sOFFICIAL TRANSCRIPT

PROCEEDINGS BEFORE

THE SUPREME COURT

OF THE

UNITED STATES

CAPTION: BYRON KEITH COOPER, Petitioner

v. OKLAHOMA

CASE NO: 95-5207

PLACE: Washington, D.C.

DATE: Wednesday, January 17, 1996

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IN THE SUPREME COURT OF THE UNITED STATES

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BYRON KEITH COOPER, :

Petitioner :

v. : No. 95-5207

OKLAHOMA :

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Washington, D.C.

Wednesday, January 17, 1996

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:10 a.m.

APPEARANCES:

ROBERT ALAN RAVITZ, ESQ., Oklahoma City, Oklahoma; on behalf of the Petitioner.

W. A. EDMONDSON, ESQ., Attorney General of Oklahoma, Oklahoma City, Oklahoma; on behalf of the Respondent.

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P R O C E E D I N G S

(11:10 a.m.)

CHIEF JUSTICE REHNQUIST: Spectators are admonished as you leave, please do not talk until you get outside. We have another case coming up that we're going to hear right now, and that case is Number 95-5207, Cooper v. Oklahoma.

Mr. Ravitz, you may proceed whenever you're ready.

ORAL ARGUMENT OF ROBERT ALAN RAVITZ

ON BEHALF OF THE PETITIONER

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

This case presents the question whether the State of Oklahoma may allocate a level of proof as high as clear and convincing evidence on the defendant in determining his competency to stand trial.

Despite uncontroverted expert testimony the accuracy of which was not disputed by the trial judge, despite testimony from defense team investigators that Mr. Cooper was cracking up and was incompetent, despite numerous witnesses and court observations of peculiar conduct throughout a 3 to 4-week period prior to trial, and despite the fact that the trial judge in Oklahoma failed to find Mr. Cooper was malingering, the court,

utilizing a clear and convincing standard of proof, held that Mr. Cooper was competent to stand trial.

QUESTION: Well, if the evidence was so overwhelming, as you describe it, Mr. Ravitz, one would think that it met even a clear and convincing test.

MR. RAVITZ: I think, Mr. Chief Justice, that goes exactly to the crux of this argument, that when people look at a clear and convincing test, they take it as such a high burden that despite this type of evidence they can legitimately conclude, using this burden of proof, or this standard of proof, and say, as a matter of law, despite all this evidence, this person is still competent to stand trial.

QUESTION: What do you mean, as a matter of law? I take it the State is certainly entitled to put the burden of proof on the person who is claiming to be mentally incompetent.

MR. RAVITZ: Absolutely.

QUESTION: And so, if you say -- you say as a matter of law, the trier of fact is free to disbelieve witnesses, so I don't see where you get as a matter of law coming out of this.

MR. RAVITZ: What we're saying is that the competency standard, the clear and convincing standard is a standard of law.

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This particular court has said that to reach this you need certain levels of certainty. This court has specifically said that this standard is used to take away a liberty interest, that's how high of a standard it's used for, and this standard can only be met, and Oklahoma used the term, the uniform instructions at the time of the Cooper trial used the term unmistakable.

Now, there's no evidence to show the judge used the term unmistakable, but this judge was familiar with the stock instructions, so he had to be satisfied unmistakably that Cooper was incompetent.

QUESTION: Well, to say -- the supreme court of Oklahoma didn't use the word unmistakable, did it?

MR. RAVITZ: The Oklahoma Court of Criminal Appeals --

QUESTION: Is that the one that decided -- did it use the word unmistakable?

MR. RAVITZ: They said there was no evidence from the record that unmistakable was used. They recognized that was the standard. Currently there was a different standard applied, but it doesn't matter, the clear and convincing standard is such a high burden, regardless of whether you call it unmistakable, or you say this is the standard necessary to take one's individual liberties away from him.

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QUESTION: Well, the clear and convincing evidence standard is intermediate as I've understood it and as I think our opinions -- between the preponderance of the evidence standard which obtains in most civil cases, and beyond a reasonable doubt, which is what you have to find guilt by. It's -- obviously, it's higher than the preponderance, but it's lower than beyond a reasonable doubt.

What is it that enables us to say that it ought to be one rather than the other?

MR. RAVITZ: I think we have to look at the fundamental liberty interest involved in an incompetent individual being placed on trial.

Our system of justice demands that an individual who cannot appreciate the consequences of his actions and does not understand the proceedings cannot assist counsel, cannot go on trial for his life, and this standard takes away liberty interests of that individual.

QUESTION: We can hear you pretty well, Mr. --

MR. RAVITZ: I'm sorry. I'm sorry, Mr. Chief Justice.

The truth-seeking process of a criminal trial is compromised when we require clear and convincing evidence of incompetency before we go to trial. That's why this Court in Medina looked at the impact on the particular

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harm to the fundamental right.

This Court concluded in Medina that in the narrow class of cases where the evidence was at equipoise -- in other words, where the evidence was just as likely for competency as incompetency -- that it justified the risk as to the fundamental right not to be tried while incompetent. However --

QUESTION: Do you rely on historical practice in this case? Do we know what States have required in this area, and do we know how many States are now changing to this higher standard of proof?

MR. RAVITZ: Justice O'Connor, historically at common law there was no question that this was -- there was a preponderance standard. Yes, we do rely on history. There are only four States that have a clear and convincing standard.

QUESTION: How recently did they adopt that, would you remind me?

MR. RAVITZ: Yes, Justice Scalia. Connecticut -- Pennsylvania was the first State adopting it in 1976. Connecticut and Oklahoma adopted it shortly after Addington. Wisconsin initially adopted it after Addington, but has since changed their statute.

QUESTION: Why did Addington cause them to adopt it?

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MR. RAVITZ: Well, I think that the court, or the Oklahoma legislators and the legislators of Connecticut misunderstood what this Court said in Addington. I think they tried to combine the finding of dangerousness necessary for an indefinite civil commitment with the standard of proof utilized for determining competency hearings, incorrectly, I might add.

