OFFICIAL TRANSCRIPT

PROCEEDINGS BEFORE

THE SUPREME COURT

OF THE

UNITED STATES

CAPTION: TEOFILO MEDINA, JR., Petitioner V.

CALIFORNIA

CASE NO: 90-8370

PLACE: Washington, D.C.

DATE: February 25, 1992

PAGES: 1 - 44

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IN THE SUPREME COURT OF THE UNITED STATES

TEOFILO MEDINA, JR., :

Petitioner :

v. : No. 90-8370

CALIFORNIA :

Washington, D.C.

Tuesday, February 25, 1992

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:03 a.m.

APPEARANCES:

MICHAEL PESCETTA, ESQ., San Francisco, California (appointed by this Court); on behalf of the Petitioner.

HOLLY D. WILKENS, ESQ., San Diego, California; on behalf of the Respondent.

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C O N T E N T S

ORAL ARGUMENT OF	PAGE
MICHAEL PESCETTA, ESQ.	
On behalf of the Petitioner	3
ORAL ARGUMENT OF	
HOLLY D. WILKENS, ESQ.	
On behalf of the Respondent	23
REBUTTAL ARGUMENT OF	
MICHAEL PESCETTA, ESQ.	
On behalf of the Petitioner	42

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P R O C E E D I N G S

(10:03 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument next in 90-8370, Teofilo Medina v. California.

Mr. Pescetta, you may proceed.

ORAL ARGUMENT OF MICHAEL PESCETTA

ON BEHALF OF THE PETITIONER

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

As I think the exodus from the courtroom shows, the issue in this case affects a lot fewer people than does the taxing system of California. In fact --

QUESTION: (Inaudible).

MR. PESCETTA: The question before the Court is whether in a situation after a trial court has found a bona fide doubt as to the defendant's capacity to proceed in a criminal matter, as to the defendant's capacity to cooperate rationally with counsel to understand the nature of the proceedings and the charges, whether, after that doubt has been declared, the State can, consistent with due process, put the burden on that individual whose competence is in question to prove incompetence by a preponderance and in that proceeding impose an evidentiary presumption of competence which is contained in a jury instruction.

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And I would like to start, I think, by emphasizing what we are not arguing in this case, which I think is confused to some degree by the briefing of amici curiae on behalf of respondent.

We are not contending that the presumption of competence as an initial matter, insofar as it imposes upon the defendant or counsel or any other party asserting the defendant's incompetence an initial burden of production to come forward and raise that bona fide doubt in the mind of the trial court that the defendant is not competent to proceed with the criminal proceeding

So we are not -- as amicus Criminal Justice Legal Foundation contends, we are not arguing that the quote, presumption of sanity imposed by the common law is constitutionally impermissible. What we are talking about is after that initial doubt has arisen in the mind of the trial court, whether at that juncture, focusing on that stage of the proceedings, the presumption of competency and the burden of proof is constitutional.

QUESTION: Would the burden of proof be satisfied if the Government proved by a preponderance?

MR. PESCETTA: Our contention -- is yes, Your Honor, that if the Government proved by a preponderance that the defendant is competent to stand trial, that -- maybe I'm misunderstanding Your Honor's question.

QUESTION: Well, you would not insist on a higher standard of proof than a preponderance.

MR. PESCETTA: I submit that we do not need to go any farther than that in this case.

QUESTION: I didn't ask you -- do you think that a preponderance standard is constitutional if the Government undertook that?

MR. PESCETTA: I would have to say yes, Your Honor.

QUESTION: I'm glad.

MR. PESCETTA: The difficulty with the resolution of those issues in this kind of case I think is dependent largely on psychiatric testimony, and I will try to discuss that in the context of the Mathews test in a moment, but as this Court has recognized in a number of cases that are cited in the briefs, those kinds of decisions are fraught with risk of error, and therefore although the preponderance standard is a low standard in which the burden -- in which the risk of error is roughly evenly shared by the parties, we submit that that standard is the least that is constitutionally mandated. That is --

QUESTION: Well, Mr. Pescetta, you're asking us to reverse the judgment of the Supreme Court of California and presumably then the California courts would have to

conduct a rehearing, a retrial, at least on this aspect of the case.

Now, I think we are entitled to get from you exactly what your view is as to the preponderance in order that we may decide this case. To send it back to the Supreme Court of California and say well, you know, the preponderance is standard in favor -- let the State prove it, is the very least that the constitution requires. That is not going to help the California courts retry this case.

MR. PESCETTA: Maybe I expressed myself ineptly. What I am saying, Your Honor, is that a State can, consistent with the Constitution, adopt a higher standard of proof, but in -- but what we are arguing is that the preponderance of the evidence standard to show competence to stand trial is the minimum that the Constitution tolerates under the due process clause.

QUESTION: It's also the maximum.

MR. PESCETTA: I submit that a State may impose a higher burden, but we are saying --

QUESTION: But if we're talking about the United States Constitution --

MR. PESCETTA: Yes. I will concede that yes, the preponderance standard is the highest that the Federal Constitution mandates.

