OFFICIAL TRANSCRIPT

PROCEEDINGS BEFORE

THE SUPREME COURT

OF THE

UNITED STATES

CAPTION: SALVADOR GODINEZ, WARDEN v. RICHARD ALLEN MORAN

CASE NO: 92-725

PLACE: Washington, D.C.

DATE: Wednesday, April 21, 1993

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IN THE SUPREME COURT OF THE UNITED STATES

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SALVADOR GODINEZ, WARDEN, :

Petitioner :

v. : No. 92-725

RICHARD ALLAN MORAN :

- x

Washington, D.C.

Wednesday, April 21, 1993

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 1:09 p.m.

APPEARANCES:

DAVID F. SARNOWSKI, ESQ., Deputy Attorney General of Nevada, Carson City, Nevada; on behalf of the Petitioner.

AMY L. WAX, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C.; United States, as amicus curiae, supporting Petitioner.

CAL J. POTTER, III, ESQ., Las Vegas, Nevada; on behalf of the Respondent.

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C O N T E N T S

ORAL ARGUMENT OF PAGE

DAVID F. SARNOWSKI, ESQ.

On behalf of the Petitioner

AMY L. WAX, ESQ.

United States, as amicus

curiae, supporting Petitioner

CAL J. POTTER, III, ESQ.

On behalf of the Respondent

REBUTTAL ARGUMENT OF

DAVID F. SARNOWSKI, ESQ.

On behalf of the Petitioner

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P R O C E E D I N G S

(1:09 p.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument next in No. 92-725, Salvador Godinez v. Richard Allan Moran.

Mr. Sarnowski.

ORAL ARGUMENT OF DAVID F. SARNOWSKI

ON BEHALF OF THE PETITIONER

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

Thousands of cases are processed in our criminal justice system in both the state and Federal courts throughout this land each day. The lesser number involve the issue of whether or not a defendant is competent to proceed to trial. In this case the Ninth Circuit Court of Appeals in Federal habeas corpus review of a state court conviction and the imposition of three death sentences concluded that there is a heightened standard for the determination of whether a defendant may proceed to either waive counsel or to enter a plea of guilty, which occurred in this case. We take exception to that ruling, and that is the issue that brings us here today.

However, there are some underlying findings by the state trial court that I would like to direct the Court's attention to, specifically they appear at page 21

of the Joint Appendix. At that point the trial judge, Judge Leavitt, determined that this petitioner, Richard Moran, was in fact competent. He utilized language which tracked a Nevada statute on point, Nevada revised statute 178.400, which in turn is a formulation of this Court's pronouncement in Dusky. He also made an express finding that Mr. Moran knew the consequences of his plea of guilty and that he can intelligently and knowingly waive his constitutional right to the assistance of counsel.

In 1988 the judge made additional findings which also appear in the trial record and are before this Court, particularly at the pages D-7 and D-8 of the petition.

QUESTION: Do you say that the finding of knowing and intelligent waiver is a higher standard or a lower standard or indistinguishable from what the Ninth Circuit found was the standard, which was I believe a reasoned choice?

MR. SARNOWSKI: Our position in this case, Your Honor, is that once a defendant meets a standard of competence established by this Court in Dusky, then a defendant is competent to proceed either to waive counsel, to plead guilty, or to proceed to trial. In this particular case --

QUESTION: What do you think you have to show to say that a defendant is competent to assist counsel in his

defense? What do you think that encompasses? Are there reasoned choices to be made when you end up going to trial and have to be represented by counsel and have to assist counsel?

MR. SARNOWSKI: To answer your second question first, yes, there are reasoned choices that have to be made --

QUESTION: Such as whether to testify?

MR. SARNOWSKI: Yes, Your Honor, that is a critical choice that each defendant if they choose to proceed to trial must make. If they choose to proceed to trial they must decide whether or not they are going to have a jury trial or have a bench trial in those states which allow a defendant to waive a jury trial. Those are critical determinations that the defendant has to make. They are, in our estimation, equally important as to a defendant's cause as is the decision by a defendant to waive counsel or to plead.

QUESTION: Well, do you think then that in order to determine whether a defendant is able to assist counsel in his own defense that the determination of mental competence of necessity includes a determination of whether he can make a reasoned choice?

MR. SARNOWSKI: We believe that is correct, Your Honor. In this case two psychiatrists examined the

defendant and expressed their opinions in terms of Dusky, the Dusky standard. Neither expressed a view that he was incapable of either assisting counsel or proceeding to trial.

QUESTION: Did the trial court ask the wrong question and reach the right answer or did it ask the right question and reach the right answer, in your opinion?

MR. SARNOWSKI: We believe that the trial judge, Judge Leavitt, both asked the correct question and received the answer which was in context and directly addressed to the judge's question both --

QUESTION: It's not altogether precise, it seems to me, when we're concerned with the competency to waive that you asked about competency to stand trial. It's just a little bit different question. I understand the point, that competency to stand trial may indicate a level of mental stability that's sufficient.