QUESTION: Well, it's certainly convenient to combine the two, so that if the person can't be tried he can be put away. I mean, once you make that -- right?

MR. RAVITZ: Well, there --

QUESTION: If there is a clear and convincing indication, two things happen. Number 1, you can't try him, and number 2, he also does not walk away. He gets put into a mental institution. That's pretty handy, you must admit.

MR. RAVITZ: There's no problem -- we don't dispute the State's right to, at a competency determination, have the fact-finder make a determination of whether the individual is clear and convincingly dangerous. We don't dispute that. There's no question that they have an absolute right, but additionally that's not even necessary for the initial competency determination.

Oklahoma has a right, without even a showing of clear

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and convincing evidence of violence, to have someone treated for a period of time to restore their competency upon motion of the individual court.

QUESTION: But I guess the reason States are now experimenting with requiring a higher standard of proof of competency is because of Addington's requirement that to civilly commit someone the proof must be by clear and convincing evidence of dangerousness to self or others and of mental illness.

MR. RAVITZ: The standards involved with regard to commitment, Justice O'Connor, are totally different than the standards involved in the competency determination. In other words, the Dusky determination for competency has no relation to the subsequent final commitment. That's not to say that the court cannot commit --

QUESTION: But that is what's driving the States to adopt a different standard on competency, I suppose, the hope that they won't have someone found to be incompetent in a criminal case and then -- for mental disability, and yet not be able to commit them for civil treatment.

MR. RAVITZ: I'm not saying it's not what may have caused the State to do that, but you're -- as what I said in my reply brief, you're comparing apples to

oranges.

In this particular case, the standard to commit somebody has no relationship to the determination of how high, or the certainty that we must have before we find an individual incompetent.

QUESTION: But isn't --

QUESTION: Well, it --

QUESTION: Doesn't the point -- let's see, if the burden -- the different -- in the two different cases, in one, the plaintiff, I mean, the individual seeks -- the higher standard in the Addington context is to protect the individual.

The lower standard in the criminal context is to protect the individual, because he has the burden of proving incompetence in the criminal case, and the State has the burden in the civil case.

MR. RAVITZ: That is correct, but again, that doesn't go into effect until the trial court has determined that after a period of time the individual who is being treated can no longer be continually treated.

QUESTION: But in either case there is a presumption of competency that most jurisdictions, if not all jurisdictions, recognize, I take it.

MR. RAVITZ: That is correct, Justice --

QUESTION: And Addington said that presumption

of competency is sufficiently valid that we're going to require clear and convincing evidence to overcome it, and it seems to me that's all that Oklahoma is saying here, is that we are giving -- we are giving substance, we are giving recognition, we are giving force to the presumption of competency.

Now, I recognize that you can have different standards for commitment than for assisting counsel at your trial and so forth, but leaving that aside, it seems to me that what Oklahoma is doing is giving vigor and substance to the presumption of competency.

MR. RAVITZ: Well, I think the presumption of competency and the State interest is adequately protected where -- in what Medina did, where the defense must come forward with all evidence. They must paint a portrait to the fact-finder that this particular person is more likely than not incompetent, and if the fact-finder does not -- is not convinced of that, regardless, based on the presumption of competency or for whatever reason, the fact-finder is going to conclude that the individual is competent.

In fact, what this particular standard does is allow people that -- a fact-finder, the trial judge himself, he looks at this person and he says, this person is more than likely incompetent to stand trial. That's

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what I think in my mind from all this evidence. Yet because of the clear and convincing standard, I'm not clear and convincingly convinced, so therefore I am not going to find this person incompetent, and this person is going to have to go through trial.

QUESTION: The Court of Criminal Appeals mentioned what it thought was a propensity of some defendants to malinger in this area as a justification for the clear and convincing standard. What is your response to that?

MR. RAVITZ: First of all, if the court concludes, Mr. Chief Justice, that as a matter of fact the individual is malingering, the court's going to conclude that the defendant hasn't met his burden of proof under a preponderance.

QUESTION: Yes, but it's quite possible that a -- the trial judge may feel, I can't say for sure that this person is malingering, but if I had to do it by a preponderance standard, I would have to say he's incompetent, but clear and convincing, I can say I think he's competent, and can't a State court adopt a rule of burden of proof to adjust for that sort of thing, the possibility of malingering, even though it's not -- you can't show it in a particular case?

MR. RAVITZ: Raising the standard of proof does

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not facilitate a more accurate finding of malingering.

Let's take the situation where we have 100 incompetent individuals, okay, 5 of whom are malingerers, okay, 95 of whom are not. As we raise the level of certainty requiring an incompetency finding, let's assume that 20 individuals are thereafter now found competent, one-fifth of the individuals by virtue of the raising of the standard. How many malingerers?

Let's assume we had 5 malingerers out of this 100, as I said. How many malingerers will we have identified? Well, if we do, an odd one, and at what cost? At what cost to the fundamental right not to be tried while incompetent, because incompetents, if you go to trial while you're incompetent -- Cooper sat there for 2-1/2 weeks in orange coveralls never even talking to his attorneys. It was obvious that he was scared of his attorneys from the testimony of the experts, yet Cooper went to trial.

Cooper couldn't assist in his defense. Cooper could not tell his lawyers why the act was done, how it was done, was anybody with him, the degree of culpability. Competence is necessary to protect all sorts of fundamental rights that are implicit in the trial itself.

QUESTION: Well, you're basing your argument on the Due Process Clause?

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MR. RAVITZ: That is correct, Justice O'Connor.

QUESTION: Are you not pressing any Eighth Amendment claim here?

MR. RAVITZ: I think --

QUESTION: There's some language in your brief, but I thought it ought to be clear. You're basically resting on the Due Process Clause.