QUESTION: Why do you make that concession? It just seems like a good idea? I don't know how you go about deciding your principles here. Why not go for the whole thing while we are at it? I mean, you are not tying the rest of your principles to any case law or any long tradition of practice as far as I know of, so what is the basis for stopping short of beyond a reasonable doubt, except the suspicion that we might not accept it?

(Laughter.)

MR. PESCETTA: I think that suspicion might be rational, Your Honor. But what I am contending, Your Honor, is that there is a line of cases, this Court's cases dealing with Government intrusion on fundamental rights and other criminal contexts, for instance -- Leo v. Twomey, United States v. Matlock -- where a preponderance burden is placed on the Government to get the defendant out from under a constitutional protection which he has brought himself within. I submit that that is -- that that same kind of analysis is apt here.

I submit that there are certainly cases applying the Mathews analysis, like Addington v. Texas where a higher standard of proof has been imposed by this Court. We are arguing here only that a preponderance standard to show competence to stand trial is constitutionally mandated, because in this very difficult area the risk of

error can be shared no more by the defendant than by the State, and that that analysis leads to the result that showing competence by a preponderance will satisfy the Constitution.

If the Court would like to go further, I would not object to that, but I think that disposes of this case, certainly, because in this case the evidence is very, very closely balanced and a finding that the Federal Constitution requires a showing at least by a preponderance, I submit, will result in a reversal of this matter.

To go back to the analytical structure for a moment, I think that we can think of the constitutional structure that is imposed by the Lego-Matlock line of cases in the following way.

Once the defendant has brought him or herself within the ambit of a constitutional protection, in a case like Nix v. Williams, for instance, has shown that there was a search, that there was no warrant, that something was actually seized that's going to be admitted into evidence, that once the defendant is underneath that constitutional umbrella that the burden then constitutionally, appropriately, shifts to the State to boot the defendant back out into the rain by showing, as in Nix v. Williams, that there is an inevitable discovery

of that same evidence.

QUESTION: This is what, the Fourth Amendment now you're talking about?

MR. PESCETTA: I'm simply talking about any constitutional protection.

QUESTION: Well, are you sure that you're -- you mentioned Nix v. Williams, which I think is Fourth Amendment, Lego against Twomey, isn't that also Fourth Amendment?

MR. PESCETTA: That's Fifth Amendment.

QUESTION: Yes, you've got two different constitutional provisions there.

MR. PESCETTA: I agree, Your Honor, that those are different constitutional provisions. What I'm saying is that once the defendant has brought him or herself within the ambit of a fundamental constitutional protection, there is nothing strange about placing the burden on the --

QUESTION: Well, I wonder if you are justified. I mean, there aren't just two constitutional provisions, as you and I both know. There are any number of them. You know, not infinite, but 15, 20, something like that, in the first 10 amendments to the Constitution. You are now citing the treatment in two cases and saying that this justifies a generalization. I'm not sure you're correct.

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MR. PESCETTA: Well, I may not be correct in every instance, Your Honor. What I am trying to do is to harmonize the cases in which -- attempt to harmonize in a -- in something of a coherent scheme some of the approaches that this Court has taken in which the burden has been placed on the State to make a showing by a preponderance to get a defendant out from some constitutional protection.

What respondent has argued is that except for the elements of criminal offense the State never has to bear any burdens, and that is just plain wrong, Your Honor.

QUESTION: But doesn't the history have a good deal to do with it of how that burden has been allocated historically?

MR. PESCETTA: Yes, Your Honor. I submit in this case the historical evidence, though not terribly clear, favors petitioner's position as much as respondent's certainly. At the time of the adoption of the Constitution I think we have to recognize that detailed analysis of the differences between burdens of persuasion and burdens of production are a relatively new development in legal analysis.

QUESTION: Doesn't that suggest that perhaps the Constitution doesn't speak much to those questions?

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MR. PESCETTA: I don't agree, Your Honor. I think that a strong historical showing that one side or the other is -- that one side or the other has a position that has been unequivocally accepted, as in the case of Leland v. Oregon and other affirmative defense cases, that the burden of proof can be placed on the defendant, that that's one situation.

I submit that when the historical evidence is more murky, that there is at least no presumption that what the defendant is asking for as an additional procedural protection is completely out of the ballpark. What I'm suggesting is that application of the Mathews v. Eldridge analysis provides a structure for determining whether or not --

QUESTION: Have we ever applied Mathews in the criminal constitutional law field?

MR. PESCETTA: In United States v. Raddatz and in Ake v. Oklahoma the Court did so. I submit that some of the other decisions by the Court could be harmonized through the Mathews v. Eldridge test, although it's not -- it's certainly not cited in those cases.

I think what we are arguing is that the situations in which the defendant has brought him or herself within a constitutional protection and contrasted with the cases in which -- the affirmative defense kind of

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cases, running from Leland v. Oregon to Justice White's opinion in Patterson v. New York, that there is a different analysis when the State has brought the defendant by proving the commission of the crime beyond a reasonable doubt within a constitutionally acceptable umbrella of culpability, that then the burden can appropriately and constitutionally be placed on the defendant to get him or herself back out from under that level of -- that umbrella of culpability.