MR. SARNOWSKI: It is our position that if a defendant is assessed and it is determined by the trial court that he has a factual and rational understanding of the proceedings, that he has the ability to assist, not necessarily that counsel actually is assisting, because as was the case here the defendant ultimately chose not to have counsel, but if he does have that ability to assist

he has, he meets the baseline standard which also includes the ability to make a reasoned choice.

He must make a reasoned choice at all stages of the proceedings, and if he at some point in time does not meet a competency standard, then as an officer of the court it's up to his counsel or the prosecutor or up to the court sua sponte to ascertain whether the proceeding should be suspended or not.

In this case --

QUESTION: Is competency comprehended within knowing and intelligent voluntary waiver? Would it be satisfactory for a judge to say before I allow you to plead I'm going to insure that your plea and the waiver of rights is knowing, intelligent, and voluntary? Would that suffice in a case where we have some question about competency?

MR. SARNOWSKI: I believe that the judge has to independently ascertain that the defendant is competent and --

QUESTION: So that's different than knowing and intelligent?

MR. SARNOWSKI: Yes. But in the sequence of events that may well happen a judge may proceed on a Boykin canvas or a Faretta canvas in terms of a defendant waiving counsel and ascertain that a further inquiry into

competence is necessary. The competence evaluation does not necessarily occur first in every instance.

Here the totality of the circumstances that faced the trial judge understandably did not peak any further inquiry once he had made his conclusion. It has to be noted from the record that both trial counsel appointed to represent Mr. Moran in these two separate incidences were present in court up to the time that the judge made his finding that Mr. Moran was competent. And in fact at the conclusion of the competence determination before the judge allowed them to be discharged the record clearly reflects that he asked them if they had anything to say to the court or to address the court and they chose not to and indicated that the judge had covered what was necessary. At that point in time the judge had fulfilled the requisite requirements under Dusky.

However, the question before us is did the Ninth Circuit standard require a baseline of constitutional due process for those defendants either waiving counsel or pleading guilty which is higher than the baseline this Court established in Dusky. It is our contention that no such standard is required by the pronouncements of this Court, nor should one be applied for there are several problems that ensue because of it, the first and not the least of which is if you require a defendant to be more

competent to waive counsel in some instances you do not allow a defendant to exercise the parallel right to represent himself, which this Court clearly set out in Faretta.

The second --

QUESTION: The court of appeals said they weren't bound by the results of a state court hearing because they applied the wrong standard?

MR. SARNOWSKI: That's correct, Your Honor.

QUESTION: And they said that their standard of reasoned choice is a higher standard?

MR. SARNOWSKI: Yes, that's what they said.

QUESTION: So they must have thought it was. Do you think it's -- if the court hadn't said so would you think it's a higher standard? Reasoned choice?

MR. SARNOWSKI: No, we would not. As I indicated earlier, each defendant throughout the process has to make reasoned choices. They may not be a choice you or I would make if we were standing in his shoes or they may not be the choice that with hindsight we would say was the best choice available to him, but it's the defendant's choice. In fact in noting the opposition to our initial petition for certiorari the respondent in this case indicated that it was merely a matter of semantics as to the argument involved and that our petition did not

present a question that this Court should consider. However, it is very clear --

QUESTION: Well, it set aside a state court -- it refused to follow a state court finding that otherwise it should have.

MR. SARNOWSKI: Your Honor, the Ninth Circuit relied on a premise that merely because the state courts applied an incorrect standard as far as the law is concerned that its factual findings were not due any deference, and we would certainly take issue with that. The facts are what they are, regardless of the applicable legal standard. It is clear that this Court's pronouncements in Maggio v. Fulford and Miller v. Fenton require deference by the Federal courts to findings of historical fact for state criminal defendants.

That did not occur in this case, and in fact we would go so far as to say that the circuit court panel considering the case substituted its own facts for those not found to be weighty in the state court system. For instance, they relied on certain extracts from a Physicians' Desk Reference and noted that certain medications that the defendant was using at the time of his plea had certain properties.

QUESTION: But they were looking at it from the standpoint of their standard.

MR. SARNOWSKI: That's correct.

QUESTION: Which you say was wrong. If it's supposed to be a higher standard you say they had no business applying a higher standard.

MR. SARNOWSKI: Regardless of the standard to be applied they should not have substituted its judgment and allocated different weights than the state courts. In this particular instance the state trial judge when he conducted the post conviction review hearing in 1988 expressly declined to find that the mere fact that the defendant was under the influence of some prescription medications had any significant weight, and as a matter of fact he found that the defendant had failed under state law to bear his burden of proof to show that that had any medical significance in that --

QUESTION: Do you think this argument you're making now is within your question presented, the single question presented?

