is a right that is given to both the guilty and to the innocent. And, while there is no doubt that this issue, the issue of child sex abuse, is a most serious issue facing us today, there is also no doubt --

QUESTION: Well, I take it you think the right to be present is just broader than confrontation? That the confrontation clause is really not the measure of the right.

MR. POSNANSKY: It is broader; due process is certainly involved. The due process right goes to the ability of the defendant to contribute to his own defense as opposed to just confront the witnesses.

To contribute, to suggest lines of inquiry to his attorney, to substantially and meaningfully contribute to his own defense. Things that he can personally do. And it's also clearly involved in that right as well.

There were alternative methods and there are alternative methods available short of simply excluding the defendant from being present and there was no showing in this case that the defendant was a threat to these children or that the children perceived him to be a threat.

There are many different things that a court can do if the children are so afraid that they can't testify. I do not believe that by this Court holding that a defendant has the right to be present at the competency hearing that it would in any way weaken the ability of the states to prosecute child sex abuse cases.

We have closed circuit television now. We can have an intercom system. There are many alternatives available so that the defendant can at least assist his attorney, can at least hear the testimony of the children, consult with his attorney and have some input into a very critical phase of the trial proceedings. Thank you very much.

QUESTION: Thank you, Mr. Posnansky. Mrs. Warren, you have four minutes remaining.

REBUTTAL ARGUMENT OF

MRS. PENNY R. WARREN

ON BEHALF OF PETITIONER

MRS. WARREN: Your Honor, one very brief clarification. In terms of the facts of the case being explored in a competency hearing, at page 86 of the Joint Appendix in the opinion in this case, Justice Stevenson chastises the Circuit Court for going into the facts of the case and we believe that message is very clear. It will not be done in the future.

Unless the Court has any further questions, we would ask the Court to reverse the Kentucky Supreme Court and hold that neither Stincer's right to be present under due process, nor confrontation was denied in this case.

CHIEF JUSTICE REHNQUIST: Thank you, Mrs.

Warren.

The case is submitted.

(Whereupon, at 1:56 p.m., oral argument in the above-entitled case was submitted).

CERTIFICATION

lderson Reporting Company, Inc., hereby certifies that the ttached pages represents an accurate transcription of lectronic sound recording of the oral argument before the)preme Court of The United States in the Matter of:

#86-572 - KENTUCKY, Petitioner V. SERGIO STINCER

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BY Paul A. Richardson

(REPORTER)