But the inquiry in this kind of case is sui generis in the sense that it is the only situation in which the defendant's own ability to cooperate in the current proceeding, in the proceedings on competence as well as ultimately in the criminal proceedings, has an effect on the ability to litigate. And that's our -- I think that that is really the intuitive bottom line here, that once that initial burden of production has been met, once that State trial court has looked down on the defendant and said I doubt whether you can cooperate with your counsel in litigating this case, I doubt whether you can cooperate rationally in this proceeding, whether it makes sense -- whether it makes rational constitutional sense then to turn to that same defendant and say, and you're the one who has to prove that, because the mental condition that gives rise to that doubt in the initial

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burden of production stage will in hard cases make it that much more difficult for that party to meet the burden of persuasion on the ultimate issue.

QUESTION: He could get to all the evidence that the State could get to. I suppose the only way the State can prove competence is having him examined and through medical testimony.

MR. PESCETTA: The State has --

QUESTION: Do you think they could put his lawyer on the stand, the State?

MR. PESCETTA: That has been done. That -- I think if you look at a case that Justice Kennedy sat on in the Ninth Circuit --

QUESTION: Well, certainly you don't suggest that the State has access to more sources to prove competence than the defendant would have.

MR. PESCETTA: The State has the same access to evidence that the defense has, yes, Your Honor.

QUESTION: So the defense has an equal ability to get it. As a matter of fact, I would think the defendant would have sources that the State couldn't really command.

MR. PESCETTA: I disagree, Your Honor.

QUESTION: Well, what about the lawyer?

MR. PESCETTA: The lawyer, his observations of

the defendant's demeanor and mental state, they are available to the prosecution. The case that I was referring to a minute ago that Justice Kennedy sat on in the Ninth Circuit, Darrow v. Gunn, explicitly recognized that under California law --

QUESTION: So they can take the lawyer and say what did he tell you and what did he say about this crime, or not?

MR. PESCETTA: Well, in fact, that's what happened in this case. The investigator, who was covered by the attorney-client privilege, got on the stand and testified to what the defendant had told him about the client, which was nothing. He testified to what his communications with the client had been, and that evidence --

QUESTION: Well, at least the defendant has equal access to information.

MR. PESCETTA: I would suggest, Your Honor, that equal access implies that the defendant, him or herself, does have control over the evidence of his or her mental state, and I submit that the problem in this case is precisely that the mental disorder that is the source of this competency proceeding --

QUESTION: Well, perhaps if you say defendant, but suppose we talk about the defendant and the

defendant's counsel, the defense team. The defendant's counsel certainly has the opportunity to evaluate and assess the condition of the defendant, and the defendant's counsel then I assume has the opportunity to call and retain experts in order to make the showing that's needed.

MR. PESCETTA: Yes, Your Honor, but so does the State. And the State in similar instances, and certainly I submit in this case, has superior access to the defendant when he's incarcerated, has as much resources as the defense -- if you look at the record in this case, what defendant's family members testified to as to his behavior in jail was on the basis of episodic visits. What the prosecution's witness, Sergeant -- Detective -- Deputy Green, I believe his name was, testified was to a whole year of --

QUESTION: Well, but the critical issue I take it -- correct me if I'm wrong -- is the ability of the defendant to cooperate with counsel in the presentation of the case. Is that the ultimate legal --

MR. PESCETTA: That's the ultimate test, and what we're arguing is --

QUESTION: Who would know that better than the attorney?

MR. PESCETTA: Well, to the extent that the attorney knows it, I submit, that evidence is available to

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the State. The difficulty is that that defendant's ability to establish or persuade or communicate his actual inability to communicate rationally may, and in this case I believe was, compromised by the very mental disorder in question.

I submit that this Court's decision in McNeil v. Director of the Patuxent Institution is on point here, because the analysis here is, I submit from the State's point of view, assumes the question in issue. It assumes that the defendant has access to the evidence of his or her mental state, in some sense because it assumes that the defendant is competently regulating the access of both his own counsel and the experts and the State to what is ultimately a question of what is inside his or her head.

QUESTION: But it seems to me we have to look at the totality of the cases to which this rule you're urging upon us applies.

You argue as though it only applies to those cases in which in fact the defendant is incompetent, but it will apply to all cases, whether he's incompetent or not, and it seems to me that, regardless of whether the access to facts is the same on behalf of the prosecution and the defense, which I doubt, certainly the possibility of a malingering defendant who really is not mentally incompetent, his possibility to produce a mere draw by

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pretending incompetence is I think considerable, and that's the result. All he has to do is produce a draw that you really can't tell whether he's competent or incompetent, and in that event he can't be tried.

MR. PESCETTA: Well, Your Honor, the initial stage at which those cases are weeded out is the stage at which no bona fide doubt as to competence arises in the first instance. And if you will look at the vast majority of cases -- I think this Court's decision in Maggio v. Fulford is a good example -- most of the cases deal with instances in which trial courts say I don't have a bona fide doubt as to this defendant's competence. And those determinations are routinely, overwhelmingly upheld on appeal and on collateral attack.

Now, I think we have to recognize that in the vast majority of criminal cases this issue never arises at all. In a further number -- a further vast majority of those cases in which it does arise, there is no dispute because the experts agree, because the courts agree with the experts.