MR. SARNOWSKI: We believe -- yes, Your Honor, in this sense.

QUESTION: I thought the only question you presented was whether the Constitution requires a trial court to apply a heightened reasoned choice standard to determine competency of a defendant to enter a plea of guilty or waive counsel.

MR. SARNOWSKI: That is the question presented. However, the circuit court's conclusion in this case was inextricably bound to its own substituted facts. And it is our position that had it not substituted the facts, even under the heightened standard, the defendant in this case could not prevail, and clearly he could not prevail under the standard that we espouse before the Court.

In this instance the trial judge looked at the totality of circumstances to assess the defendant's competence, and only when he concluded that he was competent did he proceed to a very thorough Faretta canvas which appears in this record. And then and only then did he allow waiver of counsel, and then he proceeded into a very thorough plea canvas which comports fully with this Court's holdings in Boykin and the subsequent cases that ensued as a result of Boykin.

Although the defendant contested the knowing and intelligent quality of the pleas that he entered, those legal determinations were made in the state courts. And truly the Federal courts never got to the issue because the Ninth Circuit's holding was grounded in its ruling that as a matter of law that the higher standard applied in this case. It never got to the intelligent and knowing waiver issues.

However, in further response to Justice

Kennedy's initial inquiry, once competence is ascertained it is our belief that there are protections built into the system, the requirements that those canvases in both Faretta instances and Boykin instances must be knowing and intelligent, and that together the Dusky standard, the Faretta standard, and the Boykin standard provide the minimal due process that each defendant should have in our system before they are held to account for their actions in a criminal court, be it state or Federal.

If the Court has no further questions I would like to reserve the remainder of my time.

QUESTION: Very well, Mr. Sarnowski.

Ms. Wax, we'll hear from you.

ORAL ARGUMENT OF AMY L. WAX

UNITED STATES, AS AMICUS CURIAE SUPPORTING PETITIONER

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

The position of the United States in this case is that a valid finding of competency to stand trial suffices to establish competency to plead guilty or waive counsel. This Court formulated a test of competence over 30 years ago in Dusky v. United States, and we believe that it is still a workable standard for determining competency to perform all of the functions that a defendant may be called upon to perform in the course of

standing trial.

Now there are a number of reasons why this Court should reject the idea that a person can go to trial and yet be unable to waive constitutional rights. First, that view seriously distorts the meaning of Dusky and the standard of competence to stand trial in this Court's cases. That standard must be understood in light of other cases of this Court such as Jones v. Barnes that identifies certain decisions that are ultimately for the defendant to make in the course of trial.

Therefore in order to be competent to stand trial an individual must at least have the potential capacity for basic decision making in response to well explained alternatives. And there is no difference in principle or practice between the choices that confront defendants routinely at trial and the decisions at issue in this case.

QUESTION: Do you think that the tests that we have frequently articulated with respect to pleas of guilty and waivers of counsel, do you know of any case where in such a case we used the Dusky language? I always thought it was voluntary and intelligent.

MS. WAX: Well, there --

QUESTION: Isn't that the test?

MS. WAX: Right.

QUESTION: That's what you usually read.

MS. WAX: Right. We would distinguish between the need to be competent to make these decisions and whether the decisions are knowing and voluntary. We think they are two distinct inquiries. Now, a waiver being knowing and voluntary presumes competence. Competence is a subsidiary finding that needs to be made before a waiver can be knowing and intelligent. Competence goes to the inherent qualities of mind, the functional capacity of the individual, his skills. Knowing and voluntary, the knowingness and voluntariness of a waiver goes to information --

QUESTION: So you think in testing out the validity of a plea of guilty then you should not only ask whether it's voluntary and intelligent, but you should go through the Dusky catechism too?

MS. WAX: Right. Well, we think --

QUESTION: Is that right? Yes? Yes?

MS. WAX: Yes. A person has to have been found competent to stand trial generally under the Dusky standard in order to get to the point where he can consider making that choice.

QUESTION: Well, that may be so where competency is challenged, but say in the ordinary case there's no challenge to the competency of somebody and yet, and he

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wants to plead guilty. Are you, should you go through the Dusky catechism or not?

MS. WAX: Well, you're right, Your Honor, there would be, you're correct insofar as you're saying that you don't explicitly need to make a finding of competence for every defendant. It's only when there is a good, a reason to doubt an individual's competence that such a finding need be made. But I am speaking of the case where there has been such a doubt.

QUESTION: But even if they go through the Dusky routine and find the person competent, to sustain a plea of guilty you should go, you should go on to find it at least voluntary?

MS. WAX: Of course. Exactly.

QUESTION: And intelligent?

