DUE PROCESS—FUNDAMENTAL FAIRNESS—STATE STATUTE PLACING UPON THE DEFENDANT THE BURDEN OF PROVING HIS INCOMPETENCE TO STAND TRIAL ON CRIMINAL CHARGES BY CLEAR AND CONVINCING EVIDENCE VIOLATED FOURTEENTH AMENDMENT FUNDAMENTAL DUE PROCESS RIGHTS—*Cooper v. Oklahoma*, 116 S. Ct. 1373 (1996).

The Fourteenth Amendment to the United States Constitution provides that no state, in enacting or enforcing any law, shall deprive any person of "life, liberty, or property, without due process of law."[1] Furthermore, the Fifth Amendment of the Bill of Rights provides a similar protection against deprivation of "life, liberty, or property, without due process of law."[2] While the clauses mirror one another, the

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[1] U.S. CONST. amend. XIV, § 1. The Fourteenth Amendment provides in relevant part:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of laws.

Id.

Congress passed the Fourteenth Amendment in 1866, and the necessary number of states ratified it by 1868. *See* JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 11.2, at 357 (4th ed. 1991). Yet despite the amendment's broad language, the Congressional testimony prior to its enactment was ambiguous, and the Supreme Court was free to exercise broad discretion when interpreting the Amendment. *See id.* at 357-58. Yet, the early Court decisions refused to provide such an expansive reading when the Fourteenth Amendment was first challenged in the United States Supreme Court. *See generally* Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1873).

In these seminal cases, the Supreme Court determined that the Privileges and Immunities Clause of the Fourteenth Amendment was not intended to alter relations between the state and federal governments. *See id.* at 78; *see also* Erwin Chemerinsky, *The Supreme Court and the Fourteenth Amendment: The Unfulfilled Promise*, 25 LOY. L.A. L. REV. 1143, 1146 (1992) (noting that the *Slaughter-House* Court explained that the Privileges and Immunities Clause "was not meant to change the relationship between the federal and state governments or protect rights from state interference").

[2] U.S. CONST. amend. V. The Fifth Amendment provides in full:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be

Fifth Amendment Due Process Clause is applicable to the federal government,[3] while the Fourteenth Amendment's clause is binding on the states.[4] The Due Process Clauses, though providing little, if any, textual explanation,[5] are used extensively to protect individual rights.[6] The

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> compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Id.

The Fifth Amendment, part of the original Bill of Rights passed in 1791, protects a number of individual rights, including the guarantee against "double jeopardy." *See id.* The Court in *North Carolina v. Pearce*, stated that double jeopardy "protects against a second prosecution for the same offense after acquittal[,] . . . against a second prosecution for the same offense after conviction[, and] . . . against multiple punishments for the same offense." 395 U.S. 711, 717 (1969) (footnotes omitted); *see also* BLACK'S LAW DICTIONARY 491 (6th ed. 1990) (defining double jeopardy as protection "against second prosecution for same offense after acquittal or conviction, and against multiple punishments for same offense").

The Fifth Amendment also protects the right of an accused in a criminal trial to be free from compelled self-incrimination. *See* U.S. CONST. amend. V. Generally, the protection against self-incrimination is triggered whenever an accused's answers to questions may be used by the government as evidence, or as leads to evidence, in future criminal prosecutions. *See* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 12-26, at 1021 (2d ed. 1988) (discussing privilege to be silent included in Fifth Amendment); BLACK'S LAW DICTIONARY 1360 (6th ed. 1990) (defining "self-incrimination" as prohibiting "the government from requiring a person to be a witness against himself involuntarily or to furnish evidence against himself"); *see also* Garrity v. New Jersey, 385 U.S. 493, 500 (1967) (mandating that evidence coerced under threat of discharge from public employment is constitutionally inadmissible); Albertson v. Subversive Activities Control Bd., 382 U.S. 70, 77-78 (1965) (striking down an order of the Subversive Activities Board directing members of the Communist Party to admit membership as a violation of the clause against self-incrimination, where the admission of a Party member would be evidence in a prosecution against them).

Beyond these criminal protections, the Fifth Amendment requires the federal government to provide "just compensation" when taking private land for public use. *See* U.S. CONST. amend. V. The government must provide just compensation only when a "taking" has occurred. *See* BLACK'S LAW DICTIONARY 1454 (6th ed. 1990) (defining a "taking" as when a "government action directly interferes with or substantially disturbs the owner's use and enjoyment of the property"). Yet the Court has struggled with the issue of what constitutes a taking for constitutional purposes, and the term, "therefore, is best viewed not as a literal description of the governmental action." NOWAK & ROTUNDA, *supra* note 1, § 11.12, at 444. In one commentator's view, a taking is "constitutional law's expression for any sort of publicly inflicted private injury for which the Constitution requires payment of compensation." Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165, 1165 (1967).

[3] *See* BLACK'S LAW DICTIONARY 611 (6th ed. 1990) (defining "federal government" as a "system of government administered in a nation formed by the union or confederation of several independent states").

[4] *See* Sarah M. Bernstein, Note, *Fourteenth Amendment—Police Failure to Preserve Evidence and Erosion of the Due Process Right to a Fair Trial*, 80 J. CRIM. L. & CRIMINOLOGY 1256, 1263 (1990).

[5] *See, e.g.*, Moore v. East Cleveland, 431 U.S. 494, 499 (1977) (recognizing the

United States Supreme Court has recognized that these clauses contain two distinct components: substantive due process[7] and procedural due process.[8] Beyond these two concepts, however, the Supreme Court has continually protected individual rights through the "fundamental fairness" doctrine.[9]

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right to "freedom of personal choice in matters of marriage and family life"); Roe v. Wade, 410 U.S. 113, 154 (1973) (recognizing that right to "privacy includes the abortion decision"); Griswold v. Connecticut, 381 U.S. 479, 486 (1965) (recognizing a right of privacy). *But see* Bowers v. Hardwick, 478 U.S. 186, 191 (1986) (declining to recognize "a fundamental right to engage in homosexual sodomy").

[6] *See Bowers*, 478 U.S. at 191. The Supreme Court has recognized this dilemma:

> It is true that despite the language of the Due Process Clauses of the Fifth and Fourteenth Amendments, which appears to focus only on the processes by which life, liberty, or property is taken, the cases are legion in which those Clauses have been interpreted to have substantive content, subsuming rights that to a great extent are immune from federal or state regulation or proscription. Among such cases are those recognizing rights that have *little or no textual support in the constitutional language*.

Id. (emphasis added).

[7] *See* Chemerinsky, *supra* note 1, at 1149. Under the doctrine of substantive due process, the inquiry is centered on whether the state government is justified in enforcing actions that infringe on rights deemed by the Supreme Court to be "fundamental," and thereby under the protection of the Due Process Clause. *See id.* In this way, the Supreme Court sets an outside constitutional limit on legislative action and preserves individual freedoms. *See* Bernstein, *supra* note 4, at 1262.

The Supreme Court recognized the role of substantive due process, proclaiming in *Planned Parenthood v. Casey* that "[i]t is a promise of the Constitution that there is a realm of personal liberty which the government may not enter. . . . At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life." 505 U.S. 833, 847, 851 (1992). The Supreme Court, however, has become increasingly reluctant to invoke the doctrine of substantive due process because it is an area fraught with interpretational difficulty and prime for improper judicial activity. *See* Albright v. Oliver, 114 S. Ct. 807, 812 (1994) (plurality opinion) (noting that "[t]he protections of substantive due process have for the most part been accorded to matters relating to marriage, family, procreation, and the right to bodily integrity").

[8] *See* Chemerinsky, *supra* note 1, at 1149. Procedural due process "delineates the constitutional limits on judicial, executive, and administrative *enforcement*" of governmental action or decisions. TRIBE, *supra* note 2, § 10-7, at 664; *see also* Bernstein, *supra* note 4, at 1263 (stating that procedural due process defines the limits on governmental actions). Traditionally, this guarantee has invoked procedural safeguards designed to afford individuals an opportunity to be heard before they withstand substantial loss resulting from governmental action. *See* TRIBE, *supra* note 2, at 664. Also, the protection focuses on whether the government has complied with appropriate procedures before taking an individual's life, liberty, or property. *See* Chemerinsky, *supra* note 1, at 1151-52.

[9] *See* Bernstein, *supra* note 4, at 1264-65. Established in the late Nineteenth Century, the doctrine is important in that "fundamental fairness has become the touchstone of due process." Michael T. Fisher, Note, *Harmless Error, Prosecutorial Misconduct, and Due Process: There's More to Due Process than the Bottom Line*, 88 COLUM. L. REV. 1298, 1300 (1988).

The fundamental fairness doctrine has two branches. *See* WAYNE R. LAFAVE &

Among the most fundamental of rights guaranteed by the Due Process Clauses is an individual's right to a fair trial.[10] To this end, due process mandates that the procedures utilized in a criminal proceeding comply with notions of justice and fair play.[11] One of the significant protections afforded by due process concerns the doctrine whereby a defendant may not be tried when found to be mentally incompetent to stand trial.[12] Yet despite its importance to the criminal process, mental

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JEROLD H. ISRAEL, CRIMINAL PROCEDURE § 2.4, at 52 (2d ed. 1992). The first prong advances the notion that any state action that invades fundamental individual rights is prohibited by the Fourteenth Amendment Due Process Clause. *See id*; *see also* Bernstein, *supra* note 4, at 1264-65. The second and distinct prong of fundamental fairness advocates that the Bill of Rights is distinct from the Due Process Clause of the Fourteenth Amendment. *See* LAFAVE & ISRAEL, *supra*, § 2.4, at 53; Bernstein, *supra* note 4, at 1265. In other words, this second prong maintains that "[t]he concept of due process has 'an independent potency' which exists apart from the Bill of Rights, although in a particular case it may afford protection that parallels a Bill of Rights guarantee." LAFAVE & ISRAEL, *supra*, § 2.4, at 53. While the Court still applies this doctrine, the traditional demarcation between it and the "selective incorporation" doctrine has been increasingly blurred, especially in light of each doctrine's rationales. *See id.*

After the 1920s, the Supreme Court, applying the fundamental fairness doctrine, expanded the protections of the Fourteenth Amendment Due Process Clause to include the protections of the Bill of Rights as applied to state criminal procedures. *See* Bernstein, *supra* note 4, at 1265. For example, in *Duncan v. Louisiana*, the Court held that the right to a fair trial is "fundamental to the American scheme of justice." 391 U.S. 145, 149 (1968). The fundamental fairness test "'meant that the Court would be willing to enforce values which the justices saw as having a special importance in the development of individual liberty in American society, whether or not the value was one that was theoretically necessary in any system of democratic government.'" Bernstein, *supra* note 4, at 1266 (quoting 2 RONALD D. ROTUNDA ET AL., TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE § 15.6, at 75 (1986)). Currently, a majority of the Bill of Rights protections applicable to the criminal process are included under the umbrella of the Fourteenth Amendment. *See id.* As a result, most of the criminal protections afforded by the Bill of Rights are equally applicable in both federal and state actions. *See id.*

[10] *See* Arizona v. Youngblood, 488 U.S. 51, 61 (1988) (Blackmun, J., dissenting) ("The Constitution requires that criminal defendants be provided with a fair trial, not merely a 'good faith' try at a fair trial.").

[11] *See* Fisher, *supra* note 9, at 1299. Due process is supremely significant to the operation of a criminal justice system designed to effectively enforce "the criminal law through the detection, apprehension, conviction, and punishment of guilty persons." *Id.* (quoting WAYNE R. LAFAVE & JEROLD H. ISRAEL, CRIMINAL PROCEDURE § 1.6, at 37 (1984)). Among the most significant goals of the criminal process are "the maintenance of the adversarial and accusatorial systems, the assurance of respect for the individual dignity, the minimization of erroneous convictions, the appearance of fairness, and the equal protection of the law." *Id.* at 1300 (footnotes omitted). These processes further strive to guarantee that justice be served in criminal proceedings through a correct outcome that is achieved through fair procedures. *See id.*

[12] *See* Drope v. Missouri, 420 U.S. 162, 171 (1975) (noting that it has "long been accepted" that an incompetent defendant cannot be put to trial). For a discussion of common-law traditions of competency evaluations, see also *infra* notes 134-55 and accompanying text. A trial of an incompetent defendant "cannot be fair and is apt to be

incompetence may be one of the concepts most misunderstood by the public, attorneys, judges, and even mental health professionals.[13] As a result, it is difficult for courts to draw distinct lines when ruling in incompetency cases, and the decision is often fact-sensitive.[14]

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unreliable." JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 25.02, at 290 (1987). An incompetent defendant would likely be unable to effectively assist his counsel, confront his accusers, and rationally testify at trial on his own behalf. *See id.*

The American Law Institute believes that some of the traditional rationales underlying the punishment of criminal offenders, like retribution, may be frustrated when the defendant is unable to understand the proceedings against him. *See* MODEL PENAL CODE § 4.04 cmt., at 230 n.1 (1985). Similarly, a desire for accuracy in criminal proceedings and other public policy rationales underlie the requirement of competency to stand trial. *See* PAUL H. ROBINSON, CRIMINAL LAW DEFENSES § 208, at 503 (1984); *see also infra* note 66 (discussing current incompetency standards); *infra* notes 157-61 and accompanying text (discussing current incompetency burdens).