MR. RAVITZ: I think this Court has recognized that --

QUESTION: Yes or no?

MR. RAVITZ: Yes, we are following the Due Process Clause, but this Court has applied heightened levels of due process in situations where the death penalty was involved.

This Court, recognizing the risk in Turner v. Murray, said that in -- that you could voir dire an individual on race and in a capital case but not in a noncapital case.

QUESTION: So you're not making a general argument applicable to all criminal defendants. You want us to just address the situation in the capital context?

MR. RAVITZ: No, my argument is addressed to every -- is addressed to all cases, but if this Court chose to divide the two situations they would have ample opportunities to do this.

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This Court and several members of this Court have recognized that there are due -- different due process considerations in a capital case versus a noncapital case, but we are advocating this across the board.

QUESTION: What about the standard in the State for not guilty by reason of insanity? That's incompetence at the time the act was committed to have the necessary state of mind. What is Oklahoma's standard for that defense?

MR. RAVITZ: I may be wrong, Justice Ginsburg, but I believe it's a preponderance standard.

QUESTION: Just a preponderance.

MR. RAVITZ: Yes.

QUESTION: So could the State have a higher standard? Could it say, an NGI acquittal has to be established by clear and convincing evidence?

MR. RAVITZ: Oh, yes. The Federal statute does it. This court in --

QUESTION: Even beyond a reasonable doubt?

MR. RAVITZ: This Court in Leland recognized -- proved the beyond a reasonable doubt standard. Now, it hasn't been addressed since Leland.

QUESTION: Then how do you -- that also involves the same kind of fundamental right, doesn't it, not to be

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convicted of a crime when one is not able to form the mental state necessary?

MR. RAVITZ: This Court has never recognized that insanity defense was a fundamental right. I believe that you said that in Medina, that they've never recognized this as a fundamental right. This obviously would be different if a court was instructing someone that they couldn't take insanity into consideration in determining whether a defendant proved -- had been proved beyond a reasonable doubt as to the elements of the crime, but once the elements have in fact been proven beyond a reasonable doubt, this Court has never said that the insanity defense is a fundamental right.

Whereas here we have a fundamental right, and here we have a right before any evidence of guilt has been established by the State, and that's what's so different.

Again, we've got to look at the truth-seeking function and what it does to the criminal trial when we require somebody to prove with this kind of certainty that he's more likely than not incompetent. Who is going to be brought to trial? People who are more --

QUESTION: If you're going to talk about, you know, realities, you know, I think the history is with you. I'm not sure the realities are. Once upon a time you could not put on a parade of psychiatrists who will

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testify that this person has all sorts of new mental afflictions that nobody ever heard of.

It's very easy to raise a doubt of concern in competence nowadays, as it was not much earlier. The fact-finder could just look at this person and make his own judgment. Now, he has to listen to a parade of expert witnesses, and it's always -- in my experience, you can find a psychiatrist who will say that this person is not competent.

MR. RAVITZ: As early as 1790, Justice Scalia, in Ley's Case, which is cited in our brief, the judge remanded the individual to a surgeon to have the surgeon look at him, so we've had people looking at competency for over 200 years on that particular theme.

But additionally, let's look at the resources. What that court said --

QUESTION: A surgeon is not a psychiatrist.

MR. RAVITZ: That's correct, but probably in 1790 that was probably the best we could do.

QUESTION: Yes, right.

MR. RAVITZ: But I think when we look at that, let's look at the experts. How many experts do we have to prove? What kind of cost to the system? How many experts? Do we have to have five experts, six experts? We had one uncontroverted expert.

And again, should the defendant be required to come forward with that kind of evidence, and at what risk?

This Court specifically said in a narrow situation where the evidence is at equipoise, that's one thing, but the tie goes to the State after Medina, there's no question. If I don't come forward with evidence, if I don't come forward with the psychiatrist, if I don't come forward with friends --

QUESTION: Well, it's more than coming forward.

MR. RAVITZ: -- with doctors, with --

QUESTION: It's more than coming forward. You have to have, at least have a preponderance of the evidence. You have to have at least 51 percent probability.

MR. RAVITZ: I have to convince that fact-finder. I have to show all this. The State can actually hide behind the clear and convincing evidence. They can paint less of a picture.

Yes.

QUESTION: You know this area of the law better than I do. Is there -- has it been held or decided about whether you could have a trial for a person who was physically ill to the point where he couldn't understand what was going on, like a coma, somebody who's in a coma? Are there any -- is there case law on that, about the

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right to be present and participate in your trial?

I mean, suppose a person were in a coma, so he couldn't understand. He might recover, he might not.

MR. RAVITZ: If --

QUESTION: If he recovered, you could try him, if not, not. Is that right?

MR. RAVITZ: I think clearly under Dusky that person could not be tried.

QUESTION: It's Dusky.

MR. RAVITZ: Well now, Dusky just establishes the standard, but an interpretation --

QUESTION: But I mean, is it clear that a person who is in a coma cannot be brought to trial?

MR. RAVITZ: If that person cannot --

QUESTION: Can't understand what's going on.

MR. RAVITZ: Then that person cannot be brought to trial.

QUESTION: It has nothing to do with psychiatry.

MR. RAVITZ: That person cannot be brought to trial.

QUESTION: And the law that says that is, the case that says that? Do you know, off-hand?

MR. RAVITZ: Well, Dusky establishes the two-prong test for determining competency. If the person cannot assist his lawyer in presenting a defense --

QUESTION: And he couldn't assist the lawyer, okay.

MR. RAVITZ: Then you can't -- assist --

QUESTION: I mean, it seems to me possibly that this -- well, I'll ask your opponent. I mean, the question here I would think is whether he is competent. Whether he is physically incompetent or mentally incompetent, or whatever, it's a competency question.

MR. RAVITZ: That's correct.

QUESTION: All right.

MR. RAVITZ: The picture that the fact-finder gets with regards to a preponderance standard is the most accurate picture, because the defendant must come forward with all sorts of evidence to prove his incompetency.