It is only in the difficult cases -- and I submit that this language -- this Court's language in Morrison v. California is apt on this point -- it is only in the difficult cases, it is only in the cases where the defendant may actually be hampered in his ability to

produce evidence of his or her own incompetence, that this burden of proof question makes a difference. And it makes a very substantial, in fact a fundamental outcome-determinative difference, in those cases in which, when the defendant has produced a draw, as Your Honor puts it, when we have to decide what is the worst damage that is done -- trying that defendant when he is arguably incompetent, or committing him as incompetent when there is a chance that he is in fact competent.

That, I submit, relates to the cost element of the State's interest under the Mathews test, and I would submit that the evidence that we've submitted in our brief and that has not been contested at all by respondent or by any of the amici in this case is that that -- that the imposition that that places on the State is minimal. It is very minimal. The California statute itself requires a report within 15 days after the committal of an individual as incompetent.

Now, if that individual is in fact competent there is an easy means by which the director of the facility to which the defendant is committed can return that defendant almost immediately to the Court he or she came from. The evidence that we've supplied in the studies by Roesch and Golding, who are I think the leading authorities in this field, shows that an average stay in a

commitment as incompetent is 43 days. And just to put that in perspective, if I may, that's less than half of the time that this Court allows for petitioning for certiorari in a criminal case.

QUESTION: Do you mean by that that at the end of the 40-some-odd days the person is found to be competent?

MR. PESCETTA: My understanding of that statistic is that 43 days is the average duration of the commitment, so that in an average of 43 days the defendant is returned to the Court as competent, and that's an average of cases in which the defendant is received at the facility and immediately turned around and returned to the Court as competent, and it includes cases in which there is a longer commitment when the State would suffer no harm to its interest because the defendant is in fact incompetent and it has taken whatever the amount of days it is to restore his competence.

QUESTION: Is it clear both in this case and in the classic cases that we're considering that, if there is an erroneous determination of incompetence, that the defendant is held in custody until there is a second hearing on the issue?

MR. PESCETTA: California law provides for outpatient treatment in appropriate cases. In general, it

is commitment to a mental health facility and there's a whole range of mental health facilities.

QUESTION: And what about this particular case?

MR. PESCETTA: In this particular case, Mr. Medina was incarcerated in the county jail prior to trial and he would have been incarcerated I am sure in Atascadero or Patton State Hospital, which are the normal places for commitment as incompetents.

In either event, he would have been committed to a mental health facility, where, I think the studies show unanimously, the chances of a more accurate determination of whether Mr. Medina is or is not, in fact incompetent, can or cannot voluntarily cooperate with counsel, can be made. And I submit that the increase in the accuracy of the decision which is afforded by that commitment to a mental health facility is also a factor pushing in favor of saying that the consequences of an erroneous finding of incompetence are less serious than the consequences of an erroneous finding of competence.

QUESTION: Well, you can say that about a lot of criminal rules. I mean, at some point any system that is going to commit people to prison is going to -- you can say any rule, if you don't have it, the consequence will be this person might go free, but if you have it it will mean an innocent person will be put away. You can't adopt

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any rules without that kind of consequence.

MR. PESCETTA: I certainly do not suggest, Your Honor, that that is the only criterion. It is certainly a factor in the Mathews analysis. And the other factors, there's certainly no question but that the trial of an incompetent is fundamentally unfair.

QUESTION: Counsel, are there things that the defendant's counsel is just inadequate to evaluate when he suspects that there may be a mental imbalance, and is that why it is not important or dispositive in your view that the defense counsel has real access to the defendant? Is your point that we need a battery of experts to do this, and that the defense attorney isn't really that much help?

MR. PESCETTA: Well, that's what the statute in California contemplates, is appointment of experts.

My position, Your Honor, is that the defense counsel's access to evidence is superior at the point where the initial burden of production is placed on the defendant, where the defense counsel is, we concede, in the best position to go to the trial court and say, I cannot communicate with this defendant, please appoint experts, we have to have a competency hearing.

But once that proceeding is initiated that goes away, because the prosecution, the court, has the power under Estelle v. Smith, under all of the rules that we've

cited in the briefing, to obtain evidence of the defendant's mental condition. And the defense counsel, I submit, in the instance, for instance where the defendant turned over the table in the courtroom, the defense counsel had no superior ability to know whether that was a product of the defendant's mental state, of his underlying mental disorder, than anyone else did.

QUESTION: It's probably hard for you to generalize, but in most of these cases are there standard tests that medical experts testify to? Is that the way the competency hearing works?

MR. PESCETTA: There is normally an -- a -- the experts normally give tests, if they can, to the defendant. There is a range of mental states. The mental state that the prosecutor suggested was the standard of competence in this case, whether the defendant is a vegetable, that doesn't fall, really, within our problem here, because that's not going to be disputed if the defendant is literally a quote, vegetable, unquote.

If it is clear that a defendant who has no psychiatric history, no evidence of mental impairment, is just saying he or she is mentally incompetent in order to delay the proceedings, which was the situation in Maggio v. Fulford, that's at the other end of the spectrum.

It's in the middle where the expertise of the

experts is directed not only at the ultimate question of the defendant's ability to cooperate with counsel in the criminal proceedings, but in his ability to cooperate now that the expert's opinion is crucial and they do standard psychological tests on him.