[13] *See* ABA STANDING COMMITTEE OF ASSOCIATION STANDARDS FOR CRIMINAL JUSTICE, CRIMINAL JUSTICE MENTAL HEALTH STANDARDS, 7-139 (First Tentative Draft, July 1983). While similar in theory to the defense of insanity at the time of a criminal offense, incompetency to stand trial is a separate and distinct issue in purpose, in the test to be applied, in the procedural protections mandated by due process, and in its effect upon defendants. *See id.* Simply, the insanity defense, or a verdict of not guilty by reason of insanity (NGRI) is traditionally considered "'insanity at the time of the offense,'" and serves to excuse one's criminal conduct, while incompetence to stand trial is considered "'insanity at the time of trial.'" *Id.* (footnote omitted); *see also* ROBINSON, *supra* note 12, § 208, at 501 (stating that the insanity defense "considers the defendant's mental capacity at the time of the offense and serves to fully exculpate the defendant for his conduct" while an incompetency finding serves "simply to bar his trial"). Also, a finding of incompetency does not usually result in the defendant's release, but rather in his commitment to a mental facility. *See* Jackson v. Indiana, 406 U.S. 715, 731 (1972). Yet the Supreme Court has held that due process is violated when a criminal defendant is committed indefinitely solely on the basis of his incompetency to stand trial. *See id.* at 738.

One of the most significant distinctions between an incompetency finding and a verdict of NGRI is that the defendant in an NGRI is "assumed" to have committed the criminal action at issue, but the incompetent defendant is never even "put to trial" on the criminal charge. *See* Jones v. United States, 463 U.S. 354, 363 (1983) (noting that a NGRI verdict establishes, beyond a reasonable doubt, that the defendant committed a criminal act and that she or he committed the act because of mental illness).

For an in-depth and well-researched discussion of the NGRI acquitees as opposed to incompetent defendants, see generally John Kip Cornwell, *Confining Mentally Disordered "Super-Criminals": A Realignment of Rights in the Nineties*, 33 HOUS. L. REV. 651 (1996). Professor Cornwell notes that a state has a legitimate interest in protecting society from dangerous incompetent defendants "suspected" of committing crimes. *See id.* at 683. *But see generally* Robert A. Burt & Norval Morris, *A Proposal for the Abolition of the Incompetency Plea*, 40 U. CHI. L. REV. 66 (1972) (advocating the complete abolition of the incompetency plea).

[14] *See, e.g.*, United States v. Barnes, 30 F.3d 575, 577 (5th Cir. 1994) (finding that a defendant's inability to communicate in front of a large group of people did not make him incompetent to stand trial); United States v. Chischilly, 30 F.3d 1144, 1150 (9th Cir. 1994) (finding that the defense's expert testimony was outweighed by the government's expert testimony); United States v. Ecker, 30 F.3d 966, 969 (8th Cir. 1994) (finding that an incompetency hearing held four years after the start of trial was not so long as to be

In *Cooper v. Oklahoma*,[15] the United States Supreme Court entertained a due process challenge to a state statute[16] placing a burden of clear and convincing evidence upon a defendant seeking to prove his incompetence to stand trial.[17] The Court, in a unanimous decision, held that such a standard violated the defendant's guarantee of due process.[18] In reaching this conclusion, the Court noted that neither history nor current practice in a majority of jurisdictions supported a heightened burden,[19] and that a clear and convincing evidence standard did not guarantee "fundamental fairness" to the criminal defendant.[20] Therefore, the Court mandated that while a state may choose to place the burden of proving incompetency upon the defendant, it can require a standard no higher than a preponderance of the evidence.[21]

In 1989, a jury in the District Court of Oklahoma County, Oklahoma, found defendant Byron Keith Cooper (Cooper) guilty of first-degree murder.[22] After finding beyond a reasonable doubt that Cooper had killed eighty-six-year-old Harold Sheppard during a burglary,[23] and

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unreasonable). *See generally* Richard A. Bonnie, *The Competence of Criminal Defendants: Beyond* Dusky *and* Drope, 47 U. MIAMI L. REV. 539 (1993); Bruce J. Winnick, *Presumptions and Burdens of Proof in Determining Competency to Stand Trial: An Analysis of* Medina v. California *and the Supreme Court's New Due Process Methodology in Criminal Cases*, 47 U. MIAMI L. REV. 817 (1993); Stacey A. Giulianti, Comment, *The Right to Proceed Pro Se at Competency Hearings: Practical Solutions to a Constitutional Catch-22*, 47 U. MIAMI L. REV. 883 (1993).

[15] 116 S. Ct. 1373 (1996).

[16] *See* OKLA. STAT. ANN. tit. 22, § 1175.4(B) (West Supp. 1996), *amended by* 1996 Okla. Sess. Law Serv. 161 (West); *infra* note 43.

[17] *See Cooper*, 116 S. Ct. at 1374-75. It is likely impossible to precisely delineate at what point evidence becomes "clear and convincing," as can be seen by *Black's Law Dictionary*'s attempt to define clear and convincing proof. *See* BLACK'S LAW DICTIONARY 251 (6th ed. 1990). *Black's* defines this term as "proof which results in reasonable certainty of the truth of the ultimate fact in controversy," and "[p]roof which requires more than a preponderance of the evidence but less than proof beyond a reasonable doubt." *Id.*

[18] *See Cooper*, 116 S. Ct. at 1384.

[19] *See id.* at 1377-80.

[20] *See id.* at 1380.

[21] *See id.* at 1377; *see also* BLACK'S LAW DICTIONARY 1182 (6th ed. 1990) (defining "preponderance of the evidence" as "evidence which is of greater weight or more convincing than the evidence which is offered in opposition to it" and "evidence which as a whole shows that the fact sought to be proved is more probable than not").

[22] *See* Cooper v. State, 889 P.2d 293, 298 (Okla. Crim. App. 1995), *rev'd*, 116 S. Ct. 1373 (1996).

[23] *See id.* On September 5, the day after Sheppard was murdered, Cooper used the deceased's credit card to purchase two gold watches. *See id.* The teller, suspicious because Cooper "did not look like the kind of customer to whom [J.C. Penney's] would issue a credit card," called the authorities and provided them with a composite drawing. *See id.* This drawing helped police spot Cooper two weeks later, and after a short chase, the authorities apprehended him. *See id.*

that certain aggravating factors were present,[24] the trial court imposed the death penalty.[25]

On five occasions, the trial court questioned Cooper's competence: each time the judge considered whether Cooper was able to understand the charges against him and to aid in his own defense.[26] On the first occasion, the judge relied on a single opinion given by a state-employed clinical psychologist.[27] After Cooper completed a three-month stay at a mental health hospital, his attorney offered additional testimony as to his

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Initially, Cooper claimed to have murdered Sheppard and another woman, but later in the interrogation he retracted the admissions. *See id.* Cooper denied being at the crime scene, even though police had not told him the address, but finally admitted that he may have committed the murders, but that he "could not remember." *See id.* at 298-99.

During the investigation police uncovered evidence of Sheppard's hair and a gold watch at Cooper's apartment and found the defendant's fingerprints on items in the Sheppard residence. *See id.* at 299. Additionally, blood found at the crime scene matched Cooper's, and cigarettes of the type Cooper smoked were recovered from the scene. *See id.* While Cooper could not explain how these items came to be in the deceased's home, he did tell police that "if he had killed the man, his prints should have been found on the weapon, and he was certain they would not be." *Id.* Cooper's prophesy came true in that the police found no prints on the murder weapon. *See id.* Science cut short Cooper's career as a prophet, however, when a chemical sprayed on the knife revealed "swipe marks which would be exhibited if blood on the blade had been wiped off." *Id.*

[24] *See id.* at 298. The jury found five aggravating factors: Cooper had previously been convicted of a felony involving violence; the murder was "especially heinous, atrocious and cruel"; the murder was committed to avoid arrest; the murder was committed while Cooper was serving a sentence for a prior felony conviction; and Cooper posed a continuing threat to society. *See id.*

[25] *See id.*

[26] *See* Cooper v. Oklahoma, 116 S. Ct. 1373, 1375 (1996). The Oklahoma trial court applied its statutory standard, which mirrored the minimal constitutional standard for competency as laid out by the Supreme Court in *Dusky v. United States*. *See id.*; *see also Dusky*, 362 U.S. 402, 402 (1960) (per curiam). The *Dusky* Court held that an incompetency "test must [ask] whether [the defendant] has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding—and whether he has a rational as well as factual understanding of the proceedings against him." *Cooper*, 116 S. Ct. at 1375; *see also infra* notes 60-66 and accompanying text (discussing the *Dusky* decision).

[27] *See Cooper*, 116 S. Ct. at 1375. The state psychologist, Dr. Edith King, testified before the trial court that she believed Cooper was incompetent when she originally examined him, but that he may be malingering. *See Cooper*, 889 P.2d at 303. Furthermore, she testified that Cooper indicated on at least four occasions during his evaluation that he seemed to understand the charges against him, was aware of the consequences he faced if convicted, and expressed an interest in pleading insanity. *See id.* Cooper was also reported in the record to have stated, "[y]ou're wasting your time going over courtroom proceedings with me. I know them. I've already spent 10 calendar years behind bars," and "I've got nothing to lose, I've already got two murder raps on me." *Id.* at 303-04. Based on this testimony, the trial judge committed Cooper to a state mental health facility at Vinita for treatment. *See id.* at 303.

mental state.[28] While this information provided conflicting evidence as to whether Cooper would be able to participate in his own defense,[29] the trial judge ruled against the defendant for a second time, instructing Cooper to proceed with his trial.[30]

One week before the trial was to begin, Cooper's attorney once again questioned Cooper's competence.[31] The attorney noted that he was behaving oddly and that Cooper refused to communicate with him.[32] Still, however, the trial judge declined to retract his previous determination.[33]

On the first day of Cooper's trial, his spasmodic behavior induced the court to conduct a competency hearing.[34] At the hearing, the judge personally observed the defendant and heard testimony from a lay witness, a third expert psychologist, and Cooper himself.[35] While the

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[28] *See Cooper*, 889 P.2d at 304.

[29] *See id.*

[30] *See Cooper*, 116 S. Ct. at 1375.

[31] *See id.*

[32] *See id.* The respondent's and petitioner's briefs show evidence of Cooper's bizarre activity. *See, e.g.*, Brief for the Petitioner at *5, Cooper v. Oklahoma, 116 S. Ct. 1373 (1996) (No. 95-5207) (*available in* 1995 WL 694355) [hereinafter Petitioner's Brief] (explaining that Cooper "insisted his mother had died a long time ago[,]" which "obviously was not true, as his mother testified during the penalty phase of the trial[,]" made a drawing of "'Noryb,' a spirit with whom Mr. Cooper claimed to communicate [, and he] lapsed into unintelligible speech").

[33] *See Cooper*, 116 S. Ct. at 1375.

[34] *See id.* Cooper refused to change out of his prison suit because the suit the county offered was "burning" him. *See id.* n.1. Furthermore, Cooper talked to himself and to an "imaginary 'spirit'" he claimed gave him counsel. *See id.* While on the witness stand, Cooper confessed his fear that his lead lawyer wanted to kill him. *See id.* Finally, the head counsel noted during his closing arguments to the court that any time he tried to get close to Cooper when he was on the witness stand:

> he would stand up and he would get away from me as far as he could. . . . So I've approached him from every side . . . except I haven't approached him from the front. So yesterday, I approach him from the front. And that's the last thing I did. . . . [Cooper] stood up and he got as far back against the rail behind the witness chair as he could get. I edged closer. He got as far back and he got up on that rail. So I've got him up on the rail and I'm thinking, hey, what can I lose? . . . [W]ithout looking for his safety at all and looking what's behind him, when I moved the least bit . . . he fell to get away from me. . . . He hit his head. The thud on that marble when he jackknifed backward off of that railing into that marble could be heard at the back of the courtroom . . . .

Id.; *see also* Petitioner's Brief, *supra* note 32, at *5 (stating that Cooper became "so paranoid and distraught during the questioning . . . that as defense counsel approached him, he backed up out of the witness chair and fell backwards over the railing, jackknifed between the witness box and the wall, striking his head against the marble wall").

[35] *See Cooper*, 116 S. Ct. at 1375. Cooper failed to respond to a majority of questioning on the stand, but when he did respond he indicated that his counsel was trying to kill him, and he accused his lawyer, the prosecutor, and others of trying to

expert concluded that Cooper was presently incompetent and could not communicate with his lawyers, the expert believed Cooper would likely attain competency if subjected to an aggressive program of treatment.[36] Even with this testimony, the trial judge ruled against Cooper.[37]

As the trial progressed, Cooper exhibited more bizarre behavior consistent with the expert's testimony provided at the prior hearing.[38] The defense attorney offered even more evidence of Cooper's mental state during the sentencing phase by disclosing details of Cooper's troubled childhood.[39] Finally, the defense counsel moved for a mistrial[40]

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choke him with a rope. *See* Petitioner's Brief, *supra* note 32, at *5.

[36] *See* Cooper v. State, 889 P.2d 293, 304 (Okla. Crim. App. 1995), *rev'd*, 116 S. Ct. 1373 (1996). Dr. Philip Murphy testified for the defense that while Cooper may have been a "world-class, first-class manipulator," he had a mental mood disorder that would keep him from communicating with his counsel. *See id.* Dr. Murphy further testified that Cooper might improve if given "aggressive" treatment, including doses of an anti-anxiety medication. *See* Petitioner's Brief, *supra* note 32, at *9.