QUESTION: Mr. Edmondson, may I ask you --

QUESTION: No, it's Mr. --

QUESTION: I'm sorry, Mr. Ravitz. I looked at the wrong name.

May I ask you just on your basic theory of the case, in the last case we had there were two different opinions supporting majority result. One relied on the Mathews analysis, and the other relied on Patterson v. New York, a more historical analysis. Do you have a preference between the two as to what you think should be followed in this case?

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MR. RAVITZ: Well, obviously I think this Court would follow -- Medina was a five-member majority, so I think this Court is bound to follow Medina. I think that the -- Mathews is a useful guide, looking at the interests at stake.

QUESTION: But you would follow a Patterson approach, and then your emphasis would be on history, I gather, rather than on basic fairness.

MR. RAVITZ: I think when you look at basic fairness, Justice Stevens, it's just as compelling as history, maybe even more compelling than history, because basic fairness --

QUESTION: How could it be more compelling than history? If your brief is right, and I don't know if they challenged or not, all the history, except for these four responses to the Addington, all the history says preponderance.

MR. RAVITZ: That's correct, but fairness is just as compelling.

QUESTION: Mr. Ravitz, you need both, don't you? I mean, all history shows you is that it may be a fundamental right protected by the Due Process Clause. If it never existed in history, it certainly is not.

If it did exist in history, you still have to ask the question, well, yes, there was always a 12-person

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jury historically. Does that mean that it's a lack of due process if you don't have a 12-person jury, have a new rule, have 10 instead?

You have to ask yourself was it important enough, so you really do have to get to the importance question anyway, regardless of what the history says, don't you?

MR. RAVITZ: Yes, but I think we have to realize what --

QUESTION: You wouldn't if the history was the other way, if the history showed that -- you know, that there had never been a right to a preponderance of the evidence claim, then you lose without any further inquiry, but having established that there was historically, you still have to show that it's so essential to our form of ordered liberty that it can't be changed.

MR. RAVITZ: What we have to do is look at the impact of this standard on the fundamental constitutional right not to be tried while incompetent, and if we look at the impact, what we're saying is, we're going to have a group of individuals who are now more than likely incompetent, who are going to go on trial for their life, who are going to have an opportunity to get before a judge and waive the guiding hand of counsel, are going to go before a judge and plead guilty, make decisions on whether

to -- not to testify, or, too, to testify, and that's the risk that we take, and what interest does the State have? What interest has the State shown in their brief?

The only interest the State really shows is, I can show it's okay for me to try individuals who are more likely than not incompetent because I want to move them through the court system.

I'd like to reserve the balance of my time for rebuttal, Mr. Chief Justice.

QUESTION: Very well, Mr. Ravitz.

General Edmondson, we'll hear from you.

ORAL ARGUMENT OF W. A. EDMONDSON

ON BEHALF OF THE RESPONDENT

GENERAL EDMONDSON: Thank you, Mr. Chief Justice, and may it please the Court:

The burden of proof at issue here today is not a stand-alone provision. It is part of a procedure, a system involved in the State of Oklahoma. It was designed to do essentially two things: 1) minimize the risk of false findings of incompetency based upon fabricated symptoms, and 2) while still preserving, protecting, and safeguarding the fundamental due process right not to be tried while incompetent.

If I could, before I go into the substance of my argument, respond to a couple of questions that were asked

earlier, Justice Ginsburg asked what the burden of proof was in an insanity case in the State of Oklahoma.

Under the statutes and case law of the State of Oklahoma, the defendant has an initial burden showing that his sanity at the time of the commission of the offense is at risk. It is then placed upon the State to show the defendant's sanity beyond a reasonable doubt as part of the elements that are proved in the case-in-chief.

The other question by Justice Breyer was what happens if a defendant is by physical problems rendered incapable? The example of coma was given, and the statutes of the State of Oklahoma on determination of competency at 1175.1 et seq provide not only for the mental ability to proceed but also incompetency by reason of physical disability.

QUESTION: Was an insanity defense made in this case?

GENERAL EDMONDSON: No, Justice O'Connor. There were questions raised in the second stage in particular about the defendant's terrible upbringing, about his childhood, about the pressures that were brought upon him and the fact that he was terribly disadvantaged as a child, but the defense to the case was not guilty.

QUESTION: And the statute has been changed since this case was tried on the clear and convincing

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standard? The language is different now?

GENERAL EDMONDSON: The uniform jury instruction --

QUESTION: It used to say it had to be unmistakable proof.

GENERAL EDMONDSON: The uniform -- it was clear unmistakable and convincing in the uniform jury instruction, which may well have come into play had there been a jury trial on the issue of competency. Now, that jury instruction did not comport with the law of the State of Oklahoma as enunciated by the Court of Criminal Appeals, which is found in the case of Matter of C.G., a 1981 case that predated this trial, and as a matter of fact which was cited by the amicus American Association on Mental Retardation.

QUESTION: Now, there wouldn't be a jury trial in Oklahoma on the decision of competency made by the trial judge?

GENERAL EDMONDSON: Yes, ma'am, there is a right to demand a jury trial at two stages --

QUESTION: On that question.

GENERAL EDMONDSON: On two stages in the competency proceedings under 1175.1, and that's why I stress, Justice O'Connor, that the burden of proof has to be examined in the context of the entire system.

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QUESTION: 1175 is -- that's your civil commitment statute --

QUESTION: Yes -- no.

GENERAL EDMONDSON: No, on the competency proceeding. Under our --

QUESTION: In the criminal case, would you explain exactly how the Oklahoma system works if a defendant says through counsel I want to challenge this defendant's competence to stand trial?

GENERAL EDMONDSON: Certainly. The process is initiated by an application to determine competency which must state facts sufficient to raise a doubt, not even a bona fide doubt as required by Pate v. Robinson and the Drope case, but just a doubt as to the competency of the defendant.