If I may, Your Honor, I'd like to reserve the remainder of my time.

QUESTION: Very well, Mr. Pescetta.

Ms. Wilkens, we'll hear from you.

ORAL ARGUMENT OF HOLLY D. WILKENS

ON BEHALF OF THE RESPONDENT

MS. WILKENS: Mr. Chief Justice, and may it please the Court:

California's allocation of the burden of proof to the moving party in a competency determination offends no principle of justice which is so rooted in our traditions and conscience to be ranked as fundamental.

Additionally, the California procedure is in accord with the Federal Government, which provides similarly in a statute which was amended in 1984. Additionally, of the 14 legislatures of States which have specifically addressed the allocation of a burden of proof, 11 of the 14 comport with California law.

Moreover, the competency determination is unique in that it can be raised by the defense, by the

prosecution, or sua sponte by the Court. So accordingly it is important to recall that there may be defendants who are not resisting a competency determination but nevertheless are subject to the litigation which may ultimately lead to their confinement without any determination of guilt. There may be defendants with strong defenses to criminal charges who are precluded from making those defenses because of an incompetency determination.

Additionally, petitioner --

QUESTION: You're suggesting that a defendant may not always welcome a determination of incompetency.

MS. WILKENS: Indeed, and that has been the case in some instances. I would invite the Court's attention to United States v. Hemsi out of the Second Circuit, a 1990 case at 901 Fed 2d 293, which illustrates this point. In that particular prosecution it was the Government who initiated the incompetency proceeding. The defense counsel took the stand and testified in favor of a competency finding, and ultimately it was appealed to the Second Circuit, the incompetency determination. So we cannot assume that each and every defendant is seeking the incompetency determination.

QUESTION: Well, maybe we should put the burden on the defendant only when -- put the burden on the State

only when the defendant is seeking it and put the burden on the defendant when the State is seeking it, and vice versa.

MS. WILKENS: Well, Your Honor, admittedly that is a conceivably solution, but I can only emphasize that --

QUESTION: Why not?

MS. WILKENS: It's not incumbent upon California to adopt such a procedure. The petitioner has ignored California's right to bring a defendant to trial. As this Court has recognized, the right to bring a criminal defendant to trial is fundamental to a scheme of ordered liberty and to social justice and peace, and --

QUESTION: Of course, their argument as I understand it is you don't really lose the right; you merely delay its assertion for whatever time it takes to have a more accurate competency determination after he's in the institution for a while.

MS. WILKENS: Yes. The only thing petitioner will concede is that there would be some delay. But I'd like to discuss the delay, because in reading petitioner's brief there are references to the majority being returned immediately and the rest being returned quickly, and there are studies referencing averages of 43 days. And counsel this morning has indicated that the California Penal Code

provides for a report within 15 days. So he's talking days, and I don't think that's appropriate.

The Penal Code section counsel refers to section 1370, subsection (a)(2). That provides for a report in 15 days to the trial court as to whether defendant will go to an outpatient program or be committed to a mental institution. It's not a determination as to competency at 15 days.

The California law provides for a 90-day period for the initial diagnostic evaluation. The Federal provision, which is the same, provides for a 4-month commitment to a mental institution, so we're not talking days.

QUESTION: So what you're saying is that his 43-day figure really should be 90 days or 120 days.

MS. WILKENS: Well, no, his 15-day figure should be 90 days or 4 months. Now, with respect to his 43-day figure, I have some problems with that as well. The one study which counsel cites relating to California relates to Atascadero, which is but one of California's mental hospitals, but that particular study references the majority of incompetent defendants being returned in a little over 3 months.

Now, that is just one study, and the California law provides for a full competency hearing again at 18

months in the event that someone is still committed and has not yet been certified mentally competent. And the legislature selected 18 months for a reason, and in the Pacific Law Journal, Volume 6, at page 492, at footnote 67, they cite California Department of Health records relating to all commitments pursuant to Penal Code section 1370, and those records indicate that the majority of defendants are returned within 2 years, and this is a significant difference.

QUESTION: Well, let me ask you this. Supposing in the institution the people in the institution think this fellow is malingering and he's really perfectly competent. Is there any procedure by which they can bring that fact to the attention of the court? Do they have to wait the 2 years, in other words?

MS. WILKENS: Absolutely not. If at any time at the mental health facility the experts arrive at an opinion that the individual is indeed competent, he is returned to court at that time. But again it's important to note that the California procedures provide for expert evaluations prior to the hearing on this matter. So if an individual is particularly adept at fooling the experts in that context, there's no reason to suggest that he will be returned immediately, based on the evaluations in the hospital setting.

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QUESTION: No, but isn't there this different. Maybe I don't understand the procedure, but isn't it different that if he's been committed to an institution where he's under 24-hour-a-day custody and supervision by experts in mental health, they have one body of facts to work with, whereas if he has not had a hearing at all, isn't he in a normal jail, or he's not necessarily in a mental institution when the issue arises. So you don't -- the State has had a different amount of access to the relevant facts at the second hearing than it would have at the first hearing.

MS. WILKENS: That's correct. He may not even be in custody prior to the hearing on mental competency.