There was also lay testimony from inmates who had spent time with Cooper while he was in holding. *See Cooper*, 889 P.2d at 304. They testified that "he compulsively and continually cleaned his cell; played with his feces, smearing it on his face; and talked to himself or to thin air." *Id.* This was disputed, however, by the inmates who testified for the state. *See id.* The prosecution's evidence showed that Cooper had communicated normally with other inmates, and had appeared to understand the contents of two pro se complaints he had filed in 1991 and 1992. *See id.*

[37] *See Cooper*, 116 S. Ct. at 1375. While the judge did not dispute the evidence, he stated that his "shirtsleeve opinion of Mr. Cooper is that he's not normal." *Id.* at 1376. But, "to say he's not competent is something else. . . . I don't believe he has carried the burden by clear and convincing evidence of his incompetency." *Id.*

[38] *See id.* Cooper did not sit near, or talk to, his counsel, and he often remained in the fetal position talking to himself. *See id.* n.2. Further, near the end of the State's evidence, a deputy accompanying Cooper "notified the trial judge there was 'a real heavy odor of feces in the area' and Cooper appeared to have feces in his hand. Both the bailiff and the deputy had seen [Cooper] eating feces." Petitioner's Brief, *supra* note 32, at *10. Luckily, the court ordered a recess so the deputies could remove the feces, which "'looked like candy,'" from Cooper's hand. *See* Brief for Respondent at *11, Cooper v. Oklahoma, 116 S. Ct. 1373 (1996) (No. 95-5207) (*available in* 1995 WL 739592) [hereinafter Respondent's Brief].

[39] *See Cooper*, 116 S. Ct. at 1376. Cooper's brief paints a painful portrait of a person persecuted "virtually from birth at the hands of those under a duty to protect him: his family, foster homes, and the justice system." Petitioner's Brief, *supra* note 32, at *11. Cooper's

> brother, older sister, uncle, grandmother, and great-aunt testified in great detail to Cooper's childhood, although . . . "they didn't have very much of a childhood" because they didn't have a father, and only "about a third of a mother." Their mother was an alcoholic and had been diagnosed with schizophrenia. Their great-aunt observed that when the children were small, "[t]hey lived like animals." That is, they never had food or supervision and they begged for food. There were times when there was no water, electricity or gas in the house. Even when their mother was working . . . there were times when the family had no food in the refrigerator, only Boone's Farm Liquor.

Id. n.7. Unfortunately for Cooper and his siblings, their mother came home once in a

or, alternatively, for a renewed investigation into Cooper's competence.[41] The court denied these motions and sentenced Cooper to death.[42]

Cooper appealed to the Oklahoma Court of Criminal Appeals, contending that the Oklahoma presumption of competence, in unison with the statutory requirement[43] that Cooper establish his incompetence by clear and convincing evidence,[44] violated his fundamental right to due process of law under the Fifth[45] and Fourteenth[46] Amendments.[47] Before

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while, and "she regularly beat them with her hands, and items such as brooms, a hammer, extension cords, a candle holder, and shoes; she even pulled knives on them, and on one occasion shot at them." *Id.* at *11.

Cooper received the worst beatings of all, because "he looked most like their dad[,]" and on one occasion, his mother "beat him with a baseball bat until he could not move." *Id.* When Cooper was small, he was moved briefly to a foster home, where he was forced to "sleep in the geese pens." *Id.* at *12. By the age of four, and after a stint in a state-run home where he was told his parents had died in a car wreck, Cooper was back with his mother and her new husband. *See id.* While the husband was a good father to Cooper and his siblings, he was shot dead by his new bride in 1974, when Cooper was only 11. *See id.* From then on, Cooper spent the rest of his formative years in either boys' homes or penitentiaries. *See id.* at *12-13.

[40] *See* OKLA. STAT. ANN. tit. 12, § 651 (West 1988) (stating that a new trial can be granted, "after a verdict by the jury . . . on the application of the aggrieved party" when certain events materially affect "the substantial rights of [the aggrieved] party"); *see also* BLACK'S LAW DICTIONARY 1002 (6th ed. 1990) (defining "mistrial" as "[a]n erroneous, invalid, or nugatory trial" and "[a] device used to halt trial proceedings when error is so prejudicial and fundamental that expenditure of further time and expense would be wasteful if not futile").

[41] *See Cooper*, 116 S. Ct. at 1376.

[42] *See id.*

[43] *See* OKLA. STAT. ANN. tit. 22, § 1175.4(B) (West Supp. 1996), *amended by* 1996 Okla. Sess. Law Serv. 161 (West). The statute provides in relevant part:

> The court, at the hearing on the application [for determination of competency], shall determine, by clear and convincing evidence, if the person is incompetent. The person shall be presumed to be competent for the purposes of the allocation of the burden of proof and burden of going forward with the evidence.

Id. A hearing under § 1175 can be held before a jury of six persons. *See id.* Additionally, the defendant has the right to be present at the § 1175 hearing, unless it is shown by clear and convincing evidence that his presence would be disruptive. *See id.* § 1175.4(C) (West 1986 & Supp. 1996). Furthermore, the defendant is afforded many procedural protections natural to the criminal trial process, such as the right to cross-examine witnesses. *See id.* § 1175.4(D).

[44] *See* OKLA. STAT. ANN. tit. 22 § 1175.4(B) (West Supp. 1996), *amended by* 1996 Okla. Sess. Law Serv. 161 (West).

[45] *See* U.S. CONST. amend. V. The Fifth Amendment provides that "[n]o person shall . . . be deprived of life, liberty, or property, without due process of law." *Id.* Through this doctrine of "selective incorporation" the Court has applied almost all of the protections of the Bill of Rights, including the Fifth Amendment, to the states. *See, e.g.*, Benton v. Maryland, 395 U.S. 784, 794 (1969) (incorporating the freedom from double jeopardy); Duncan v. Louisiana, 391 U.S. 145, 149 (1968) (incorporating the right to trial before a jury); Klopfer v. North Carolina, 386 U.S. 213, 222 (1967) (incorporating the right to a speedy trial); Pointer v. Texas, 380 U.S. 400, 403 (1965) (incorporating the

the appellate court, Cooper argued that the clear and convincing standard

right to confront witnesses); Malloy v. Hogan, 378 U.S. 1, 6 (1964) (incorporating the right to be free from compelled self-incrimination); Gideon v. Wainwright, 372 U.S. 335, 342-44 (1963) (incorporating the right to counsel); Robinson v. California, 370 U.S. 660, 667 (1962) (incorporating the right to be free of cruel and unusual punishments); Mapp v. Ohio, 367 U.S. 643, 655 (1961) (incorporating the right to exclude illegally-seized evidence from criminal trials); Wolf v. Colorado, 338 U.S. 25, 27-28 (1949) (incorporating the right to freedom from unreasonable search and seizure); *In re* Oliver, 333 U.S. 257, 278 (1948) (incorporating the right to a public trial); Everson v. Board of Educ., 330 U.S. 1, 15-16 (1947) (incorporating the protection against establishment of religion); Cantwell v. Connecticut, 310 U.S. 296, 303 (1940) (incorporating the right to free exercise of religion); Hague v. Committee for Indus. Org., 307 U.S. 496, 512 (1939) (incorporating the right to petition for grievances); DeJonge v. Oregon, 299 U.S. 353, 365-66 (1937) (incorporating the right to assembly); Near v. Minnesota, 283 U.S. 697, 707 (1931) (incorporating the right to free press); Fiske v. Kansas, 274 U.S. 380, 387 (1927) (incorporating the right to free speech); Chicago, Burlington & Quincy R.R. v. Chicago, 166 U.S. 226, 236 (1897) (incorporating the right to just compensation). "The only provisions of the first eight amendments that have not been incorporated are the second and third amendments, the fifth amendment's requirement of grand jury indictment, and the seventh amendment." GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW 784 (3d ed. 1991).

Technically, the Bill of Rights is still not directly applicable to the states, but the protections, such as the First Amendment guaranty of freedom of speech, are made applicable *through* the Fourteenth Amendment Due Process Clause. *See* TRIBE, *supra* note 2, § 11-2, at 772. The Court, therefore, looks to the Bill of Rights as "points of reference only." *Id.* at 773 n.25. In the majority of cases, the Court applies the same constitutional standard to state and federal governments when an incorporated protection is involved, even though "the congruence is not invariably perfect." *Id.* (citations omitted).

In determining whether a protection found in the Bill of Rights is applicable through selective incorporation, the Court has asked whether the right is among those "fundamental to the American scheme of justice." *Duncan*, 391 U.S. at 149; *see also Gideon*, 372 U.S. at 343-44 (asking whether a criminal right is "essential to a free trial"); *In re Oliver*, 333 U.S. at 273 (asking whether a right is "basic in our system of jurisprudence"); Powell v. Alabama, 287 U.S. 45, 67 (1932) (asking whether a right is among the "fundamental principles of liberty and justice which lie at the base of all our civil and political institutions"). *But see* NOWAK & ROTUNDA, *supra* note 1, § 11.6, at 385 (claiming that "[t]he preponderance of historical evidence . . . indicates that the drafters of the [Fourteenth] [A]mendment did not specifically intend to apply all of [the Bill of Rights] to the states") (footnote omitted).

[46] *See* U.S. CONST. amend XIV. The Fourteenth Amendment provides that "[n]o state shall . . . deprive any person of life, liberty, or property, without due process of law." Nowak and Rotunda note that the Due Process Clauses protect both procedural and substantive rights. *See* NOWAK & ROTUNDA, *supra* note 1, § 10.6, at 338-39. Procedural due process is limited, guaranteeing only that the government will provide a fair decision-making process before acting to affect an individual's life, liberty, or property. *See id.* at 339. Substantive due process, by contrast, determines the compatibility of the substance of a governmental action with that action's underlying constitutionality. *See id.*

[47] *See* Cooper v. State, 889 P.2d 293, 299 (1995), *rev'd*, 116 S. Ct. 1373 (1996). Beyond his constitutional arguments concerning Oklahoma's statutory standards, Cooper also challenged, inter alia, jury instructions, the competency of his attorney, and other aspects of his trial. *See id.* at 305-18.

was unduly harsh under United States Supreme Court jurisprudence, relying on decisions such as *Medina v. California*[48] and *Addington v. Texas*,[49] because it offended a "principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental."[50]

In rejecting Cooper's argument and affirming his sentence, the appellate court noted that it may be difficult to ascertain whether a defendant is feigning incompetency, given "the inexactness and uncertainty attached to [competency] proceedings."[51] The court noted that the standard was justified because Oklahoma's interest in assuring an efficient judiciary was considerable and because a "truly incompetent defendant, through his attorneys and experts, can prove incompetency with relative ease."[52]

Having exhausted his state court remedies,[53] Cooper appealed to the United States Supreme Court, which granted Cooper's petition for certiorari.[54] The Court granted Cooper an appeal to determine whether the standard of clear and convincing evidence, when placed on a

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[48] 505 U.S. 437 (1992); *see infra* notes 88-101 and accompanying text (discussing the Court's disposition of *Medina*).

[49] 441 U.S. 418 (1979).

[50] *Cooper*, 889 P.2d at 303 (quoting *Medina*, 505 U.S. at 445 (quoting Patterson v. New York, 432 U.S. 197, 202 (1977))) (internal quotation marks omitted).

[51] *Id.* at 302-03. The court understood the conflicting competency testimony "to illustrate the inexactness and uncertainty attached to proceedings of this nature, proceedings based on diagnoses which are to a large extent based on medical impressions drawn from subjective analysis. . . ." *Id.* at 303 (quoting *Medina*, 505 U.S. at 451 (quoting Addington v. Texas, 441 U.S. 418, 430 (1979))) (internal quotation marks omitted).

[52] *Id.* The appellate court emphasized that "[t]he State has great interest in assuring its citizens a thorough and speedy judicial process, together with the presumption of competency which is historically based on our law." *Id.*

[53] *See generally* OKLA. CONST. art. VII, § 4. The Oklahoma Supreme Court's appellate jurisdiction is "coextensive with the State and [extends] to all cases at law and in equity," except in criminal cases, where the Court of Criminal Appeals has "exclusive appellate jurisdiction" unless provided for by statute. *Id.*; *see also* OKLA. STAT. ANN. tit. 20, § 40 (West 1991) (providing that the "Court of Criminal Appeals shall have exclusive appellate jurisdiction . . . in all criminal cases appealed from" the lower courts); *id.* tit. 22, § 1080 (West 1986) (stating that the Uniform Post-Conviction Procedure Act entitles a defendant to challenge a criminal conviction to the Court of Criminal Appeals). Cooper also had a statutory right to appeal his conviction under Oklahoma criminal procedure because the State imposed capital punishment. *See* OKLA. CRIM. P. R. 9.4.