MS. WAX: Yes, but we think that's very different from what the court said in this case. The Ninth Circuit didn't really say anything about, they didn't question the need to find the waiver knowing and voluntary. They said that you first need to do an additional inquiry into competence, you need to stop everything and start over again when it comes to competence, make a finding on a distinct standard and then go on and do the inquiry into whether the competency inquiry is, whether the waiver is knowing and voluntary.

QUESTION: Well, Ms. Wax, the Ninth Circuit appeared to be concerned about the fact that the defendant was on medication and the trial court didn't know the effect of the medication, and that the answers were monosyllabic, and so forth. Would those factors go into determining whether the plea was knowingly and intelligently made?

MS. WAX: Yes. In fact we think that they are relevant to whether it was knowing --

QUESTION: They might be relevant to competence as well.

MS. WAX: Yes. Yes. We would point out, though, that whether the pleas were knowing and voluntarily made is not the question presented in this case. The --

QUESTION: Well, I'm just trying to find out whether the, some of the things that bothered the Ninth Circuit are appropriately looked at not only in the question of competence but in knowing whether it's knowing and intelligent.

MS. WAX: We think they could look, be looked at under both rubrics. The Ninth Circuit happened to look at those factors when it questioned the competence finding, but certainly with medication you could argue that in fact it goes more to whether it's knowing and voluntary because

if you stop the medication then the person might change, and so competence is sort of a baseline state of the person. We agree with that.

Now, now only is the adoption of multiple tests of competence illogical and unnecessary because decision-making ability really properly is part of the Dusky inquiry, but it also will have tremendous adverse effects on the trial process. First of all it will endlessly multiply procedures, the procedures that the trial court must conduct. It will require the trial court to bring the proceedings to a halt and conduct a fresh inquiry into competence every time it looks like the defense needs to make an important decision. And this will raise all sorts of opportunities for doubt and error --

QUESTION: Ms. Wax, do you understand that that would be necessary even when the man has been determined to be competent in the Dusky sense and also has counsel?

MS. WAX: It's --

QUESTION: Most trials you do have a lawyer there, and I had sort of assumed that if you have the lawyer then, having survived the Dusky standard, that's all you need.

MS. WAX: Well, if you're asking whether this Dusky standard applies when you have a lawyer and when you don't have a lawyer, we would say it applies under both

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circumstances.

QUESTION: Well, the Dusky, you have to satisfy the Dusky standard always, I suppose.

MS. WAX: Yes.

QUESTION: But then I'm asking you whether you think under the Ninth Circuit's holding that when you do, when you satisfy the Dusky standard and when you do have a lawyer you also have to satisfy a higher standard on every other thing that might arise during the trial?

MS. WAX: We think the Ninth Circuit said that because it said setting aside the waiver of counsel issue, it implied, I think, that if you plead guilty then you need some special capacity to make that choice.

QUESTION: But this is pleading guilty without a lawyer.

MS. WAX: With or without -- we didn't read the Ninth Circuit to say that it only applied because this person didn't have a lawyer. We see --

QUESTION: Well, would you have the same objection to the Ninth Circuit holding if it were limited in that respect?

MS. WAX: Yes, we would. We don't think an extra competency determination is necessary whether you have a lawyer or whether you don't have a lawyer because competency goes to those qualities of mind you have to

possess to go to trial. The lawyer brings --

QUESTION: One of which is to cooperate with counsel.

MS. WAX: Yes. But the lawyer -- to consult with counsel is the phrase in Dusky.

QUESTION: Right.

MS. WAX: That is a way of measuring a certain mental capacity. It's a method of summarizing all the mental functions that you have to possess. It's put in terms of consulting with counsel, but it doesn't mean it only applies when counsel is there.

QUESTION: Ms. Wax, is this case about the standard that should be used or is it really about whether the defendant was entitled to a hearing? What was the defendant arguing about in the Ninth Circuit?

MS. WAX: The way the Ninth, we would say that the way the Ninth Circuit decided the case, although they did fault the court for not holding a hearing, we think they did hold a hearing by the way, ultimately the rule of decision here was that there was an erroneous standard for competence applied, and the Ninth Circuit implied that if Dusky really was the standard the findings, at least at the post conviction stage, hearing stage, would have been sufficient to ground a finding of competence. The Ninth Circuit --

QUESTION: Was that the focus of the attack before the Ninth Circuit?

MS. WAX: Before the Ninth Circuit respondent said in fairly crude terms that his plea and his waiver were invalid, and he didn't really parse out the competence and whether it was knowing and voluntary factors terribly well and he didn't specifically argue that the wrong standard was used.

QUESTION: But he did say I should have had a hearing. He made that very clear, didn't he?

MS. WAX: That was -- yes, that was one of the things he argued. But the question arises what standard to apply at the hearing.

QUESTION: Subsequently, after you decide whether you need a hearing or not, I suppose you then have to decide what standard you apply. But isn't that a prior question, and wasn't that the question really raised?