So with respect to delay, there is a significant difference, however, and the State does have a concern with respect to malingering, because as the expert testimony below from petitioner's own expert indicates, avoiding the death penalty is a motivation for malingering. And counsel has indicated that there will be little litigation on the issue of mental competency, but I would suggest that it will come in the cases that California has the greatest interest.

That is, the more serious the offense the greater the motivation to malinger, and this is something that has been recognized historically since 1847 when Hale

observed that it would be appropriate to empanel a jury to see if a claim of madness is real or fraudulent.

So with respect to the State's interest, it is enhanced in the sense that the delay is putting these people back into the system at the initial point. It is in all probability the most serious of offenders and those of the greatest concern to the State.

Additionally, as this case serves to illustrate, California has a strong interest in not having individuals in a hospital setting, other than those who are truly deserving of the evaluation, because as the experts again agreed in their testimony, there are individuals, career criminals, very serious, dangerous individuals, who will seek out a hospital setting because it is less secure and they are more likely to perfect an escape. So there is attendant risk to the State both in delay to the strength of the prosecution's case and with respect to facilitating the incarceration of serious offenders in a hospital setting.

QUESTION: Your comment about less secure, does it apply to Federal prisons in your estimation?

MS. WILKENS: I'm not sure, Your Honor. I'm not very familiar with the Federal study.

QUESTION: I think it is incorrect as applied to Federal medical centers such as Springfield and Rochester

and some of the others. I don't know the situation in California.

MS. WILKENS: I don't know what the situation is, and again I'm not suggesting we don't have very secure facilities.

However, there is, of course, limited space in all of our institutions, both mental and otherwise, and we have different classifications for different inmates. So if we have a large percentage of our most dangerous, most serious offenders being placed into a hospital setting, the burdens increase with respect to protecting the safety of the public. And additionally, as the record indicates here, there was an escape attempt by this very defendant from an Arizona hospital prior to his incarceration in California.

With respect to access, I would indicate that theoretically there is equal access with respect to psychiatric evaluation. However, given the vagaries of psychiatry and the core issue, which is the ability to communicate with counsel and to understand the proceedings, the defense counsel truly has superior access to the defendant himself. And additionally there is no obligation for a criminal defense attorney to facilitate the prosecution by providing specific instances in his knowledge that would evidence competence, and the entire

scheme of California is focused on the defense attorney.

Now, this morning, counsel suggested --

QUESTION: Excuse me, could the defense attorney be required to provide that -- I don't understand how a competency hearing would -- is conducted. Is the defense attorney usually put on the stand to testify? Whoever has the burden of proof?

MS. WILKENS: I would hesitate to characterize it as customary for the defense attorney to take the stand. They have, indeed, been called to testify. That would not be unprecedented, and the law as it stands today provides that the attorney-client privilege is not implicated when counsel testifies to demeanor, which is unrelated to confidences relating to the merits of the case.

QUESTION: Observations and impressions of the mental condition are not within the privilege?

MS. WILKENS: Yes, and for example, petitioner suggested that the defense investigator testified, and he indicated that in his conversations with the defendant he wanted to talk of irrelevant subjects, and he was able to discuss what those irrelevant subjects were. The difficulty is that perhaps embodied in those discussions with the defense team are very strong indications of competency.

The prosecution is not entitled to inquire as to the specifics of what communications have taken place within that attorney-client privilege, and so while the defense attorney will take the stand and tell us of his client overturning tables and other behavioral acts and irrelevant conversations, we're not privy to the information which we could utilize to show that this individual is indeed manipulating the system. And that is --

QUESTION: This burden of proof has been imposed on defendants in California for quite a while.

MS. WILKENS: Since 1917, Your Honor.

QUESTION: Well, you would think that if the defendant has the burden to prove not only to come forward with some evidence but -- the ultimate burden of proof, you would think that attorneys would play a major role in producing evidence of incompetency. And they would all be -- if there was any evidence around, you would think that they would be on the stand all the time.

MS. WILKENS: They certainly have an incentive to marshall that evidence.

QUESTION: Well, do they appear a lot, or not?

MS. WILKENS: It's not unprecedented. I have seen several cases where they have taken the stand, and again it is a one-sided endeavor with respect to

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prosecution.

QUESTION: Well, they take the stand on the defendant's side of the case.

MS. WILKENS: Yes.

QUESTION: Yes, in furthering his claim of incompetency.

MS. WILKENS: Yes, exactly. And with respect to --

QUESTION: I suppose if the lawyer takes the stand and testifies to the conduct of the defendant, I suppose he's subject to cross-examination to -- in areas that he hasn't testified to.

MS. WILKENS: Your Honor, he'd be subject to cross-examination, but it has not been resolved as to the intrusiveness into the actual attorney-client privilege.

If the prosecution was to inquire please relate to me with specificity the ability with which he related the facts surrounding the crime, this is a perfect example of Mr. Medina, because he can't recall murdering these people. He's been told he murdered them, but he can't recall, and if we ask the defense attorney, has he said anything to you which would contradict that, we're not going to get an answer.

QUESTION: Why, because the -- don't the California courts treat -- if a defendant takes -- if a

defense lawyer takes the stand and testifies as to some aspects of competency, isn't the privilege waived across the board, or do they say no?