That application can be brought by the accused, by a relative of the accused, by a friend of the accused, by a person with whom the accused resides, by a person in whose house the accused lived, or certainly by accused's counsel.

If the application is determined to raise a legitimate doubt, or even a doubt as to the defendant's competency to stand trial, the defendant then is remanded for an examination by experts, and subsequent to that examination, there is a hearing on the issue of the

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application.

The defendant or any of those parties that I mentioned have the right to demand a jury trial to determine whether there's even a doubt as to his competency, a jury trial to trigger the examination by experts.

QUESTION: But then who makes the determination of whether the defendant is competent or not after the application is accepted and the examination is conducted?

MR. RAVITZ: By the statute at both provisions on the determination on the application and on the post examination competency hearing, the issues reserved for the judge are then reserved for the jury, and the jury will make those findings.

QUESTION: May I just ask you to clarify one thing? I understand clearly when someone else seeks to have the individual judged incompetent, then the individual can ask for a jury trial and insist on clear and convincing evidence.

But now, when the individual himself says I am not competent to stand trial, does he also ask for a jury trial on that issue? He's trying to prove his own incompetence.

GENERAL EDMONDSON: He has the right to demand a jury trial.

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QUESTION: Is that ever done as a matter of practice in criminal trials in Oklahoma?

GENERAL EDMONDSON: Justice Stevens, it's common on the post examination competency hearing. Jury trials --

QUESTION: No. No, I'm asking about criminal trials in which the defendant himself seeks to establish his own incompetence. Is it common to have the issue submitted to a jury?

GENERAL EDMONDSON: Yes.

QUESTION: It is.

GENERAL EDMONDSON: On the post examination competency hearing. It is much less common on the application itself. The application is designed to raise a doubt as to its competency because uniformly in the State of Oklahoma those are granted.

QUESTION: Okay, the post examination, does it first go to a judge and he -- because here, I gather, it didn't go to a jury.

GENERAL EDMONDSON: That is correct.

QUESTION: So here, at first the judge makes the determination?

GENERAL EDMONDSON: Mr. Chief Justice, the matter -- when the examination is completed and a report is made back to the court, the matter is set for post

examination competency hearing, and then the question is asked, do you demand a jury trial, and in this case --

QUESTION: Here a jury trial was not demanded.

GENERAL EDMONDSON: That is correct.

QUESTION: But could have been had.

GENERAL EDMONDSON: Yes, sir.

QUESTION: And so in this case the judge made it in a bench trial, on effect.

GENERAL EDMONDSON: That is correct, Your Honor.

QUESTION: And the jury trial obviously would precede the trial on the charges.

GENERAL EDMONDSON: It would not be the same jury, Justice Kennedy.

QUESTION: Actually a different jury.

GENERAL EDMONDSON: Yes, sir, a different jury, because under Oklahoma statutes nothing that is said by the accused in the context of a post examination competency hearing can be used against the accused in any proceeding whatsoever, and so the same jury categorically could not hear that evidence.

QUESTION: And whether or not it's for the jury or the trial judge it's clear and convincing, that's the standard.

GENERAL EDMONDSON: That is correct.

QUESTION: General Edmondson, I must say, what

Oklahoma has done with respect to the defense of insanity on the merits at trial casts a great deal of doubt in my mind concerning the necessity of the standard that Oklahoma has adopted with respect to sanity to stand trial.

You're willing to accept the burden of proving to a jury beyond a reasonable doubt that this individual was sane 2 years ago when he committed the crime, but you say it's too onerous to accept the burden of proving to the jury by -- or not even proving to the jury. It's too onerous to have the defendant prove to the jury by a preponderance of the evidence that he's sane today.

It seems to me sanity 2 years ago is a lot harder to prove, and the State accepts a much higher burden with respect to that.

GENERAL EDMONDSON: Justice Scalia, to some extent that emphasizes the risk that Oklahoma feels on a determination of present competency, where the incentive to malinger or to create symptoms is much greater, in our estimation, than the prescience of the defendant to try to create those kinds of manifestations at the time he's committing an offense.

QUESTION: But that doesn't make sense, because the burden on the State, if you lose on the insanity issue he walks. If you lose on this issue you just keep him in

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custody until he improves, and then you try him later.

GENERAL EDMONDSON: No, Justice Stevens. On a finding of not guilty by reason of insanity --

QUESTION: Well, at least he's acquitted of the crime.

GENERAL EDMONDSON: That is correct.

QUESTION: I mean, he doesn't have the criminal -- whereas in this case it's only a temporary delay in the trial, and you can in the meantime medicate him, and treat him to try and restore his competency, so it seems to me the cost of losing on the insanity is much heavier for the State than the cost of a temporary delay in the trial, in this proceeding.

GENERAL EDMONDSON: The cost may be heavier, Your Honor, but we feel that the ability to prove present sanity at the time of the commission of the offense, when the defendant will not contemporaneously be trying to manifest symptoms of incompetence, but will simply be carrying out the commission of an offense, is a manageable burden for the State of Oklahoma.

We feel greater jeopardy, particularly in a serious case, being able to meet on a preponderance level the ability of fabricated symptoms by a defendant falsely claiming to be incompetent.

QUESTION: Can I ask you to get -- because it's

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right on the merits, and I want to be sure you do address what I take it to be their, in my mind strong argument -- or the strongest argument they make, in my mind, is, one is the history is against you, but the other thing they say is, leaving the history aside, imagine you had a certain number of people who are in comas, and some of them are faking, and some of them are not. If you're really in a coma, you can't get a fair trial. If you're faking, you can't, all right.

Now, they say a preponderance of the evidence test, you will undoubtedly make some mistakes, and there will be some people in jail or dead, because you executed them, who were in comas. You made a mistake. But for every one of those there's a mistake the other way, so you're doing the best you can.