[54] *See* Cooper v. Oklahoma, 116 S. Ct. 282 (1995). The Supreme Court later granted numerous organizations leave to file amicus curiae briefs. *See, e.g.*, Cooper v. Oklahoma, 116 S. Ct. 671 (1995) (granting leave to the National Association of Criminal Defense Lawyers); Cooper v. Oklahoma, 116 S. Ct. 562 (1995) (granting leave to the American Association on Mental Retardation).

defendant seeking to prove his incompetency to stand trial, violated due process.[55]

The Court reversed the decision of the Oklahoma Court of Criminal Appeals and held that a standard of clear and convincing evidence, when imposed upon a defendant seeking to prove his incompetence to stand trial, violated due process.[56] The Court, in reaching its decision, concluded that the State's heightened standard was supported by neither historical practice nor by the majority of contemporary jurisdictions.[57] Furthermore, the Court decided that a preponderance of the evidence standard better exhibited "fundamental fairness" in operation.[58]

The Supreme Court has long viewed a defendant's right to be tried only when competent as a fundamental guarantee of the Constitution's Due Process Clauses.[59] The Court considered what the appropriate test should be in *Dusky v. United States*,[60] where the trial court held hearings to determine whether a defendant was in fact competent to stand trial.[61] The defendant in *Dusky* was convicted of unlawfully transporting in interstate commerce a girl who had been kidnapped.[62] Reviewing the district court's application of the federal statutory standard for incompetency proceedings,[63] the Court held that the evidence did not support a determination that Dusky was competent to stand trial.[64] The Court found that it was not constitutionally sufficient for a district judge conducting an incompetency hearing to determine whether a defendant "is oriented to time and place and [has] some recollection of events."[65] Instead, the Court held that the proper standard in incompetency proceedings was "whether [the defendant] ha[d] sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding—and whether he ha[d] a rational as well as factual understanding of the proceedings against him."[66]

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[55] *See* Cooper v. Oklahoma, 116 S. Ct. 1373, 1374-75 (1996).

[56] *See id.* at 1384.

[57] *See id.* at 1377-80.

[58] *See id.* at 1383.

[59] *See* Drope v. Missouri, 420 U.S. 162, 171 (1975) (noting that "it has long been accepted" that an incompetent defendant cannot be put to trial).

[60] 362 U.S. 402 (1960) (per curiam).

[61] *See id.* at 402.

[62] *See* Dusky v. United States, 271 F.2d 385, 390 (8th Cir. 1959). Dusky was convicted of kidnapping in the United States District Court for the Western District of Missouri for picking up a 15-year-old girl in Missouri and bringing her into Kansas with the intent to rape her. *See id.* at 386-87, 390.

[63] *See* 18 U.S.C. § 4241(d) (1988).

[64] *See Dusky*, 362 U.S. at 402.

[65] *Id.* (internal quotation marks omitted).

[66] *Id.* Today, 37 jurisdictions have enacted statutes mirroring the *Dusky* standard.

See 1996 Alaska Sess. Laws 62 (defining an incompetent defendant as one unable to understand the proceedings *or* to assist in his or her defense); ARIZ. R. CRIM. P. 11.1 (same); ARK. CODE ANN. § 5-2-302 (Michie 1993) (same); CAL. PENAL CODE § 1367(a) (West Supp. 1996) (same); COLO. REV. STAT. ANN. § 16-8-102(3) (West 1990) (same); DEL. CODE ANN. tit. 11, § 404(a) (1995) (same); D.C. CODE ANN. § 24-301(a) (1996) (same); FLA. STAT. ANN. § 916.12 (West 1996) (same); HAW. REV. STAT. § 704-403 (1993) (same); IDAHO CODE § 18-210 (1987) (same); 725 ILL. COMP. STAT. ANN. 5/104-10 (West 1992) (same); IND. CODE ANN. § 35-36-3-1(a) (West Supp. 1996) (defining an incompetent defendant as one unable to understand the proceedings *and* to assist in his or her defense); IOWA CODE ANN. § 812.3 (West 1994) (defining an incompetent defendant as one unable to understand the proceedings *or* to assist in his or her defense); KAN. STAT. ANN. § 22-3301(1)(a)-(b) (1995) (same); KY. REV. STAT. ANN. § 504.060(4) (Michie Supp. 1996) (same); LA. CODE CRIM. PROC. ANN. art. 641 (West 1981) (same); MD. CODE ANN., HEALTH-GEN. § 12-101(e)(1)-(2) (1994) (same); MICH. COMP. LAWS ANN. § 330.2020(1) (West 1992) (same); MINN. R. CRIM. P. 20.01, subd. 1(1)-(2) (same); MO. ANN. STAT. § 552.020(1) (West Supp. 1996) (same); MONT. CODE ANN. § 46-14-103 (1995) (same); NEV. REV. STAT. ANN. § 178.400(2) (Michie Supp. 1995) (defining an incompetent defendant as one unable to understand the proceedings *and* to assist in his or her defense); N.J. STAT. ANN. § 2C:4-4(a) (West 1995) (defining an incompetent defendant as one unable to understand the proceedings *or* to assist in his or her defense); N.Y. CRIM. PROC. LAW § 730.10(1) (McKinney 1995) (same); N.C. GEN. STAT. ANN. § 15A-1001(a) (1988) (same); N.D. CENT. CODE § 12.1-04-04 (1985) (same); OHIO REV. CODE ANN. § 2945.37(A) (Anderson 1996) (same); OR. REV. STAT. § 161.360(2)(a)-(c) (1995) (same); S.C. CODE ANN. § 44-23-410 (Law Co-op. Supp. 1995) (same); S.D. CODIFIED LAWS § 23A-10A-1 (Michie Supp. 1996) (same); TEX. CRIM. P. CODE ANN. § 46.02(1)(a)(1)-(2) (West 1979) (same); UTAH CODE ANN. § 77-15-2(1)-(2) (1995) (same); VA. CODE ANN. § 19.2-169.1(D) (Michie 1995) (defining an incompetent defendant as one unable to understand the proceedings *and* to assist in his or her defense); WASH. REV. CODE ANN. § 10.77.010(6) (West Supp. 1997) (defining an incompetent defendant as one unable to understand the proceedings *or* to assist in his or her defense); W. VA. CODE § 27-6A-2(b) (1992) (defining an incompetent defendant as one unable to understand the proceedings *and* to assist in his or her defense); WIS. STAT. ANN. § 971.13(1) (West 1985) (defining an incompetent defendant as one unable to understand the proceedings *or* to assist in his or her defense).

Interestingly, Wyoming provides additional requirements for a finding of incompetency through its statutory standards that nonetheless reflect the *Dusky* holding. *See* WYO. STAT. ANN. § 7-11-302(a)(i)-(iv) (Michie 1995). For instance, Wyoming defines an incompetent defendant as one who is unable, because of mental illness or deficiency, to: "(i) Comprehend his position; (ii) Understand the nature and object of the proceedings against him; (iii) Conduct his defense in a rational manner; and (iv) Cooperate with his counsel to the end that any available defense may be interposed." *Id.*

While some states do not specifically define a *Dusky* standard through statute, they often adopt the standard through their court systems. *See, e.g.*, Bailey v. State, 421 So. 2d 1364, 1366 (Ala. Crim. App. 1982) (determining that an incompetent defendant is one unable to understand the proceedings *and* to assist in his or her defense); Banks v. State, 269 S.E.2d 450, 453 (Ga. 1980) (same); State v. Lewis, 584 A.2d 622, 624 (Me. 1990) (same); Commonwealth v. Prater, 651 N.E.2d 833, 837 (Mass. 1995) (same); Gammage v. State, 510 So. 2d 802, 803 (Miss. 1987) (determining that an incompetent defendant is one unable to understand the proceedings *or* to assist in his or her defense); State v. Chapman, 721 P.2d 392, 397 (N.M. 1986) (determining that an incompetent defendant is one unable to understand the proceedings *and* to assist in his or her defense); Berndt v. State, 733 S.W.2d 119, 123 (Tenn. Crim. App. 1987) (same).

The Supreme Court next addressed the issue of incompetent defendants in *Pate v. Robinson*.[67] The *Pate* case traveled twice to the Supreme Court, first as an appeal from the Illinois Supreme Court[68] and then as an appeal from the denial of a federal habeas corpus petition.[69]

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[67] 383 U.S. 375 (1966).

[68] *See* People v. Robinson, 174 N.E.2d 820, 823 (Ill. 1961), *cert. denied sub nom.* Pate v. Robinson, 368 U.S. 995 (1962) (upholding conviction where evidence failed to raise sufficient doubt as to defendant's sanity at the time of criminal offense). The defendant was originally convicted in 1959 of murdering his common-law wife, Flossie May Ward, and sentenced to life imprisonment. *See Pate*, 383 U.S. at 376.

The defense produced evidence at Robinson's murder trial that suggested that he had a long history of mental and behavioral problems. *See id.* at 378-84. When he was seven or eight, Robinson was hit on the head by a brick dropped from a third floor window, and thereafter, in the words of his mother, "'he acted a little peculiar.'" *See id.* at 378. After continual erratic behavior as a child and young adult, including periods of violence, he was placed in a state psychopathic hospital. *See id.* at 379. After his release, Robinson continued to have random outbreaks of violence toward his wife and other family members. *See id.* at 380-81.

In 1953, Robinson shot and killed his 18-month-old son and then shot himself in the head in a suicide attempt. *See id.* at 381. His gunfire missing its mark, he then tried to drown himself in a nearby lagoon. *See id.* Still unable to finish himself off, Robinson eventually approached the police to confess to his actions. *See id.* For the killing of his son, Robinson spent four years in jail. *See id.*

A few months after being released, Robinson took up residence with Flossie May Ward in a common-law marriage. *See id.* at 376, 381. On the evening of the killing, Robinson entered the restaurant where Flossie May worked brandishing a gun in his hand. *See id.* at 382. "'Don't start nothing tonight,'" Flossie May told him, after which he leapt with cat-like quickness over the counter, fired shots, and killed her outside the building. *See id.* Robinson did not attempt to avoid arrest, although he did initially deny knowledge of the killing. *See id.* at 382-83.

The prosecution made no attempt to rebut any of this testimony at trial, introducing only a stipulation from a state clinical doctor stating that, in his medical opinion, Robinson was aware of the nature of the proceedings against him and was able to communicate with his counsel at the time the doctor examined him. *See id.* at 383.

The Illinois Supreme Court affirmed Robinson's conviction. *See Robinson*, 174 N.E.2d at 824. The state supreme court held that: (1) there was insufficient evidence proffered at Robinson's trial to require the trial court to conduct an incompetency hearing; and (2) the evidence did not raise a reasonable doubt as to Robinson's sanity at the time of the killing. *See id.* at 823. The United States Supreme Court denied certiorari. *See* Robinson v. Pate, 368 U.S. 995 (1962).

[69] *See Pate*, 383 U.S. 375, 377 (1966). After the initial denial of certiorari, Robinson filed a habeas corpus petition, which the United States District Court for the Northern District of Illinois denied without a hearing. *See id.* Robinson then appealed to the United States Court of Appeals for the Seventh Circuit, which reversed and remanded to the district court with directions to, inter alia, determine whether the state court denied Robinson due process by failing to hold an incompetency hearing. *See* Robinson v. Pate, 345 F.2d 691, 697-98 (7th Cir. 1965), *rev'd*, 383 U.S. 375 (1966). Finally, on Robinson's second attempt, the United States Supreme Court granted certiorari. *See* Pate v. Robinson, 382 U.S. 890 (1965).

"Habeas corpus writs" are defined as those whose "primary function . . . [are] to release [a prisoner] from unlawful imprisonment." BLACK'S LAW DICTIONARY 709 (6th ed. 1990). A habeas corpus proceeding does not determine the guilt or innocence of a

The Court in *Pate* held that a criminal defendant's right to a fair trial constitutionally entitles the defendant to an incompetency hearing whenever evidence is put forth that raises a "'bona fide'" doubt as to his competence to stand trial.[70]

The majority opinion, authored by Justice Clark, first noted the generally accepted proposition that a state cannot convict a defendant if he is legally incompetent.[71] Justice Clark then highlighted the evidence proffered at Robinson's trial that raised a doubt as to the defendant's competence.[72] This evidence, the majority opined, was sufficient to mandate that the defendant receive a hearing on his competency to stand trial.[73] The Court also noted that Robinson had a right to an incompetency hearing under Illinois law, which "jealously guards" the defendant's right to a fair trial.[74]

Justice Harlan, joined by Justice Black, dissented from the majority decision and argued that the evidence presented at Robinson's trial did not reach the level necessary to require the trial judge to hold a competency hearing.[75] Yet even in dissent, Justice Harlan agreed with the majority's general rule that a "defendant's present incompetence may become sufficiently manifest during a trial that it denies him due process" if the trial court fails to initiate a hearing on that issue.[76]

The next Supreme Court attempt to clarify the due process interest in incompetency hearings came in *Drope v. Missouri*.[77] At issue in *Drope* was whether a defendant was denied due process when a trial court, in the face of evidence of the defendant's incompetency, refused to order a psychiatric examination to determine whether the defendant was competent to stand trial.[78] The defendant, on trial for attempted forcible rape, produced evidence of incompetent behavior before the

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prisoner, and the only issue it presents is "whether [the] prisoner is restrained of his liberty by due process." *Id.*

[70] *See Pate*, 383 U.S. at 385.

[71] *See id.* at 378 (citing Bishop v. United States, 350 U.S. 961, 961 (1956) (per curiam)).

[72] *See id.* at 376-84; *supra* note 68 (detailing the evidence presented at Robinson's trial).

[73] *See Pate*, 383 U.S. at 385.

[74] *See id.* Under Illinois law at that time, a defendant was entitled to an incompetency hearing whenever there is evidence proffered that tends to raise a "bona fide doubt" as to his ability to stand trial. *See* People v. Shrake, 182 N.E.2d 754, 755 (Ill. 1962).