MS. WILKENS: I don't know that that has been precisely litigated, but I would suggest that there has been a distinction drawn between challenging the competency of your counsel and challenging the mental competency of the defendant. And California law provides that it is only when the defendant challenges the competency of the attorney that we can go into that area. So really, if petitioner is to prevail today, it would appear the prosecution should be entitled to some very intrusive discovery, but we can't be sure of that.

QUESTION: But you say that that has not been resolved, as the law presently stands in California.

MS. WILKENS: No, there has never been that specific question addressed. However, it is made quite clear that it is waived when the defense attorney's competency is challenged, not when the defendant challenges mental competency, so we have no assurances in that regard.

Now, with respect to the particular California scheme, we rely strongly on this Court's reaffirmation that the State has a preeminent role in the allocation of burdens of proof with respect to matters such as we face

today. This Court has been reluctant to disturb --

QUESTION: Where did that reaffirmation occur?

MS. WILKENS: Your Honor, I rely heavily on Patterson v. New York, and particularly the language in Martin v. Ohio, which characterizes the strength of Patterson, which reiterates the opportunities that this Court has had to depart from Leland, and it has repeatedly declined to do so. And we rely heavily upon Patterson v. New York for support as to our discretion in this area.

QUESTION: But you don't think just Leland and the reaffirmation of it controls this case, do you?

MS. WILKENS: Yes, Your Honor, I would suggest it does.

QUESTION: Other than to support the notion that you should leave it to the State, but --

MS. WILKENS: I think that we find support in that. As you'll notice, we have not undertaken any type of analysis under Mathews v. Eldridge because it's our position we need not reach such, because we are within the rights as defined under Patterson v. New York.

There is no tradition which we are violating. Our process is certainly reasonable within the discussion of Morrison. We certainly are not placing an oppressive burden on the defendant. We are not compelling any hardship. We are asking merely that he show to the jury

that it is more probable than not that he is incompetent than competent.

Now, with respect to counsel's remarks about focusing on the trial court's declaration of doubt, it's important to focus on that particular determination by the trial court. That is the determination which decides whether there will be an inquiry at all, and counsel has no problem with California's allocation of both a burden of production and burden of persuasion at that point.

However, he suggests that once the trial court has declared a doubt and asked for a competency hearing, that somehow California should change its presumption and its allocations, and there's nothing to support that. And it's interesting to note that it's only when the defendant's incompetency claim is going to be subject to an adversarial setting, where the prosecution will have the ability to produce evidence and to cross-examine and look into the defendant's allocations, that suddenly there's a problem.

The determination of doubt does not preclude the State of California from utilizing procedures which will help to ensure that the risk of erroneous determinations adverse to the State's interests are reduced.

As this Court --

QUESTION: What it boils down to, as I

understand it, you take the position that if the judge doesn't know, he just can't tell whether this man is competent or not, then he should make him stand trial.

MS. WILKENS: Well, yes. In California it's done by a jury and requires a unanimous jury verdict.

QUESTION: Yes.

MS. WILKENS: But it's our position that if a defendant cannot convince 12 jurors that it's more likely he's incompetent than competent, indeed he should stand trial.

Mr. Medina had a full and fair opportunity to present evidence to 12 jurors, and he could not convince one of those jurors that it was more likely that he was incompetent, and the jury picked a foreman and read its verdict in less than 2 hours. There's no denial of due process here. But, no, that is our position.

QUESTION: No, but it would be the same, I suppose, if they had a hung jury and they deliberated for 14 days and they said we really can't tell, we can't return a verdict. That would still require that he'd have to go to trial, then.

MS. WILKENS: Well, procedurally, if we had a hung jury in California we'd do it again.

QUESTION: Oh, you do.

MS. WILKENS: Yes. So if that were the scenario

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we'd do it over again. We'd have another 6-day hearing.

QUESTION: If the jury comes back with a verdict turning down the defendant's submission of incompetency, you don't really know whether the jury in the jury room said gee, this is a toss-up. And so we have to rely on the presumption, because they are instructed on the presumption, aren't they?

MS. WILKENS: That's correct. If a jury comes back --

QUESTION: So you really don't know if they thought it was a tie.

MS. WILKENS: That's correct. If we have a unanimous jury verdict it could be based on equipoise, and we don't know if they utilized the presumption or not. And with respect to equipoise, I can only observe that in the event there's an erroneous guilt determination we cannot equate that with a guilty man -- with an innocent man being found guilty. We cannot make that correlation.

And additionally, when an individual proceeds to trial they are accorded all the protections afforded, including the beyond-a-reasonable-doubt standard. Additionally, it's important to note that the finality of the decision here can impact as to the fairness of what has been allocated. And a competency determination is not final. If there is a change in circumstances which

suggest that the original competency finding was erroneous --

QUESTION: Based, for example, on his performance during trial?

MS. WILKENS: Yes. If there is behavioral outburst --

QUESTION: Or outside of trial.

MS. WILKENS: Absolutely. If the defense attorney is encompassing problems, it can be brought to the attention of the court, and we can stop the proceedings again and again litigate the idea of competency. So the absence of finality is a factor to be considered, and the uniqueness of this proceeding is a factor to be considered in the manner in which California has allocated the burden.