Then they say, you change that, you change everything. Suddenly, you have maybe eight people who were executed or in jail who really were not faking, they were in comas, for every one you let outside, so this thing that's very harmful to the system at the same time you don't have much justification for it, because after all, when you do make a mistake, and you wrongly let somebody out who, you know, who wasn't in a coma, he was a faker, you put him in the mental hospital anyway, he's more likely to get tried because he can't fake the coma

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forever, and so there isn't much harm to the State from the preponderance of the evidence.

At the same time, there's quite a lot of harm to the fairness of the system the other way.

All right. Now, I'm just restating what I take to be their argument because I want to be certain that you respond to that.

GENERAL EDMONDSON: Justice Breyer, of course, it's easier to respond to the coma argument because they very --

QUESTION: I use the coma because I want to get away from the all kinds of other issues of the earlier insanity defense, et cetera, but you can respond in terms of the insanity.

GENERAL EDMONDSON: Thank you. Coma, of course, rarely arises spontaneously during the context --

QUESTION: I just did that for illustration.

GENERAL EDMONDSON: In terms of the allocation of the risk of error, which I believe is the direction that we're heading in, I again point to the entire context of Oklahoma system rather than simply the burden of proof.

Also embodied in Oklahoma statutes is the fact that the issue can be raised at any time during the proceedings, which means if the issue is raised early on and the decision is not satisfactory to the accused --

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QUESTION: He says there are a lot of good things. He says that ultimately, if you apply this standard of proof, the only difference between that and what, 48, or 46 States do, the preponderance, is that a very large number, a significant number of not -- of people who weren't faking will be in prison, and that's a big harm to the system, and the need for that in Oklahoma is very small -- not nonexistent, but small, because the other people, the people that you wrongly got off the trial who were faking, you put them in the mental hospital anyway for the most part, or they recover and you try them later.

Now, that's -- he's saying the harm to the system of fundamental fairness is great, the benefit to the system of your rule is small, and you have the history against you. That says, I took his argument. I mean, I took that to be the argument, and I want to be sure you, you know, respond to it.

GENERAL EDMONDSON: I would like to respond first of all if I could, Justice Breyer, to the allegation that assigning a preponderance of the evidence is the uniform or even the overwhelming practice of the States. It is not. There are 25 States that assign a preponderance of the evidence and 25 States that do something different.

I would certainly not claim that clear and convincing is by any stretch the majority. I think there are four States --

QUESTION: Some of those States that do something different in fact put the burden on the State, don't they?

GENERAL EDMONDSON: Yes.

QUESTION: So in fact it's not just 25 to 25. The line up is less favorable to you than that.

GENERAL EDMONDSON: Justice Souter, there are 25 that use the preponderance of the evidence. The other States may or may not allocate a burden, but we're talking about the level of proof. Some States don't say what the level of proof is at all. Two States --

QUESTION: But I'm just saying that if there are 25 States that put the burden on the defendant to prove by a preponderance, and there are 25 who do not, some of the 25 who do not in fact place a burden not on the defendant at all, but upon the State. I come from one of those, and I know it's not unique, so it -- I'm just saying that this is not an evenly balanced division among the States.

GENERAL EDMONDSON: That is exactly the point I was attempting to make. If there was a very wide variety of approaches to the competency issue among the 50 States, that it is not four States have clear and convincing and

everybody else has preponderance of the evidence. That is not accurate.

QUESTION: But it is accurate, isn't it, that of the States that place the burden on the defendant, only four place that burden to a degree of clear and convincing. The others have a lesser burden.

GENERAL EDMONDSON: That is correct, Justice Souter, except Oklahoma does not place it on the defendant, Oklahoma places it on the party that raises it, and there could be instances where the State of Oklahoma --

QUESTION: But if a party other than the defendant raises the question and wants to commit the defendant, must that party prove more than incompetence? Must the party also prove a danger to himself or the community?

GENERAL EDMONDSON: That is correct.

QUESTION: But the defendant need not prove the danger of that kind in order to establish incompetence to stand trial.

GENERAL EDMONDSON: That is correct also.

QUESTION: So that if the defendant carries his burden, even under the clear and convincing standard, he will not necessarily receive civil commitment, will he?

GENERAL EDMONDSON: Not necessarily.

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QUESTION: Because there are different issues in the case.

GENERAL EDMONDSON: But interestingly, in Oklahoma's statute we incorporate in title 22, our criminal provisions, the provisions out of title 43 on involuntary commitment and, at the post examination competency hearing stage, if the jury or the judge determines that this individual is incompetent, is not capable of regaining competence within the foreseeable future, and is a person who is mentally ill as defined under title 43 and is dangerous, then that same hearing can result in the civil commitment under a clear and convincing evidence standard mandated by Addington.

QUESTION: Yes, but the issues are sufficiently different that you could not say that in the routine case of the criminal defendant seeking to establish his own incompetence, if he prevails at the hearing he will not necessarily be civilly committed.

GENERAL EDMONDSON: I certainly would not say that that would be a routine decision, Justice Stevens. I would say in a case, for instance, like this one, where there are allegations of mental illness and where there is evidence of dangerousness, had there been a finding that this defendant was incompetent and unable to be restored, there may very well have been also a finding that he

should be committed civilly under the burden of proof required by Addington.

QUESTION: But of course, the unable to be restored element of it, he would be trying to prove that himself, would he? Normally he wouldn't have to do that in order to prevail to postpone the trial.

GENERAL EDMONDSON: If -- he would not be required to do that.

QUESTION: And certainly the State wouldn't be trying to prove that.

GENERAL EDMONDSON: If I were facing a potential trial in a capital case, I would be trying to prove that. I don't know whether a typical defendant would or not.

QUESTION: Because then you'd be permanently civilly committed.

GENERAL EDMONDSON: Because -- no, not under the rulings of this Court. I would be civilly committed only so long as there is a continuing finding that I'm dangerous.

QUESTION: But as soon as you lose that finding, you could be tried for the crime.