MS. WAX: Well, our answer is that there was a hearing.

QUESTION: Thank you, Ms. Wax.

Mr. Potter, we'll hear from you.

ORAL ARGUMENT OF CAL J. POTTER, III

ON BEHALF OF THE RESPONDENT

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

This case is a straight forward application of Westbrook v. Arizona concerning due process where a doubtfully competent defendant seeks to waive constitutional rights such as the right to counsel. In this instance the general pate and query as to competency to stand trial, to assist counsel, and understand the proceedings is not enough. Due process requires a specific determination by the psychiatrist as to the defendant's competency to waive counsel.

This is not a case of heightened standards, but context-specific inquiries into the competency to waive counsel. The trial court --

QUESTION: The Ninth Circuit thought it was applying a higher standard because that's the reason it refused to follow the state court determination.

MR. POTTER: They did apply a reasoned choice, but it's a higher standard in terms of what their decision was. But the real critical issue here is the wrong standard was applied, and the wrong standard was that they were dealing, the state court was dealing with a Faretta canvas instead of going through a Westbrook type hearing as a matter of due process.

QUESTION: Well, what is the standard --

QUESTION: Well, that's a different issue. You refer to Westbrook as if it were some terribly well known

case, a Westbrook hearing. I mean, I haven't seen Westbrook cited I don't think in 25 or 30 years until now.

MR. POTTER: The whole Sieling v. Eyman case that the Ninth Circuit relied upon is based upon Westbrook and Pate. And the Pate hearing that came out in the same time as Westbrook, those types of analysis, particularly here where an individual has a question as to his competence, clearly they had done the initial hearing as to his ability to understand what was occurring and his ability to assist counsel. So the court is on notice at that particular point in time --

QUESTION: Mr. Potter, Westbrook is an unargued per curiam, 1 page long, which really does not get a great deal of precedential deference from our Court.

MR. POTTER: That is correct, but it's a due process case.

QUESTION: Well, so it's a due process case. That doesn't make any difference.

MR. POTTER: And it stands for the precedent that --

QUESTION: Well, what about the Massey case which preceded it?

MR. POTTER: Same thing. It goes to the voluntariness issue.

QUESTION: That was not a per curiam.

MR. POTTER: That's correct. But the issues here --

QUESTION: In your submission what is the standard that a trial court should use in determining competency to plead guilty and to waive the assistance of counsel?

MR. POTTER: It's a decisional competency that's entwined with Johnson v. Zerbst as to voluntariness. And whether it's a broader inquiry, a focused inquiry, is not the real issue. It's not whether this is a reasoned choice, although reasoned choices are involved. I don't think this Court has to reach that issue as to a bright line test.

QUESTION: Maybe we do, maybe we don't. But what I hear you say is that you're backing away as quickly as possible from the reasoned choice standard used by the Ninth Circuit. That's the way I read your brief at page 17. You're just telling us well, you have to look at everything, make a contextual inquiry, but you don't give us any standard at all.

MR. POTTER: Well, the standard is the reasoned, or the voluntariness and the intelligent waiver. The reasoned choice is the standard that could be applied.

QUESTION: So you think knowing, intelligent, and voluntary waiver includes, comprehends competency?

MR. POTTER: Yes. And although there is also an actual competency type analysis, under the Pate analysis there is also a due process analysis as to competency.

QUESTION: It doesn't sound to me like you're really defending the judgment of the Ninth Circuit. You're defending the judgment, perhaps, but not on the rationale that the Ninth Circuit is.

MR. POTTER: The rationale that the Ninth Circuit used is that the state courts used an improper standard.

QUESTION: Yes. Are you defending that?

MR. POTTER: Yes. And the improper standard was --

QUESTION: So you say -- I though you should answer, you should have answered Justice Kennedy then the standard is reasoned choice. That's the only one there is. I'm defending the Ninth Circuit judgment.

MR. POTTER: Well, there is, that can be accepted as the proper standard. What we're saying is that their inquiry also deals with, although it says reasoned choice and a heightened standard, it's also a broader standard from the due process standpoint that there has to be a searching inquiry made. And what was important in this particular case was that the court was aware and had doubts as to Mr. Moran's competency. They

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did the initial analysis. They knew that he had --

QUESTION: So you want us to decide that there wasn't a sufficient inquiry here and therefore to affirm?

MR. POTTER: Yes.

QUESTION: That's, I suppose that isn't the way the Ninth Circuit went about it, but you want us to affirm on that ground even though you didn't cross appeal their opinion?

MR. POTTER: Well, they, the Ninth Circuit did say that an improper standard was applied, the improper standard being the reasonable choice standard. But from a due process standpoint --

QUESTION: Why isn't Ms. Wax correct in what she said a moment ago that the voluntary and reasonableness standard which you're pegging your case on now presupposes competence? And what that looks to is the particular state of mind at the moment of voluntariness based in part upon knowledge of consequences, i.e. of the particular decision. Why isn't she correct when she says that the standard that you are now arguing for presupposes competence? It's not a substitution for it.