[75] *See Pate*, 383 U.S. at 388 (Harlan, J., dissenting).

[76] *Id.* Justice Harlan's general disagreement with the majority centered on the level of evidence produced, instead of the constitutional protection itself. *See id.* at 388-91 (Harlan, J., dissenting).

[77] 420 U.S. 162 (1975).

[78] *See id.* at 163-64.

commencement of his trial[79] and attempted suicide during the trial itself.[80] The trial judge, however, denied the motions for competency evaluations, and a jury found Drope guilty.[81] Drope, on appeal to the Supreme Court, challenged his conviction, alleging that the trial court violated his constitutional rights by failing to order an examination before trial, and by conducting the trial in his absence, which was the result of his suicide attempt.[82]

The Supreme Court, in an opinion by Chief Justice Burger, reversed Drope's conviction, stating that the trial court failed to give proper weight to evidence produced both before and during trial that suggested Drope's incompetence.[83] The Court reiterated the holdings of *Dusky* and *Pate*, and determined that the evidence presented in the record mandated that the trial court inquire into whether the petitioner was competent to stand trial.[84] First, the Court noted that there was sufficient evidence to warrant a pretrial competency determination.[85] Furthermore, the Chief Justice declared that sufficient evidence was produced after the commencement of the trial to warrant a competency hearing.[86]

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[79] *See id.* at 165-66. Defendant Drope was indicted in Missouri for the attempted forcible rape of his wife. *See id.* at 164. His attorney filed pretrial motions requesting that the defendant receive a psychiatric evaluation, because, in his opinion, Drope was "not a person of sound mind" and should be examined "before the case should be forced to trial." *Id.* at 165.

In a report attached to the counsel's motion, the petitioner was described as, inter alia, "markedly agitated and upset," "a very neurotic individual who is also depressed," and was diagnosed as suffering from "[s]ociopathic personality disorder, sexual perversion, [and] [b]orderline mental deficiency." *Id.* at 164-65 n.1. The trial court denied these motions and proceeded to trial. *See id.* at 165.

Drope's wife also testified as to his sexual perversions, his habit of "roll[ing] down the stairs" if he did not get his way, and his attempt to choke her a week before the trial was to begin. *See id.* at 166.

[80] *See id.* Because Drope shot himself in the abdomen, his attorney moved for a mistrial. *See id.* at 166-67. Yet the trial judge denied the motion, stating that any difficulty faced in the proceeding without the defendant present "was brought about by [the defendant], who was on bond and had a responsibility to be present." *Id.* at 166. A jury found Drope guilty and, after he spent three weeks in a hospital recovering from the suicide attempt, the trial court sentenced him to life imprisonment. *See id.* at 167.

[81] *See id.* The Missouri Supreme Court affirmed Drope's conviction after determining that the trial court's denial of a psychiatric evaluation was not improper. *See id.* at 168.

[82] *See Drope*, 420 U.S. at 168-69.

[83] *See id.* at 180-81.

[84] *See id.* at 181. For a discussion of *Dusky*, see *supra* notes 60-66 and accompanying text. For a discussion of *Pate*, see *supra* notes 67-76 and accompanying text.

[85] *See Drope*, 420 U.S. at 177. Chief Justice Burger highlighted the report attached to the pretrial motion, which detailed Drope's history of irrational behavior and his diagnosis of borderline mental deficiency. *See id.* at 175-76.

[86] *See id.* at 179. The Court opinion specifically stressed the testimony of Drope's

Consequently, the Court overturned Drope's conviction on the grounds that it violated due process.[87]

In 1992, the Supreme Court addressed two important due process challenges in *Medina v. California*:[88] first, can a state allocate the burden of proving incompetency to stand trial to the defendant;[89] and second, can a state impose a rebuttable presumption of competency on the defendant going to trial.[90] In answering both of these questions in the affirmative, the Supreme Court, in a majority opinion written by Justice Kennedy, proclaimed that neither of these procedures offended "'some principle of justice so rooted in the traditions and conscience . . . as to be ranked as fundamental.'"[91]

Initially, the Court articulated that the proper due process analysis was the one announced in *Patterson v. New York*,[92] which required that a less searching inquiry be made when examining a state law that regulated the procedures by which the state carried out its criminal laws.[93] Applying this analysis, the majority asserted that both Court precedent and historical and contemporary practice mandated a finding that the state

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wife concerning Drope's attempt to choke her to death on the eve of the trial, as well as his suicide attempt during the trial itself. *See id.* at 179-80. The Court maintained that the proper course of action, once this evidence was proffered to the trial court, would have been to suspend the proceedings until the court made a competency determination. *See id.* at 181.

[87] *See id.* at 183.

[88] 505 U.S. 437 (1992).

[89] *See id.* at 446.

[90] *See id.* at 452. The state statute at issue stated that "[i]t shall be presumed that the defendant is mentally competent unless it is proved by a preponderance of the evidence that the defendant is mentally incompetent." CAL. PENAL CODE § 1369(f) (West 1982).

[91] *Medina*, 505 U.S. at 446 (quoting Patterson v. New York, 432 U.S. 197, 202 (1977)).

[92] 432 U.S. 197 (1977). The *Patterson* Court upheld a state statute that placed on the defendant the burden of proving the affirmative defense of extreme emotional disturbance. *See id.* at 210. In upholding the statute, the Court noted that "it is normally 'within the power of the State to regulate procedures under which its laws are carried out, including the burden of producing evidence and the burden of persuasion.'" *Id.* at 201.

[93] *See Medina*, 505 U.S. at 445 (citing *Patterson*, 432 U.S. at 201-02). In applying *Patterson* as the proper due process standard, the Court specifically distinguished *Mathews v. Eldridge*. *See Medina*, 505 U.S. at 443 (citing 424 U.S. 319, 335 (1976)). The *Medina* Court determined that the balancing test of *Mathews* was inappropriate in a criminal realm, as that test "was first conceived to address due process claims arising in the context of administrative law." *Id.* at 444. Furthermore, the Court noted that the *Mathews* framework had been applied to resolve due process challenges in criminal law on only two occasions, both of which were distinguishable from the facts before it. *See id.* at 444; *see also* Herrera v. Collins, 506 U.S. 390, 407-08 (1993) (applying *Medina* to determine if a state-imposed time-limit on motions for new trial "offends some principle of justice so rooted in tradition and conscience of our people as to rank as fundamental" (quoting *Patterson*, 432 U.S. at 202)).

rules were not so offensive to a fundamental principle of justice as to be deemed unconstitutional.[94]

Furthermore, Justice Kennedy noted that the defendant's due process rights were sufficiently guarded, even with the burden of proof placed upon the defendant.[95] Moreover, the Justice contended that placing the burden on the defendant would prove outcome-determinative in only a small number of cases.[96] In addition, the majority declared that due process merely guarantees a criminal defendant "a reasonable opportunity to demonstrate that he is not competent to stand trial"[97] and "does not . . . require a State to adopt one procedure over another on the basis that it may produce results more favorable to the accused."[98]

Justice Blackmun, in dissent, insisted that "a Constitution that forbids the trial and conviction of an incompetent person [cannot] tolerate[] the trial and conviction of a person about whom the evidence of competency is so equivocal and unclear."[99] The Justice disagreed with the majority's application of *Patterson*, and believed that in reality the Court actually applied a balancing test via *Mathews v. Eldridge*.[100] Justice Blackmun argued that the "Due Process Clause is not the Some

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[94] *See Medina*, 505 U.S. at 446. The Court noted that there was "no settled tradition" in either English or early American law as to the proper allocation of a burden of proof. *See id.* at 446-47. Furthermore, the majority stated that modern American jurisdictions were divided: some placed the burden on the "moving party;" some placed it on the defendant; and some placed it on the state. *See id.* at 447-48.

The Court also highlighted Supreme Court precedent in finding that "it is enough that the State affords the criminal defendant on whose behalf a plea of incompetence is asserted a reasonable opportunity to demonstrate that he is not competent to stand trial." *Id.* at 451. The Court then declared that "in essence, the challenged presumption [that a state cannot place a rebuttable presumption upon the defendant] is a restatement of the burden of proof, and it follows from what we have said that the presumption does not violate the Due Process Clause." *Id.* at 453.

[95] *See id.* at 449.

[96] *See id.* Justice Kennedy noted that a preponderance of the evidence standard would only affect those "narrow class of cases where the evidence is in equipoise; that is, where the evidence that a defendant is competent is just as strong as the evidence that he is incompetent." *Id.*

[97] *Id.* at 451.

[98] *Id.* Justice O'Connor authored an opinion, joined by Justice Souter, concurring in the judgment, and disagreed that *Patterson* was the proper due process standard. *See id.* at 453 (O'Connor, J., concurring in the judgment). Justice O'Connor applied the balancing test of *Mathews*, yet concluded that it was constitutionally permissible to place the burden on the defendant. *See id.* at 455 (O'Connor, J., concurring in the judgment).

[99] *Medina*, 505 U.S. at 456 (Blackmun, J., dissenting).

[100] *See id.* at 462 (Blackmun, J., dissenting). Initially, Justice Blackmun found fault with the majority's distinction between *Mathews* and *Patterson*, because the sole question at issue was whether the state procedure was "adequate" to protect the defendant's right to not be tried while incompetent. *See id.* at 459 (Blackmun, J., dissenting).

Process Clause" and that the clause must require "*some* conceivable steps be taken to eliminate the risk of erroneous convictions."[101]

The case of a possibly-incompetent defendant was next addressed in *Godinez v. Moran*.[102] As Justice Thomas's opinion for the Court articulated, the question at issue in *Godinez* was whether the competency standard necessary for a defendant to plead guilty or waive his right to counsel was the same as the competency standard for standing trial.[103] Initially, the Court addressed the Ninth Circuit's interpretation of due process, which required a defendant to have the ability to make a "reasoned choice" before being allowed to waive counsel or plead guilty, a standard the lower court determined was distinct from the *Dusky* test of "rational understanding."[104] The Court disagreed and stated that the *Dusky* standard, sufficiently adequate to protect defendants who plead not guilty, must be sufficiently adequate to protect those who plead guilty.[105] Furthermore, Justice Thomas remarked that there was "no reason to believe that the decision to waive counsel requires an appreciably higher level of mental functioning than the decision to waive other constitutional rights."[106] Finally, the Justice asserted that due process allows states to

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[101] *Id.* at 463, 466 (Blackmun, J., dissenting). Justice Blackmun did not disagree with the majority's belief that the allocation of a burden would only be determinative in a limited number of cases. *See id.* at 467 (Blackmun, J., dissenting). Yet the Justice did opine that "[i]n those few difficult cases, the State should bear the burden . . . of ensur[ing] that [the defendant] is competent to defend himself." *Id.* The Justice also asserted that when due process is implicated, "'[t]he individual should not be asked to share equally with society the risk of error when the possible injury to the individual is significantly greater than any possible harm to the state.'" *Id.* (quoting Addington v. Texas, 441 U.S. 418, 427 (1979)).

[102] 509 U.S. 389 (1993). *Godinez*, like its incompetent ancestor *Pate* before it, traveled twice to the Supreme Court. *See id.* at 391-96. Defendant Moran was tried and convicted of murder in the Nevada state court system. *See id.* at 391-93. The Supreme Court of Nevada upheld his conviction, and the United States Supreme Court denied certiorari. *See* Moran v. Whitley, 493 U.S. 874 (1989).

Moran then filed a petition for habeas corpus, which was denied by the United States District Court for the District of Nevada. *See Godinez*, 509 U.S. at 393. The United States Court of Appeals for the Ninth Circuit reversed, stating that "'[c]ompetency to waive constitutional rights,'" such as waiving of counsel or pleading guilty, "'requires a higher level of mental functioning than that required to stand trial.'" *Id.* at 394 (quoting Moran v. Godinez, 972 F.2d 263, 266 (9th Cir. 1992)). Because the issue had divided state courts and federal courts of appeals, the Supreme Court granted certiorari. *See* Godinez v. Moran, 506 U.S. 1033 (1992).

[103] *See Godinez*, 509 U.S. at 391.

[104] *See id.* at 397.

[105] *See id.* at 398-99. Justice Thomas's majority opinion confessed that "[h]ow [the reasonable choice] standard is different from (much less higher than) the *Dusky* standard—whether the defendant has a 'rational understanding' of the proceedings—is not readily apparent to us." *Id.* at 397.

[106] *Id.* at 399.

enact "more elaborate" competency standards than required by *Dusky*, but does not mandate such enactments.[107]

Justice Kennedy, joined by Justice Scalia, authored an opinion concurring in part and in the judgment.[108] The Justice wrote separately to enunciate that the Due Process Clause does not accept the application of differing standards of competency to different situations that may arise in the course of a trial.[109] Because the single *Dusky* standard of competency did not "offend any 'principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental,'" Justice Kennedy proffered that applying differing standards of competency at different trial stages would "disrupt the orderly course of trial and . . . prove unworkable both at trial and on appellate review."[110]

Justice Blackmun, in a dissent joined by Justice Stevens, proclaimed the Court's opinion a "death sentence for a person whose decision to discharge counsel, plead guilty, and present no defense well may have been the product of medication or mental illness."[111] The dissent suggested that the standard for competence was "specifically designed" to ensure that a defendant had the ability to consult with counsel and assist in his own defense.[112] The Justice argued that the reliability of such a finding, and therefore its due process protection, "vanishes when its basic premise—that counsel will be present—ceases to exist."[113] In contrast to the majority, Justice Blackmun recognized that competency in one trial context is not necessarily the same as competency in another context.[114] Finally, the dissent asserted that the "reasonable choice" standard applied by the Ninth Circuit provided better protection to a

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[107] *See id.* at 402. To the majority, the Due Process Clause, in prohibiting the trial of an incompetent defendant, "has a modest aim: [i]t seeks to ensure that he has capacity to understand the proceedings and to assist counsel." *Id.*

[108] *See Godinez*, 509 U.S. at 402 (Kennedy, J., concurring in part and in the judgment).