GENERAL EDMONDSON: Not necessarily. Only if he's also found to be restored to competence. Now, he could be found to be not dangerous, still not be competent to stand trial and be released.

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QUESTION: In any case, as long as that continues, you're still alive, aren't you?

GENERAL EDMONDSON: That is correct, and the important aspect --

QUESTION: Which is a good thing from your point of view.

GENERAL EDMONDSON: Yes, Justice Scalia, and the important fact is the meshing of those two requirements.

QUESTION: Well, there's a meshing -- I recognize the fact that if you had defendant's burden being preponderance to show incompetence, State's burden being clear and convincing to commit, that there is in fact a kind of gap between them in which some might fall.

I take it, simply because I haven't heard anything about it, that there is no indication that in fact any substantial number of defendants were in fact walking away from the courthouse having, under the preponderance standard having shown that they were incompetent, but with the State being incapable to commit them.

GENERAL EDMONDSON: Nor, Justice --

QUESTION: That wasn't a serious problem, was it?

GENERAL EDMONDSON: Nor, Justice Souter, has there been any indication that in the 15 years that the

State of Oklahoma has required a clear and convincing evidence standard, that defendants who were factually incompetent have been forced to stand trial in the State of Oklahoma.

These things obviously, by nature and by definition --

QUESTION: Yes, well, that would be very difficult to tell, whereas the question that I raised would be very easy to answer. We'd just have to look at the courthouse door and see who was walking out, and I take it that there's no indication that was happening to the degree of raising a systemic problem.

GENERAL EDMONDSON: I cannot answer that historically, Justice Souter, and my experience as a prosecutor and Attorney General only date back to 1982, so all of my personal experience has been under the new statute.

QUESTION: Of course, this could be one of those cases. The trial judge at least said, because of the clear and convincing standard, I'm going to find competence here, even though reading the cold record might cause one to really question the result, at least under a preponderance standard.

GENERAL EDMONDSON: Justice O'Connor, I -- the judge's pronouncement seemed to indicate that he made that

finding solely on the basis of clear and convincing evidence. I agree with you that the cold reading of the transcript, absent the evidence of malingering, should have led any trier of fact to conclude that this defendant was incompetent, and I can only rectify the judge's finding with the transcript by the conclusion that he also found that this defendant was malingering and fabricating his symptoms.

QUESTION: Yes, but the likelihood of malingering is just one of the facts the trier of fact has to take into consideration in reaching the ultimate conclusion, and it necessarily follows, as I understand the Oklahoma system, that there at least exists the possibility that there are a class of people who are more likely than not incompetent.

Taking into account malingering and all of this, more likely than not they are incompetent, and therefore under most States they wouldn't try them until they'd recovered, but in -- Oklahoma is willing to say, no, you go to trial anyway.

GENERAL EDMONDSON: That is correct --

QUESTION: Yes.

GENERAL EDMONDSON: -- Justice Stevens, but not without a hearing to determine whether or not they are factually incompetent.

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QUESTION: No, they've had the hearing, and after the hearing the conclusion might be, it's 55 percent chance they're incompetent, but it's not a 65 or 75 percent chance so we're going to let -- the risk of error is placed on the defendant in those cases.

GENERAL EDMONDSON: That is correct, with the other safeguards of the statute designed to overcome that risk of error by providing multiple opportunities for the defendant to reraise the issue.

QUESTION: Yes, but the multiple opportunities would be there regardless of the standard. Even if you reduce the standard, you'd still give the same multiple opportunities.

GENERAL EDMONDSON: You have the same multiple opportunities, that is correct. You don't have the opportunity except under Oklahoma statute to change your forum. If you're dissatisfied with the ruling of the judge on incompetency when you raise it again you can demand a jury trial, or vice versa, a new jury.

QUESTION: Yes, but all of those features of the system could remain in place under a different standard.

GENERAL EDMONDSON: Exactly.

QUESTION: Yes.

GENERAL EDMONDSON: Except for my point that the reason those safeguards are there are to guarantee that

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the safeguards preserve the substantive due process rights of the defendant while still protecting against the false findings of incompetence based upon malingering.

QUESTION: General Edmondson, is there any evidence in the record or any references to studies in the record to indicate that in the last 20 or 30 years juries or judges as fact-finders have in fact been getting hoodwinked either by malingerers or by psychiatrists?

And I'll be candid to say -- I was a trial judge once, and I'll be candid to say that I thought juries were very good at smelling this sort of thing out and I never, as a trial judge, had the impression that juries were particularly impressed with psychiatric testimony at all, and I -- is there any indication that in fact the practice of deception was more successful than I was observing it?

GENERAL EDMONDSON: Judge -- Your Honor, there are, of course, studies about the effects of malingering, and there is the fact that it has reached the stage where it is a separate diagnosis under the Diagnostic and Statistical Manual, Fourth Edition. I don't know --

QUESTION: What do you mean, a separate diagnosis? You mean that itself is a psychiatric disease, malingering is?

GENERAL EDMONDSON: It is not classified as a disease, it is classified as a finding.

QUESTION: Oh.

GENERAL EDMONDSON: With requisite elements to make that finding.

QUESTION: Even the psychiatrists can tell.

QUESTION: You got that right.

GENERAL EDMONDSON: None were presented in the context of this trial below, and I doubt if it would be very easy to get a collection of jurists who were willing to say that they were in fact hoodwinked by an accused who was falsely claiming incompetence.

I would suggest that in the context of this case the accused might have been well advised to demand his jury trial because the jury would not have had what the court had, which was the repeated statements by defense counsel that in their opinion the defendant was faking, and I doubt if counsel would have made those same statements, which they were required in candor and under disciplinary rules to tell the court, I doubt if they would have made those same statements to the court -- to the jury, had a jury trial been demanded.

Now, whether the jury under those circumstances would still have denied the finding of incompetence is pure speculation. I don't know.