MR. POTTER: Because she presupposed in the answer that in fact the individual did not have these other factors, presupposed that --

QUESTION: What other factors? I'm not sure I

understand you.

MR. POTTER: The factors that the court was aware of when they did their initial analysis about the fact that he was competent to assist counsel and had an understanding. The court was aware at that time --

QUESTION: You mean whether the court is inquiring into competence or whether the court is inquiring into voluntariness it could take account of the medication? Is that your point?

MR. POTTER: Yes. And that was the other factor. In addition, what Mr. Moran was doing --

QUESTION: Well then why, why then doesn't your argument boil down to what was suggested a moment ago, that you're really not necessarily -- number one, you're not defending the Ninth Circuit, and number two, your argument really goes not to the need for a new standard of competence in general but to the need for as particularized an inquiry when there is a waiver of counsel as there is when there is a plea of guilty. Isn't that what you're really arguing for now?

MR. POTTER: Yes. Yes, we are.

QUESTION: But that's not what the Ninth Circuit held.

MR. POTTER: That's correct, Your Honor. What we're saying is in this instance that because Mr. Moran

was on medication -- the competency is already made before the colloquy takes place. The court is aware that he is on medication, yet unbelievably does not ask what kind of medication he is on.

QUESTION: Well, if it -- if we were to decide as a matter of law that the Dusky competency standard was perfectly satisfactory for the original inquiry as to competency and that individual waivers of rights would have to be judged by what the court could look at at that particular time, then ought not the state trial court's findings to receive deference because they did, that court did receive, did apply the correct standard, the Dusky standard which would be applicable?

MR. POTTER: But that is the actual competency and not as to due process.

QUESTION: Well, what's -- I don't understand your distinction there, Mr. Potter. I mean, I don't think the Constitution ever says anything about competency. It has always been subsumed under the due process clause.

MR. POTTER: Under the voluntariness aspects of the case --

QUESTION: You're really talking about a procedural due process.

MR. POTTER: Yes. We're talking about a procedural due process.

QUESTION: That you can't be brought to trial unless you're competent to make the necessary decisions that go along with a trial, but that's the Dusky standard.

MR. POTTER: Well, that's the Dusky standard, but not as to specific and actual decisions. In this instance under the Westbrook analysis we're dealing with the waiver of counsel. We also cited the Nevada courts to the application of a Pate type hearing, that when a different analysis, a different decisional type situation occurs that you have to have a different analysis as to whether in fact the individual is competent. He may be competent to stand trial, but he certainly may not be competent if he's waiving counsel to make those same types of decisions.

QUESTION: Did the defendant before the Ninth Circuit argue for a higher standard for determining competency to enter a plea and waive counsel?

MR. POTTER: We cited Sieling v. Eyman. We did not necessarily ask for a higher standard. We asked for a hearing, and because of the --

QUESTION: The focus of your argument was to get a hearing at that stage?

MR. POTTER: Right. Because the concern was that they were dealing strictly with Faretta and whether in fact a Faretta canvas, and they weren't dealing with

the due process argument of whether in fact we were entitled to further inquiry as to his ability to make this reasoned choice in making his waiver of counsel, also making the decision that he didn't want to put forward any kind of mitigation circumstances.

So clearly he did not have his self-interest. I believe that --

QUESTION: Do you think that in order to be competent to stand trial, which includes competence to assist counsel in the defense, that that includes a capacity to make reasoned decisions?

MR. POTTER: Yes. Yes.

QUESTION: But then you agree with your opposition on that.

MR. POTTER: I'm sorry?

QUESTION: I say then you agree with your opposition in that respect. I'm surprised at your answer, frankly.

MR. POTTER: Well, in this situation he comes in to waive a decision in terms of the context of when the decision is made. The initial analysis in this case required a decision about competency to stand trial and a decision to assist counsel. Then you have a focused inquiry in the context specific as to whether in fact he can make this decision to waive counsel and give up his

rights of representation. So to that analysis it is different.

QUESTION: It sounds like you're back where you were in the court of appeals. Your complaint here is he just didn't have a hearing.

MR. POTTER: We didn't have a hearing --

QUESTION: Your complaint is that you did not have a particular hearing at the particular time on the particular reasoned decision to be made.

MR. POTTER: That's correct.

QUESTION: It's not so much the standard that you're worried about.

MR. POTTER: That's right. We didn't argue a heightened standard. We did not argue a heightened standard to the Ninth Circuit, nor did we necessarily argue a heightened standard at any juncture in this case. What we were arguing was that we were entitled to a hearing, that the court, because they knew this individual was on medication, they had already made a determination as to competency --

QUESTION: You say the hearing you got in the state courts was not an adequate hearing?