[109] *See id.* at 404 (Kennedy, J., concurring in part and in the judgment). Justice Kennedy maintained that differing standards were "never the rule at common law, and it would take some extraordinary showing of the inadequacy of a single standard of competency for [the Court] to require States to employ heightened standards." *Id.*

[110] *Id.* at 408 (Kennedy, J., concurring in part and in the judgment).

[111] *Id.* at 409 (Blackmun, J., dissenting).

[112] *See id.* at 412 (Blackmun, J., dissenting). Justice Blackmun noted that a finding of incompetency establishes "only that [the defendant] is capable of aiding his attorney in making the critical decisions required at a trial or in plea negotiations." *Id.* at 413 (Blackmun, J., dissenting).

[113] *Godinez*, 509 U.S. at 413 (Blackmun, J., dissenting).

[114] *See id.* To Justice Blackmun, the majority's "monolithic approach to competency is true to neither life nor the law." *Id.*

defendant than a "reasonable understanding" test, because the former implies an ability to act, rather than just an ability to comprehend.[115]

In an effort to further clarify the standards applicable to incompetency proceedings, the United States Supreme Court, in *Cooper v. Oklahoma*,[116] confronted the issue of whether a state statute that placed a burden of clear and convincing evidence upon a criminal defendant seeking to show his incompetence to stand trial violated due process.[117] The Supreme Court unanimously reversed Cooper's conviction by the Oklahoma Court of Criminal Appeals in an opinion authored by Justice Stevens.[118]

The Court first acknowledged a criminal defendant's fundamental liberty interest not to be tried while incompetent,[119] and Justice Stevens quoted from the concurrence in *Riggins v. Nevada*[120] to emphasize the significance of that interest.[121] The Justice also reiterated that the test for incompetence, first set out in *Dusky*, was whether the defendant had "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding . . . [and] a rational as well as factual understanding of the proceedings against him."[122]

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[115] *See id.* at 415 & n.3 (Blackmun, J., dissenting). Justice Blackmun contended that the majority failed to recognize "that, in the distinction between a defendant who possesses a 'rational understanding' of the proceedings and one who is able to make a 'rational choice,' lies the difference between the capacity for passive and active involvement in the proceedings." *Id.*

[116] 116 S. Ct. 1373 (1996).

[117] *See id.* at 1374-75.

[118] *See id.* at 1374, 1384.

[119] *See id.* at 1376 (citing Medina v. California, 505 U.S. 437, 453 (1992); Drope v. Missouri, 420 U.S. 162, 171-72 (1975); Pate v. Robinson, 383 U.S. 375, 378 (1966)); *see also supra* notes 67-76 and accompanying text (discussing *Pate*); *supra* notes 77-87 and accompanying text (discussing *Drope*); *supra* notes 88-101 and accompanying text (discussing *Medina*).

[120] 504 U.S. 127, 139 (1992) (Kennedy, J., concurring in the judgment). Justice Kennedy noted that:

> [c]ompetence to stand trial is rudimentary, for upon it depends the main part of those rights deemed essential to a fair trial, including the right to effective assistance of counsel, the right to summon, to confront, and to cross-examine witnesses, and the right to testify on one's own behalf or to remain silent without penalty for doing so.

Id. at 139-40 (Kennedy, J., concurring in the judgment) (citation omitted).

[121] *See Cooper*, 116 S. Ct. at 1376-77. The Court noted that "the right not to stand trial while incompetent is sufficiently important to merit protection even if the defendant has failed to make a timely request for a competency determination." *Id.* at 1377 n.4 (citing *Pate*, 383 U.S. at 384).

[122] Dusky v. United States, 362 U.S. 402, 402 (1960) (per curiam) (internal quotation marks omitted). The Oklahoma statutory standard of competency is substantially similar to that adopted by the *Dusky* Court, asking whether the defendant has the "present ability of a person arrested for or charged with a crime to understand the nature of the charges and proceedings against him and to effectively and rationally assist in his defense."

The Court then explained the holding of *Medina v. California*,[123] which noted that states may presume the competency of a criminal defendant and force that defendant to prove incompetency by a preponderance of the evidence.[124] The *Medina* Court, Justice Stevens stated, focused its due process inquiry on whether a presumption of competency "offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental."[125] Justice Stevens explained that *Medina* determined that a presumption of competency did not offend any recognized principle of "fundamental fairness"[126] because the procedural rule at issue affected only a small segment of the competency cases.[127] More specifically, the Court elaborated, the rule at issue in *Medina* would only be invoked when the evidence tending to show competency was equally as strong as the evidence against it.[128]

The Court distinguished the issue in *Cooper* from the issue in *Medina*.[129] Justice Stevens explained that *Cooper* posed the question of "whether a State may proceed with a criminal trial after the defendant has demonstrated that he is more likely than not incompetent."[130] The Court noted that Oklahoma did not argue that it could impose the higher standard of beyond a reasonable doubt on the defendant,[131] yet the state

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OKLA. STAT. ANN. tit. 22, § 1175.1(1) (West Supp. 1996).

[123] 505 U.S. 437 (1992).

[124] *See Cooper*, 116 S. Ct. at 1377 (citing Medina v. California, 505 U.S. 437, 449 (1992)); *see also supra* notes 88-101 and accompanying text (discussing *Medina*).

[125] *Cooper*, 116 S. Ct. at 1377 (quoting Patterson v. New York, 432 U.S. 197, 202 (1977)) (internal quotation marks omitted).

[126] *See supra* note 9 and accompanying text (addressing the notion of "fundamental fairness").

[127] *See Cooper*, 116 S. Ct. at 1377 (citing *Medina*, 505 U.S. at 449).

[128] *See id.*

[129] *See id.*

[130] *Id.* Oklahoma argued that, under Court precedent, "although due process requires basic procedural safeguards be observed, balancing of society's interest against those of the accused has been left to the legislative branch." Respondent's Brief, *supra* note 38, at *12-13. Under this balancing approach, "the clear and convincing intermediate level of proof adopted by [the] Legislature is sufficient to protect the values of society and is an accurate reflection of how the risk of error should be distributed." *Id.* at *13.

[131] *See Cooper*, 116 S. Ct. at 1377 (citing Transcript of Oral Argument at *46-47, Cooper v. Oklahoma, 116 S. Ct. 1373 (No. 95-5207) (1996) (*available in* 1996 WL 21695)) (the counsel for the State "very much doubt[ed] if any State could enact [a standard of] beyond a reasonable doubt consistent with the fundamental requirement of fairness and an opportunity for the defendant")). Only one state, Maryland, requires a burden of beyond a reasonable doubt in competency proceedings, and there the burden is on the state to disprove the defendant's incompetency. *See* Langworthy v. State, 416 A.2d 1287, 1295 (Md. Ct. Spec. App. 1980) (stating that a trial judge, "even if he is persuaded by a preponderance of evidence . . . or, yet more, he is persuaded clearly and convincingly . . . he must still find the defendant incompetent absent persuasion beyond

did contend that a standard of clear and convincing evidence sufficiently balanced both the state's and defendant's competing interests.[132] Regardless, the Court was "persuaded, by both traditional and modern practice and the importance of the constitutional interest at stake" that the State's argument was erroneous.[133]

In its next step toward rejecting Oklahoma's argument, the Court discussed the history of competency evaluations to determine whether earlier courts had deemed competency interests fundamental.[134] Justice Stevens began the inquiry by examining the traditions of the English common law.[135] The Justice, while noting that pre-constitutional English case history did not clearly delineate a standard of competency,[136] observed that prominent English jurisprudential theorists felt a court could not try a "mad" defendant.[137] By the Eighteenth Century, the Court stated, English cases began to hint at the proper standard through jury instructions.[138] Justice Stevens highlighted the case *Queen v.*

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a reasonable doubt in the other direction"), *cert. denied sub nom.* Langworthy v. Maryland, 450 U.S. 960 (1981).

[132] *See Cooper*, 116 S. Ct. at 1377. Oklahoma claimed that a higher standard was justified in light of the substantial procedural safeguards afforded to criminal defendants. *See* Respondent's Brief, *supra* note 38, at *22. The State looked to, inter alia, the defendant's ability to have counsel provided, to be examined by psychiatric experts at state expense, and that the issue of competency could be raised at any time during the criminal procedure. *See id.* at *22, *28; *see also supra* note 43 (detailing the procedural protections afforded under Oklahoma law). The State thought that these protections, which were not available to the same degree at the early common law, sufficiently justified a heightened standard that would better protect the State's interest. *See* Respondent's Brief, *supra* note 38, at *22.

[133] *Cooper*, 116 S. Ct. at 1377.

[134] *See id.* at 1377-80.

[135] *See id.* at 1377.

[136] *See id.* The earliest case the Court cited was *Trial of Charles Bateman*, which was decided in 1685. *See id.* (citing 11 How. St. Tr. 474 (1816)). The *Bateman* court noted that "nothing is more certain law, than that a person who falls mad after a crime supposed to be committed, shall not be tried for it." *Id.* at 476; *see also* Kinloch's Case, 18 How. St. Tr. 395, 411 (1746) ("[N]o trial ought to proceed to the condemnation of a man, who by the providence of God is rendered totally incapable of speaking for himself, or of instructing others to speak for him.").

[137] *See Cooper*, 116 S. Ct. at 1377-78; *see also* 4 WILLIAM BLACKSTONE, COMMENTARIES 864 (George Chase ed., 4th ed. 1938). In the well-known commentaries authored by Blackstone, the renowned English legal scholar, it is stated that:

> In criminal cases therefore, idiots and lunatics are not chargeable for their own acts, if committed when under these incapacities . . . . Also, if a man in his sound memory commits a capital offense, and before arraignment for it, he becomes mad, he ought not to be arraigned for it; because he is not able to plead to it with that advice and caution that he ought. And if, after he has pleaded, the prisoner becomes mad, he shall not be tried: for how can he make his defense?

Id.

[138] *See Cooper*, 116 S. Ct. at 1378.

Goode,[139] where the English court instructed the jury to determine whether the defendant was "insane or not."[140] The Court also recognized that in 1800, England codified the common-law rule that a jury could be assembled to determine the competency of a defendant charged with treason, murder, or some other felony.[141]

These English authorities, the Court stated, stood for the proposition that, traditionally, a jury determining the competence of a defendant considered whether he was "more likely than not" incompetent.[142] There was nothing in these cases, the Justice observed, that hinted to a standard higher than a preponderance of the evidence, and more specifically to clear and convincing evidence.[143] Justice Stevens also acknowledged that these cases did not indicate that these preponderance-like standards were a departure from even earlier practice.[144]

Having determined that old-English law had not employed a clear and convincing standard, the Court reasoned that it must move forward in time to examine modern case law.[145] The Justice found more supportive evidence in twentieth-century English law, where the court in *Queen v.*

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[139] 112 Eng. Rep. 572 (K.B. 1837). The defendant in *Goode* was charged with "uttering seditious words" against the Queen when he claimed that she was "an usurper" and that he would "have [her] off the throne." *Id.*.

[140] *See Cooper*, 116 S. Ct. at 1378. Justice Stevens noted these early courts often referred to a defendant's "insanity" rather than his "competence." *See id.* n.8. Regardless of the terminology used, however, the Court recognized that the key issue in these cases was whether the defendant was sufficiently able to comprehend the nature of the trial and the charges against him. *See id.* (quoting King v. Pritchard, 173 Eng. Rep. 135, 135 (K.B. 1836) (jury properly impaneled to determine whether mute defendant charged with bestiality had "sufficient intellect to comprehend the course of the proceedings, so as to make a proper defence")).

[141] *See id.* at 1378; *see also* Criminal Lunatics Act, 1800, 39 & 40 Geo. 3, ch. 94, § 2 (Eng.). The act mandated that if "any person indicted for any offence" was found to be insane "by a jury lawfully impannelled for that purpose, so that such person cannot be tried," the court was to "order such person to be kept in strict custody until his Majesty's pleasure shall be known." *Id.*

[142] *See Cooper*, 116 S. Ct. at 1378. Justice Stevens placed emphasis on the "disjunctive" phrasing of these jury instructions. *See id.* While many of the courts issuing these jury instructions did not use the exact phrase "preponderance of the evidence," the disjunctive language necessitates finding a defendant to be either competent or incompetent based upon the same inquiry. *See id.*; *see also* BLACK'S LAW DICTIONARY 1183 (6th ed. 1990) (defining "preponderance of the evidence" as "evidence which is of greater weight or more convincing than the evidence which is offered in opposition to it" and "evidence which as a whole shows that the fact sought to be proved is more probable than not").

[143] *See Cooper*, 116 S. Ct. at 1378.

[144] *See id.*

[145] *See id.* at 1378-80.