QUESTION: I would -- let me ask you -- I don't want to go off on a tangent of the details of this case,

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but if he really had demanded a jury trial, wouldn't the State have had the opportunity to require his counsel to testify after there being a substitution of counsel?

GENERAL EDMONDSON: The case law and the statutes of the State of Oklahoma are absolutely silent on this. The standards of the American Bar Association provide that there are circumstances in competency proceedings where counsel might not only be a witness but might be the best witness, and I do know as a matter of practice that courts pay great deference, particularly in the application stage, to a presentment by counsel that in his opinion this -- his client is not competent to proceed.

QUESTION: So probably you could have gotten it in front of the jury if it had become a jury issue.

GENERAL EDMONDSON: I don't know the answer to that question. I do know that under these ABA standards, even if counsel becomes a witness as to the manifestations of his client, he cannot be inquired as to communications with his client over his objection.

QUESTION: Is there anything else you want to say in response to what I've raised before, which I take it as being that he's saying under your test the only difference is that there will be five people in prison or executed who absolutely were the same as if they were in a

coma for every one who is a faker who you caught by this test, and you don't need the test to catch the fakers, because the fakers are going to be put in mental hospitals anyway.

Now, I know I raised that before, but I just wanted to be -- you then went off on a number of other things, and I wanted to see if you --

GENERAL EDMONDSON: Justice Breyer, I would have to concede that Oklahoma has not constructed a perfect system. I don't know if any State in the Union has. I will concede that there will be errors.

I do not concede that there have to be errors. I do believe that the clear and convincing standard in a case of actual incompetence is a standard that can be met, and that truly in --

QUESTION: What about beyond a reasonable doubt? Could Oklahoma go that far? Could you say, we have a real problem with people faking it, so we want to ratchet it up one notch higher and say, if you're going to avoid trial on grounds of incompetency, you have to show you're incompetent beyond a reasonable doubt? Is that --

GENERAL EDMONDSON: Justice Ginsburg, I would very much doubt if any State could enact beyond a reasonable doubt consistent with the fundamental requirement of fairness and an opportunity for the

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defendant, if he's the one presenting the cause of incompetence, to meet that burden of proof no matter -- and we have enacted a great number of safeguards in the Oklahoma statute, but I don't know if they would be sufficient to require beyond a reasonable doubt. No State has done that, except the State of Maryland, and they place that burden on the State.

QUESTION: So --

QUESTION: Of course, you're not prepared to concede, I take it, that innocent people are necessarily going to go to prison because of this. All that we're talking about is deprivation of the value, whatever it's worth, of being able to advise your attorney during the proceeding, and you know, it's not clear how many defendants profit considerably from being able to advise their attorney during the trial.

GENERAL EDMONDSON: Justice Scalia, I do not concede that innocent people are going to go to prison. I --

QUESTION: Are you saying there isn't any fundamental right involved, because that's important. If there is a fundamental right involved, that's one thing. If there isn't, then there's no due process claim here, but I thought you recognized that yes, there is a fundamental right not to stand trial when one doesn't

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understand what's going on.

GENERAL EDMONDSON: Not in those terms, Justice Ginsburg, but there is a fundamental right, under due process, not to be tried while incompetent.

QUESTION: All right. If there is that fundamental right not to be tried while incompetent, can the State say, but you're not going to be able to prove -- to have available that fundamental right you have to show incompetency beyond a reasonable doubt. I thought you said that would be going too far, that that would cross the constitutional -- that would go from what's constitutional --

GENERAL EDMONDSON: I think, consistent with Patterson v. New York, a State has great latitude in constructing the procedures to guarantee that right. I don't know if that latitude extends to beyond a reasonable doubt.

QUESTION: Thank you, General Edmondson.

GENERAL EDMONDSON: Thank you.

QUESTION: Mr. Ravitz, you have 5 minutes remaining.

REBUTTAL ARGUMENT OF ROBERT ALAN RAVITZ

ON BEHALF OF THE PETITIONER

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

Addington cannot be read to require the

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individual to bear a high burden before his constitutional rights will be honored.

The judge in this case was given an opportunity to find malingering. The prosecutor argued it. The judge did not find malingering.

QUESTION: Now, the defendant here never asked for a jury determination of competency.

MR. RAVITZ: That's correct, Justice O'Connor.

QUESTION: Why is that? Were you involved at the trial?

MR. RAVITZ: Yes, sir -- yes, ma'am. You can't win a jury trial on incompetency on a clear and convincing standard. It's impossible. It's just not done. That's why we never asked for it. We hope that the trial judge will do it.

In the other States that Mr. Edmondson talks about, they all do it with decisionmaker satisfaction, or something similar to that. I'll take decisionmaker satisfaction.

But here, the decisionmaker was able to utilize this higher standard, a standard that was initially enunciated to protect individual --

QUESTION: How fundamental is this right, Mr. Ravitz? That's what it comes to.

MR. RAVITZ: I think --

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QUESTION: We've -- it's always been -- some legal systems, of course, allow a trial in absentia, where he's not only incompetent, he's not even there. He's not even physically there, much less mentally there.

MR. RAVITZ: Less than 4 years ago, Justice Scalia, in Medina, this Court said it was a fundamental right. I mean, if the Court says it's not an important fundamental -- to me, it's really important.

To me, it's real important to be able to talk to my client, to be able to find out about the case, to find out the individual's culpability, and I can't do that when my client is incompetent, and we -- Oklahoma is asking you to try individuals who are more than likely incompetent, and the State of Oklahoma has no legitimate interest in minimizing correct or just determinations of competency, and that is exactly what they're doing.

Thank you.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Ravitz.

The case is submitted.

(Whereupon, at 12:07 p.m., the case in the above-entitled matter was submitted.)

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CASE NO: 95-5207

and that these attached pages constitutes the original transcript of the proceedings for the records of the court.

BY Ann Marie Federico

(REPORTER)