MR. POTTER: It didn't focus on the right standard --

QUESTION: Well, anyway, you say it was not an

adequate hearing.

MR. POTTER: As to that issue.

QUESTION: Yes. And therefore the findings of the state court weren't entitled to deference.

MR. POTTER: The finding would be as to law on the due process issue, and that's the distinction. There may be a finding as to competency, as to actual competency that might have some kind of deference in terms of the fact finding, but what occurred here was a double barrelled argument. We were talking about the medication as to actual competency, but we were also saying that we were entitled to a hearing based upon the fact that there was a question as to whether this individual could waive his counsel and whether in fact he was acting in his own self interest.

Our argument was essentially that Johnson-Zerbst invokes a protection of the trial court when the accused is without counsel to assure the voluntariness. What it said was that there's a mixed fact. The protecting duty imposes serious and weighty responsibilities upon the trial judge of determining whether there is an intelligent and competent waiver. And we look to Justice Frankfurter and Jackson statements in Von Moltke v. Gillies about a searching inquiry of the court that there must be an understanding choice.

Now in Westbrook the Court reiterated the distinction between competency to stand trial with counsel and competency to proceed uncounseled. It required a separate inquiry because Dusky addresses a different question. Although it may be the same standard, the context specific is what is important, whether in fact you can assist counsel.

Our argument is that the plea to be voluntary must be understood. Dusky does not answer the same three questions about waiver of counsel, about plea, and the mitigating evidence. We look to Pate v. Robinson and Drope. It says that demeanor is not enough. So the mere fact that the trial court had the individual before them was not enough. In addition, this Court said in Pate that a 6-year old re-analysis was not sufficient. Due process does not require this higher standard, but requires a separate inquiry.

QUESTION: Then again it does not require a higher standard, it just requires a separate inquiry?

MR. POTTER: That's correct, and that was our argument that we were asking for in terms of the due process.

QUESTION: Well, I mean, I suppose you can be fully competent and yet not have made an effective waiver because all the facts weren't in front of you or because

you misunderstood the consequence, or so forth and so on, right? It's not even entirely the same issue, is it? Is it entirely an issue of competence?

MR. POTTER: There is a difference between the actual competence and the specific inquiry as to whether in fact an individual can make decisional matters such as the waiver of counsel and the right to give up his assistance. In this instance I think --

QUESTION: Your right to a hearing doesn't just go to competence. If you want a separate hearing on this issue it's not just because you're worried about the person's competence. You're worried about whether he has been advised as to the consequences of this particular -- there are a lot of other things.

MR. POTTER: Right. As to the voluntariness.

QUESTION: So it's not really a competence question at all. It's a question of whether the waiver was effective. Competence is one element of that. And you're not asserting that for that one element the standard is any higher than it is for competence to stand trial?

MR. POTTER: We're saying it's a different focus.

QUESTION: Are you saying, Mr. Potter, that, put the Dusky standard here for competence to stand trial, and

over here put the inquiry as to whether a particular, say a decision not to take the stand was knowing and voluntary? Are you saying that there's still some other requirement that has to be met if both of those were met, that at the time the person is asked whether or not to take the stand there must be another competency inquiry?

MR. POTTER: That's what Pate says --

QUESTION: I'm asking what is your contention. Yes or no?

MR. POTTER: My contention is yes, if there are factors that show that there's a continuing duty on the part of the court that the individual brings forward some --

QUESTION: So there's a third test that the state has to satisfy?

MR. POTTER: It's not a third test. It's a situation of where they have a continuing obligation if additional factors come forward. In this instance the additional factor that came before the court at the time it's doing this canvas is the situation where he is told that he is on medication. There is absolutely no question at that point as to what effect the medication had upon him, whether in fact he was, the dosages that he was taking, whether he understood what was going forward.

QUESTION: You agree that there was a general

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inquiry as to competency at this hearing, do you not?

MR. POTTER: Yes. And the general questions as to competency dealt only with his ability to assist counsel and to stand trial. They did not deal with the specific aspect of him waiving counsel, of him deciding that he was entering, going to enter a guilty plea.

QUESTION: Are you talking about the post conviction hearing or at the criminal trial?

MR. POTTER: At the criminal trial or the entry of plea. At the post conviction they dealt strictly with actual competency and not with this due process aspect.

QUESTION: Well, I thought the challenge was to the, in the post conviction hearing the case was in state habeas, or whatever you want to call it, was that the defendant challenged the voluntariness of his plea.

MR. POTTER: We did. We also made another argument that in fact we were entitled to a hearing and cited the court to --

QUESTION: Well, you had an evidentiary hearing in the post conviction, at the post conviction stage.