QUESTION: Counsel, may I ask you just to go back to one issue? Do you take the position that the presumption is itself of independent evidentiary force, as opposed to merely being a sort of opaque way of stating the burden of proof?

MS. WILKENS: It is definitely not of evidentiary value, and it is simply a restatement of the --

QUESTION: I thought you were indicating that it was when you answered Justice White, or I think agreed

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with Justice White, that it might be that the -- when the verdict comes back -- the verdict of competence -- that it reflects the presumption rather than mere equipoise.

MS. WILKENS: My reference was if the jury cannot resolve it and truly believes that the evidence is in equipoise the law instructs them that it is the defendants, or whoever is asserting incompetence, it is their burden, so by virtue of their failing to meet the burden, they are to return the competency finding.

QUESTION: Why do they instruct on the presumption? Because the statue says so?

MS. WILKENS: Well, it's in accord with the statutory language. It starts out by stating there's a presumption. It's probably surplus. But again, there is no evidentiary value to presumptions in California.

QUESTION: Well, are they -- is the jury instructed on that?

MS. WILKENS: The jury is instructed on very simple language, which indicates that --

QUESTION: Well, does the simple language state what you just told me, that a presumption has no evidentiary force in California?

MS. WILKENS: They are not specifically told that it has an evidentiary force, but there's --

QUESTION: Well, if they're not told that, don't

you think that a normal juror would assume that the presumption, as in the instructions here, did carry some evidentiary force?

MS. WILKENS: No, I don't understand how a lay person would make such a judgment.

QUESTION: Is that because you assume a lay person wouldn't understand what they were talking about in the first place?

MS. WILKENS: No, I don't think that they would -- I don't think they would interpret the presumption of competency to have evidentiary value. I don't think, based on the language of the statute --

QUESTION: Well, why wouldn't the jurors -- I mean, don't we assume that the jurors are going to be rationale at least to the extent of assuming that if they are instructed on a burden of proof, then are instructed on a presumption, that the probable inference is the presumption means something different from or in addition to the burden of proof, and if that's the case, isn't the juror going to say gee, if we're -- if the see-saw is level, we better give effect to the presumption.

MS. WILKENS: If that were the order in which they were instructed, I might agree, but here it states a criminal defendant is presumed to be mentally competent. Then it begins to recite how they are to make their

determination, and then they are instructed that when everything is equal, when the evidence is equal, they are to find for competency. So I don't believe the instruction as written could lead to that result.

And in conclusion I would just like to read from Snyder v. Massachusetts that justice, though due to the accused, is due to the accuser also, and the concept of fairness must not be strained until it is narrowed to a filament is we are to keep the balance true.

Mr. Medina had a full and fair opportunity to demonstrate his mental incompetency. There has been no denial of due process by California and its allocation of the burden of proof after the finding and declaration of a doubt with respect to competency.

And if there are no questions, California would submit, Mr. Chief Justice.

QUESTION: Very well, Ms. Wilkens.

Mr. Pescetta, you have 2 minutes remaining.

REBUTTAL ARGUMENT OF MICHAEL PESCETTA

ON BEHALF OF THE PETITIONER

MR. PESCETTA: I'll have to talk fast.

To respond to the access question, there is no doubt, I submit, that once defense counsel or any party initiates the competency inquiry, that all bets are off as to the defendant's invocation of any privileges -- his own

privilege against self-incrimination, the attorney-client privilege. All the evidence is available if the prosecution wants it.

With respect to the --

QUESTION: On that point, has that been decided in California, or are you just saying that's the position you would take?

MR. PESCETTA: Well, certainly that's true under Estelle v. Smith with respect to the confidentiality of the expert evaluations. Certainly in this case defense counsel did make representations as to communications made to him by the defendant in the course of the competency proceeding, and so did the defense investigator. So I submit that there is a fallacy --

QUESTION: Yes, but it seems to me as a general rule counsel often could testify about demeanor and tone of voice and things like that without necessarily violating the privilege. I mean, I'm not -- I'm just not sure you --

MR. PESCETTA: But Your Honor the only way the inquiry starts is when counsel makes a representation about the substance of his communications. That is, this defendant cannot rationally cooperate with me in presenting this case.

QUESTION: Well, that's not so, is it? The

judge can raise it sua sponte.

MR. PESCETTA: Well, yes, Your Honor, but that -- to the extent that that's based on behavior, that demeanor evidence is equally available to the State. To the extent that defense counsel is invoking the incompetency procedure, that is necessary based on defense counsel's arguably privileged communication.

QUESTION: Yes, but what if he doesn't invoke it? Is your answer clearly correct even in cases in which he does not invoke it?

MR. PESCETTA: My understanding of California law is that once the competency proceeding is initiated, the privileged -- the privilege -- the defendant's ability to invoke privileges is gone.

Now, as to the -- as to what happens in the event of a toss-up, I submit that the State is wrong in suggesting that the defendant can ask for repeated competency proceedings.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Pescetta.

The case is submitted.

[Whereupon, at 11:58 a.m., the case in the above-entitled matter was submitted.]

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BY Ann-Marie Federico

(REPORTER)