Podola[146] ruled "'the onus [of proving incompetency] is discharged if the jury [is] satisfied on the balance of probabilities'" that the defendant is incompetent.[147]

The Court next examined the historical practice in the United States and noted that the earliest American case law echoed the previously examined English authorities.[148] The Justice noted that there was an explicit use of a preponderance standard by the turn of the twentieth century.[149] The Court first looked to *Jordan v. State*,[150] where a jury instruction from a Tennessee court indicated that a competency proceeding must be "'controlled by a preponderance of the proof.'"[151] This standard, the Court noted, echoed the one used by the Pennsylvania Supreme Court in *Commonwealth v. Simanowicz*.[152] Again, Justice Stevens reiterated that these authorities did not use a standard of clear and convincing evidence.[153] The Justice also remarked that many of these early cases distinctly mentioned the common-law roots of

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[146] 3 All E.R. 418 (1959).

[147] *Cooper*, 116 S. Ct. at 1379 (quoting Queen v. Podola, 3 All E.R. 418, 429 (1959)). Chief Justice Lord Parker, writing in *Podola*, noted that such a test has been applied "so often that [it] may be said to be firmly embodied in our law." *Podola*, 3 All E.R. at 431.

[148] *See Cooper*, 116 S. Ct. at 1379. The Court noted that in *Commonwealth v. Braley*, a case decided following the ratification of the Constitution in Massachusetts, the court instructed the jury to consider "'whether [the accused] neglected or refused to plead to the indictment against him for murder, of his free will and malice, or whether he did so neglect by the act of God.'" *Id.* n.12 (citing 1 Mass. 102 (1804)) (alteration in original). The Court hypothesized that this instruction may have been a precursor to the "sane or insane" disjunctive employed by other English and American courts of this period. *See id. See generally* Freeman v. People, 4 Denio 9 (N.Y. 1847) (adopting jury instructions of King v. Dyson, 173 Eng. Rep. 135 (1836)). These cases, while not explicitly adopting a preponderance standard, often stated the inquiry in the disjunctive, similar to the early English courts. *See supra* note 142 and accompanying text (discussing use of disjunctive phrasing in early English jury instructions).

[149] *See Cooper*, 116 S. Ct. at 1379.

[150] 135 S.W. 327 (Tenn. 1911). The *Jordan* court noted that the object of an incompetency hearing is "to determine whether [the defendant] has mind and discretion which would enable him to appreciate the charge against him, the proceedings thereon, and enable him to make a proper defense." *Id.* at 329.

[151] *Cooper*, 116 S. Ct. at 1379 (quoting *Jordan*, 135 S.W. at 329).

[152] *See id.*; 89 A. 562, 563 (Pa. 1913). In *Simanowicz*, competency was determined "by a preponderance of the evidence." 89 A. at 563. As the *Cooper* Court noted, a sampling of case law from many jurisdictions reinforced its findings that a preponderance standard was the traditional standard for competency determinations. *See Cooper*, 116 S. Ct. at 1379 n.14; *see, e.g.*, State v. Arnold, 12 Iowa 479, 484 (1861) ("A doubt must be raised whether at the time there is such mental impairment . . . as to render it probable that the prisoner cannot . . . have a full, fair and impartial trial."); People v. McElvaine, 26 N.E. 929, 933 (N.Y. 1891) (noting the court "had sufficient grounds before it to judge as to the probability of [defendant's] present sanity").

[153] *See Cooper*, 116 S. Ct. at 1379-80.

competency standards.[154] Finally, the Court commented that Oklahoma had no quarrel with the notion that early cases used a preponderance standard.[155]

Having determined that, historically, the preponderance standard was employed in competency determinations, the Court discussed the current standards in American jurisdictions.[156] First, Justice Stevens explained that only four jurisdictions required a burden of clear and convincing evidence in competency determinations,[157] and the remaining jurisdictions apply no more than a preponderance standard.[158] While

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[154] *See id.* at 1379 n.14; *see, e.g.*, French v. State, 67 N.W. 706, 710 (Wis. 1896) (noting a competency statute "providing for an inquisition, where there is a probability that the accused is . . . insane, and thereby incapacitated to act for himself, to determine whether he is so insane, is substantially [an] affirmance of a power the court had at common law in such cases, as abundantly appears from the authorities").

[155] *See Cooper*, 116 S. Ct. at 1380 n.15. Oklahoma argued that even if "common law demanded and applied a preponderance of the evidence burden . . . [history] does not compel such a result today." Respondent's Brief, *supra* note 38, at *21. To assume such a deferential approach to history, the State argued, "'would be to stamp upon [the Court's] jurisprudence the unchangeableness attributed to the laws of the Medes and the Persians.'" *Id.* (quoting Burnham v. Superior Ct., 495 U.S. 604, 619 (1990)).

[156] *See Cooper*, 116 S. Ct. at 1380.

[157] *See id.* & n.16; CONN. GEN. STAT. § 54-56d(b) (1994) (stating the standard for incompetency proceedings to be clear and convincing evidence); OKLA. STAT. ANN. tit. 22, § 1175.4(B) (West Supp. 1996) (same); 50 PA. CONS. STAT. § 7403(a) (Supp. 1996) (same); R.I. GEN. LAWS § 40.1-5.3-3(5)(b) (Supp. 1995) (same). Since the *Cooper* decision, Connecticut, Oklahoma, Pennsylvania, and Rhode Island have amended their incompetency tests to meet the *Cooper* preponderance standard. *See* 1996 Conn. Legis. Serv. 96-215 (West) (changing the standard from clear and convincing evidence to preponderance of the evidence); 1996 Okla. Sess. Law Serv. 161 (West) (same); 1996 Pa. Legis. Serv. 77 (West) (same); 1996 R.I. Pub. Laws 96-299 (same).

[158] *See Cooper*, 116 S. Ct. at 1380 & n.17; *see, e.g.*, 1996 Alaska Sess. Laws. 62 (West); CAL. PENAL CODE § 1369(f) (West 1982); COLO. REV. STAT. ANN. § 16-8-111(2) (West 1990); Diaz v. State, 508 A.2d 861, 863 (Del. 1986); Flowers v. State, 353 So. 2d 1259, 1260 (Fla. Dist. Ct. App. 1978); Johnson v. State, 433 S.E.2d 717, 719 (Ga. Ct. App. 1993); 725 ILL. COMP. STAT. ANN. 5/104-11(c) (West 1992); State v. Rhode, 503 N.W.2d 27, 35 (Iowa Ct. App. 1993); State v. Rogers, 419 So. 2d 840, 843 (La. 1982); MASS. GEN. LAWS ANN. ch. 123, § 15(d) (West Supp. 1996); MINN. R. CRIM. P. 20.01, subd. 3(6); State v. Ehrenberg, 284 N.J. Super. 309, 313, 664 A.2d 1301, 1303 (Law Div. 1994); People v. Lopez, 484 N.Y.S.2d 974, 981 (App. Div. 1985); State v. VanNatta, 506 N.W.2d 63, 65 (N.D. 1993); OHIO REV. CODE ANN. § 2945.37(A) (Anderson 1996); State v. Nance, 466 S.E.2d 349, 351 (S.C. 1996); S.D. CODIFIED LAWS § 23A-10A-6.1 (Michie 1988); TEX. CRIM. P. CODE ANN. § 46.02(1)(b) (West 1979); UTAH CODE ANN. § 77-15-5(10) (1995); VA. CODE ANN. § 19.2-169.1(E) (Michie 1995); WASH. REV. CODE ANN. § 10.77.090(2) (West 1990); W. VA. CODE § 27-6a-2(b) (1992); Loomer v. State, 768 P.2d 1042, 1045 (Wyo. 1989).

Only one state requires a burden of beyond a reasonable doubt, yet the burden falls on the state to *disprove* the defendant's incompetency. *See* Langworthy v. State, 416 A.2d 1287, 1295 (Md. Ct. Spec. App. 1980), *cert. denied sub nom.* Langworthy v. Maryland, 450 U.S. 960 (1981) (stating that a trial judge, "even if he is persuaded by a preponderance of the evidence . . . or yet more, he is persuaded clearly and convincingly . . . he must still find the defendant incompetent absent persuasion beyond a reasonable

some of these states require the defendant to prove his incompetency,[159] Justice Stevens recognized that a number of jurisdictions place the burden to prove the defendant's competency on the prosecution once the issue has been raised.[160] Furthermore, the Justice observed that the standard for competency determinations in federal courts places a burden on the

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doubt in the other direction").

Some of the jurisdictions do not make clear what the appropriate standard is. *See, e.g.*, ARIZ. R. CRIM. P. 11.5(b)(3) ("If the court determines that the defendant is incompetent . . . it shall order him committed . . . ."). Yet nothing in the case law traditions of these states suggests that the standard is higher than a preponderance of the evidence. *See, e.g.*, Mitchell v. State, 913 S.W.2d 264, 266 (Ark. 1996) (proclaiming that a defendant is presumed competent unless he proves otherwise); State v. Clark, 546 S.W.2d 455, 468 (Mo. Ct. App. 1976) (proclaiming that, in incompetency proceedings, the "[t]raditional burden of proof has no meaning").

[159] *See Cooper*, 116 S. Ct. at 1380; *see, e.g.*, Mask v. State, 869 S.W.2d 1, 5 (Ark. 1993) (placing burden of proof on defendant); *Rhode*, 503 N.W.2d at 35 (same); Mozee v. Commonwealth, 769 S.W.2d 757, 758 (Ky. 1989) (same); *Rogers*, 419 So. 2d at 843 (same); *Johnson*, 433 S.E.2d at 719 (same); State v. Caudill, 789 S.W.2d 213, 215 (Mo. Ct. App. 1990) (same); State v. Chapman, 721 P.2d 392, 395-96 (N.M. 1986) (same); State v. Baker, 320 S.E.2d 670, 677 (N.C. 1984) (same); *Nance*, 466 S.E.2d at 351 (same); Penry v. State, 903 S.W.2d 715, 729 (Tex. Crim. App. 1995) (same).

[160] *See Cooper*, 116 S. Ct. at 1380 & n.18; Lackey v. State, 615 So. 2d 145, 152 (Ala. Crim. App. 1992) (placing burden of proof on prosecution); Diaz v. State, 508 A.2d 861, 863 (Del. 1986) (same); 725 ILL. COMP. STAT. ANN. 5/104-11(c) (West 1992) (same); *Langworthy*, 416 A.2d at 1294 (same); Commonwealth v. Prater, 651 N.E.2d 833, 837 (Mass. 1995) (same); Griffin v. State, 504 So. 2d 186, 191 (Miss. 1987) (same); People v. Lopez, 484 N.Y.S.2d 974, 981 (App. Div. 1985) (same); *VanNatta*, 506 N.W.2d at 65 (same); State v. Pruitt, 480 N.E.2d 499, 506 (Ohio Ct. App. 1984) (same); S.D. CODIFIED LAWS § 23A-10A-6.1 (Michie 1988) (same).

Some states place the burden of proving or disproving the defendant's incompetency on the party, either the prosecution or defense, that initially raises the issue. *See, e.g.*, COL. REV. STAT. ANN. § 16-8-111(2) (West 1990) (placing burden of proof in competency proceeding on the "party asserting" incompetency); UTAH CODE ANN. § 77-15-5(10) (1995) (placing burden on "proponent of incompetency"); VA. CODE ANN. § 19.2-169.1(E) (Michie 1995) (placing burden on "party alleging that defendant is incompetent"); *Loomer*, 768 P.2d at 1045 (placing burden on "party seeking to establish that the accused is competent").

Still other states take the approach of assigning no specific burden to either party in an incompetency proceeding. *See, e.g., Flowers*, 353 So. 2d at 1260 (determining that, once the defendant's competency is made an issue, by either the defense or the prosecution, "the matter is simply submitted to the conscience of the trial judge"); Montano v. State, 649 N.E.2d 1053, 1057 (Ind. Ct. App. 1995) (holding that a failure to assign the burden to either party under state statute did not violate due process).

California takes a unique approach in its burden placement, placing the burden on the prosecution only when it is the "only party seeking" an incompetency finding. *See* People v. Skeirik, 280 Cal. Rptr. 175, 184 (Ct. App. 1991). When neither the prosecution nor the defense counsel questions the defendant's competency, and instead the trial court raises the issue, the court then "assumes the burden of producing evidence of incompetence," and the court "should not instruct the jury that either party has the burden of proof." *Id.*

defendant to prove incompetency by a preponderance of the evidence.[161] As a result of "[t]he near-uniform application of a standard that is more protective of the defendant's rights than Oklahoma's clear and convincing evidence rule,"[162] the Court determined that the State's "heightened standard offends a principle of justice that is deeply 'rooted in the traditions and conscience of our people.'"[163]

Justice Stevens next inquired whether the Oklahoma standard exhibited "fundamental fairness in operation."[164] In answering this question in the negative, the Court initially reinforced the function of a "burden of proof."[165] The Court explained that a burden standard functions to "instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication."[166] Furthermore, Justice Stevens stressed that the higher a standard of proof placed on a party, "'the more that party bears the risk of an erroneous decision.'"[167] Because of this risk, Justice Stevens elaborated, due process places a heightened burden on the state in certain proceedings where "individual interests at stake . . . are both 'particularly important' and 'more substantial than mere loss of money.'"[168]

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[161] *See Cooper*, 116 S. Ct. at 1380; 18 U.S.C. § 4241(d) (1988) (stating the proper standard in incompetency proceedings to be preponderance of the evidence).