MR. POTTER: No, in terms of a hearing as to his competency at the time of the plea. Our argument was that the Nevada Supreme Court had adopted Melacor, the Pate type situation, which required them to go through a hearing, that Pate required them under a context-specific

situation to make an additional determination of competency, his competency at that time to waive counsel and enter a plea.

QUESTION: Mr. Potter, a minute ago if I understood you I thought you answered a question of mine in this way, that what was defective in this case was the failure of the court to make the kind of knowingness and voluntariness inquiry upon the waiver or attempted waiver of counsel that would have been required if the defendant had pleaded guilty.

Now I understand you to be saying something different. I understand you now to be saying that the failure here was in fact a failure under existing law, the existing law being that there is a continuing duty on the part of the court to make an inquiry into competence whenever facts come to the court's attention that might put that competence in question, and that the facts in this case were facts brought to the court's knowledge about the drug use, the medication that the defendant was on. And so that your claim of error here is that the court did not fulfill its affirmative duty under existing case law to make a thorough inquiry to find out whether the medication had in fact rendered the individual incompetent. Is that your position?

MR. POTTER: Yes. We had made a double argument

that in fact in terms of the medication that he was incompetent as to actual competency. We also made an argument that the court was required, upon already knowing that there was a question as to his competency to stand trial and assist counsel because of the fact that he had committed suicide. So they did a preliminary psychiatric examination. But in addition to that when they were made aware of the medication we were also entitled to an additional competency hearing.

What really occurred here was no competency hearing at the time that these pleas were entered and the waiver of counsel was made.

QUESTION: Whether or not that's so, it sounds to me as though what you're arguing now is basically that there was an error under existing law. The Ninth Circuit may have gone off on a tangent which you do not defend, but your position is simply that there was an error under existing law.

MR. POTTER: That's correct. And the existing law, Sieling v. Eyman, that case encompasses the same thing that Melacor v. the Nevada Supreme Court, which incorporates the Pate type hearing, is the same analysis. And that was the argument that we made.

QUESTION: If you're not defending the higher standard requirement that the Ninth Circuit insisted on, I

suppose if we disabuse them of that we could, we wouldn't need to decide the argument you're making now. We could remand and you could take it up to the court of appeals, which is what you argued to them anyway.

MR. POTTER: That's correct, Your Honor. But the incidence in this situation is that they did, the state courts did apply the wrong standard. We were essentially dealing with an argument about competency to waive counsel, Westbrook, and they were dealing with Faretta. We were talking about actual competency and they stayed with actual competency and did not do anything with our argument about due process in terms of the Pate analysis. And those were the arguments that were made.

QUESTION: Thank you, Mr. Potter.

Mr. Sarnowski, you have 4 minutes remaining.

REBUTTAL ARGUMENT OF DAVID F. SARNOWSKI

ON BEHALF OF THE PETITIONER

MR. SARNOWSKI: The Ninth Circuit clearly disposed of this case below by applying the heightened standard. At page A-27 of the petition the lower court's decision is set forth in which it says that certain observations made by the trial court were inadequate to show that Mr. Moran was competent according to the higher standard of reasoned choice that the law requires.

QUESTION: I suppose it would have had to do

that in order to reverse the state court's determination, wouldn't it, because otherwise the state court's determination is subject to deference under 2254(d)?

MR. SARNOWSKI: That's our position, Justice Scalia.

QUESTION: You think that's why the Ninth Circuit felt constrained to find a higher standard?

MR. SARNOWSKI: I suppose it would border somewhat on speculation on my part, but it would seem that's one reading of their decision. In this case if the higher standard does not apply, deference must be afforded.

Mr. Potter's argument was that no hearing was held, and that's what they really proffered to the Ninth Circuit as a basis for relief, fails to recognize that a hearing was held. And although this Court has said that it is not the preferred method of assessing competence to have a hearing after the fact, the fact of the matter is that the same trial judge conducted a hearing and applied the burden of proof to the same party who had the burden under Nevada state law, Doggett v. State, a 1977 case, to show that he was incompetent.

Of course this Court just said last term that it is not impermissible to require a defendant to bear that burden of proof, in Medina. He didn't bear that burden of

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proof, and in fact the judge was singularly unpersuaded by his proffer of evidence and his failure to show how the medication impacted the defendant at the time of the entry of plea and waiver of counsel situation. The Nevada Supreme Court affirmed that. He had his hearing.

And this Court's recent pronouncement in Keeney v. Thomiel Reyes would seem to say the fact that he didn't present the evidence then requires him to make a showing of cause and prejudice, and he hasn't even argued that, much less shown it. He should not be given the second opportunity in the Federal courts to do what he had the opportunity to do, but did not, in the state courts.

If the Court has no further questions, I have no further argument.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Sarnowski.

The case is submitted.

(Whereupon, at 2:01 p.m., the case in the above-entitled matter was submitted.)

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CASE NO. 92-725

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BY Ann Mari Federico

(REPORTER)