[162] *Cooper*, 116 S. Ct. at 1380.

[163] *Id.* (quoting Medina v. California, 505 U.S. 437, 445 (1992)).

[164] *Id.* (quoting *Medina*, 505 U.S. at 448 (citing Dowling v. United States, 493 U.S. 342, 352 (1990))) (internal quotation marks omitted).

[165] *See id.* at 1380-81.

[166] *Id.* at 1381 (quoting Addington v. Texas, 441 U.S. 418, 423 (1979) (quoting *In re* Winship, 397 U.S. 358, 370 (1970) (Harlan, J., concurring))) (internal quotation marks omitted). The *Addington* Court held that to justify *civil* commitment, the state must satisfy its commitment criteria by clear and convincing evidence. *See* 441 U.S. at 433.

[167] *Cooper*, 116 S. Ct. at 1381 (quoting Cruzan v. Director, Mo. Dep't of Health, 497 U.S. 261, 283 (1990)).

[168] *Id.* (quoting Santosky v. Kramer, 455 U.S. 745, 756 (1982) (quoting *Addington*, 441 U.S. at 424)). The Court also noted other situations where a heightened burden of proof has been allowed. *See id.* n.19 (citing *Addington*, 441 U.S. at 433 (involuntary civil commitment); Woodby v. INS, 385 U.S. 276, 277 (1966) (deportation); Chaunt v. United States, 364 U.S. 350, 355 (1960) (denaturalization); Schneiderman v. United States, 320 U.S. 118, 158 (1943) (same)).

Oklahoma argued that the Court's holdings in *Cruzan* and *Ohio v. Akron Center for Reproductive Health* allowed the state to impose heightened burdens when that standard "served as a 'societal judgment about how the risk of error should be distributed between the litigants.'" Respondent's Brief, *supra* note 38, at *26 (quoting *Cruzan*, 497 U.S. at 280; citing Ohio v. Akron Ctr. for Reprod. Health, 497 U.S. 502 (1990)). Yet Justice Stevens distinguished and limited the scope of these decisions. *See Cooper*, 116 S. Ct. at 1381 n.19. *Cruzan*, the Justice argued, allowed a heightened standard of clear and convincing evidence where a third party was making a decision to terminate the life-support of an incompetent patient, because the consequences of that third-party's

The Court concluded that the Oklahoma standard placed a substantial risk on the defendant because it may lead to an erroneous determination.[169] *Medina* was distinguishable, the Justice explained, because in that case an incorrect competency determination imposed no similarly substantial risk on the defendant.[170] The placement of the preponderance burden in *Medina*, Justice Stevens opined, would only be important in the limited number of "cases in which the evidence on either side [is] equally balanced."[171] The Court noted that the danger of erroneous decisions was far greater in the present scenario because Oklahoma's clear and convincing evidence standard would affect cases where the defendant had already shown that he or she was "more likely than not" incompetent.[172]

Furthermore, the Court noted, the results of an incorrect competency decision for the defendant were "dire."[173] Because the defendant was more likely than not incompetent and had not reached the clear and convincing burden, the Court expressed fear that he may be unable to effectively participate in his defense, or employ other fundamental rights afforded to him that are essential to a fair trial.[174] The Court recognized that a defendant found to be competent would then have to determine, inter alia, whether to plead guilty, to waive his privilege against self-incrimination, or to bypass his right to "confront" his accusers through cross-examination.[175] Justice Stevens concluded therefore that competence, because of its pertinence to these other rights, is a "fundamental component of our criminal justice system."[176]

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decision, if erroneous, were "irreversible." *See id.* (citing *Cruzan*, 497 U.S. at 280). Furthermore, Justice Stevens reasoned that the Court upheld the heightened standard in *Akron Center*, where an Ohio statute required an unemancipated woman who sought an abortion to show by clear and convincing evidence that a judicial bypass of the State parental notification requirement was appropriate, "largely because the proceeding at issue was ex parte." *Id.* (citing *Akron Ctr. for Reprod. Health*, 497 U.S. at 515-16).

[169] *See Cooper*, 116 S. Ct. at 1381.

[170] *See id.*

[171] *Id.* In *Medina*, while the lower court employed a preponderance of the evidence standard, the Court felt that this burden would only "affect competency determinations in a narrow class of cases where the evidence is in equipoise; that is, where the evidence that a defendant is competent is just as strong as the evidence that he is incompetent." Medina v. California, 505 U.S. 437, 449 (1992); *see also supra* note 96 and accompanying text.

[172] *See Cooper*, 116 S. Ct. at 1381.

[173] *See id.*

[174] *See id.* (quoting Riggins v. Nevada, 504 U.S. 127, 139 (1992) (Kennedy, J., concurring in the judgment)).

[175] *See id.* at 1381-82.

[176] *Id.* at 1382 (quoting United States v. Cronic, 466 U.S. 648, 653 (1984)) (internal quotation marks omitted).

The Court next explained that it must examine whether the defendant's substantial interest in an accurate competency determination outweighed the state's interest in preventing a defendant from malingering.[177] Justice Stevens recognized that the state had an interest in limiting court expenses and providing prompt judicial resolutions, but determined that these were "modest" in comparison to the defendant's interests.[178] First, the Justice reiterated that a state is able to detain an incompetent defendant for a reasonable time "'to determine whether there is a substantial probability that he will attain [competence] in the foreseeable future.'"[179] Next, the Court professed that some defendants would be successful in faking incompetency, yet presumed "that it is unusual for even the most artful malingerer to feign incompetence successfully for a period of time while under professional care."[180] Finally, the Court questioned why such a heightened standard, if necessary to protect the state's interests,[181] had only been adopted by four jurisdictions.[182] Justice Stevens presumed that the early courts were similarly forced to combat defendants who faked competency; these courts, however, had felt no need to apply a standard higher than a preponderance of the evidence.[183]

The Court accepted that even if it were appropriate to place the burden on the "proponent of an issue," that alone did not justify raising the standard that the proponent must prove.[184] Because a heightened

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[177] *See Cooper*, 116 S. Ct. at 1382.

[178] *See id.*

[179] *Id.* (quoting Jackson v. Indiana, 406 U.S. 715, 738 (1972)) (alteration in original). If a defendant regains competence or is found to be fraudulent, the state can proceed with the trial. *See Jackson*, 406 U.S. at 738. Beyond the traditional NGRI verdict, some states have adopted another verdict in criminal cases, generally called "guilty but mentally ill" (GBMI). *See, e.g.*, MICH. COMP. LAWS ANN. § 768.36 (West 1982). Generally, the effect of a GBMI verdict is that the defendant is sentenced as if she were found guilty, but she may begin to serve that sentence by receiving psychiatric care in either a prison or a mental institution. *See* DRESSLER, *supra* note 12, § 25.08, at 316-17. If the defendant is "cured" during this initial treatment period, she will be returned to the general prison population to complete her prison sentence. *See id.*

[180] *Cooper*, 116 S. Ct. at 1382.

[181] *See* Respondent's Brief, *supra* note 38, at *28 (claiming that a clear and convincing standard limits the "chances of [a defendant] manipulating the facts to result in an erroneous finding of incompetency").

[182] *See supra* note 158 (listing those jurisdictions that applied the clear and convincing standard prior to the *Cooper* decision).

[183] *See Cooper*, 116 S. Ct. at 1382. The courts of the eighteenth and nineteenth centuries, for instance, "warned jurors charged with making competency determinations that 'there may be great fraud in this matter.'" *Id.* (quoting King v. Dyson, 173 Eng. Rep. 135, 136 n.(a) (1831)) (citations omitted) (internal quotation marks omitted).

[184] *See id.* As the district court explained in *United States v. Chisolm*,

> [i]t would be a reproach to justice if a guilty man . . . postponed his trial upon a feigned condition of the mind, as to his inability to aid in his

standard does not decrease the risk that an incorrect competency determination will be made, the Court accepted that it "simply reallocates the risk between the parties."[185] Justice Stevens confessed that the Court could perceive no basis for allocating the "large share of the risk which accompanies a clear and convincing evidence standard"[186] to the defendant because the issue of competence will be raised in cases where one side would easily prevail and in cases where the evidence would be strong enough to prevail on a preponderance standard, but not on the clear and convincing evidence standard.[187] Even though the Court recognized the importance of Oklahoma's interests, the Justice concluded that the defendant's fundamental right to be tried only when competent was greater than the state's interests in an efficient judicial process.[188]

Justice Stevens next addressed Oklahoma's argument that it was the province of the individual state to ordain the laws and procedures by which its criminal laws are given effect.[189] The Justice stated that in *Patterson v. New York*,[190] the Court had upheld a state requirement,

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> defense, . . . it would likewise be a reproach to justice and our institutions, if a human being . . . were compelled to go to trial at a time when he is not sufficiently in possession of his faculties to enable him to make a rational and proper defense. The latter would be a more grievous error than the former; since in one case an individual would go unwhipped of justice, while in the other the great safeguards which the law adopts in the punishment of crime and the upholding of justice would be rudely invaded by the tribunal whose sacred duty it is to uphold the law in all its integrity.

149 F. 284, 288 (S.D. Ala. 1906).

[185] *Cooper*, 116 S. Ct. at 1383 (citing Cruzan v. Director, Mo. Dep't of Health, 497 U.S. 261, 283 (1990)).

[186] *Id.*

[187] *See id.*

[188] *See id.*

[189] *See id.* Oklahoma argued that "[s]tates are free to adopt their own standards of proof consistent with their own concepts of public policy and fairness." Respondent's Brief, *supra* note 38, at *12. The State further posited that because the statutes applicable to competency determinations vary from state to state, the procedures necessary to protect due process must also be permitted to vary. *See id.* at *39. Furthermore, Oklahoma maintained:

> Cases in [the Supreme Court] have long proceeded on the premise that the Due Process Clause guarantees the fundamental elements of fairness in a criminal trial . . . . But it has never been thought that such cases establish [the] Court as a rule making organ for the promulgation of state rules of criminal procedure.

Id. at *40 (quoting Estelle v. McGuire, 502 U.S. 62, 70 (1991)).

Even in the rare cases when the Supreme Court has articulated a specific standard of proof, Oklahoma noted that the Court has held "that determination of the precise burden . . . is a matter of state law properly left to state legislatures and state courts." *Id.* at *41 (quoting Santosky v. Kramer, 455 U.S. 745, 769-70 (1982)) (internal quotation marks omitted).

[190] 432 U.S. 197 (1977).

consistent with common-law tradition, that placed the burden of proving an affirmative defense on a defendant charged with murder.[191] The Justice recognized that while the *Patterson* Court had upheld the statute at issue, the Court did so only because the law did not offend "some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental."[192] The Court explained that the Oklahoma statute, unlike its counterpart in *Patterson*, did offend such a fundamental principle.[193] The Justice further distinguished the statutes at issue in each case,[194] explaining that the statute in *Patterson* concerned a statutory defense, while the Oklahoma statute concerned the procedures by which the state guaranteed a fundamental right.[195]

Lastly, the Court responded to Oklahoma's final argument, that the holding of *Addington v. Texas*,[196] which upheld a clear and convincing evidence standard in civil commitment proceedings, similarly allowed a heightened standard in incompetency hearings.[197] First, the Court's opinion stated that the proceedings in civil commitment hearings and those in competency hearings concern distinct substantive issues.[198] The

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[191] *See Cooper*, 116 S. Ct. at 1383 (citing *Patterson*, 432 U.S. at 207-08). The rule in *Patterson* was upheld because due process did not "put New York to the choice of abandoning [statutory] defenses or undertaking to disprove their existence in order to convict of a crime which otherwise is within its constitutional powers to sanction by substantial punishment." *Patterson*, 432 U.S. at 208.

[192] *Id.* (quoting *Patterson*, 432 U.S. at 202) (internal quotation marks omitted).

[193] *See id.*; *see also supra* notes 134-163 and accompanying text (addressing the evolution of competency determinations in court proceedings).

[194] *See Cooper*, 116 S. Ct. at 1383.

[195] *See id.*

[196] 441 U.S. 418 (1979).

[197] *See Cooper*, 116 S. Ct. at 1383-84. "Whether states have adopted their clear and convincing standards in light of [*Addington*] is not particularly relevant. What is clear is that this Court's holding in *Addington* supports such a standard." Respondent's Brief, *supra* note 38, at *25. Oklahoma argued that a defendant who could meet the preponderance standard necessary to prevent a criminal trial, but not the clear and convincing standard necessary for involuntary commitment, "will be in legal limbo." *Id.* at *31. The State believed it was contrary to the purpose of incompetency determinations when "[a]bsent a finding of dangerousness, by clear and convincing evidence, the State is powerless to protect its citizens through either its mental health or judicial processes." *Id.*

[198] *See Cooper*, 116 S. Ct. at 1383. The Court has long drawn a distinction between civil and criminal proceedings and the process requirements that are constitutionally due in each. *See* Allen v. Illinois, 478 U.S. 364, 368 (1986) (holding that the "sexually dangerous persons act" was civil in nature, and that the guarantee against self-incrimination did not apply); *see also* Foucha v. Louisiana, 504 U.S. 71, 95 (1992) (Kennedy, J., dissenting) (noting that "the procedural protections afforded in a criminal commitment surpass those in a civil commitment; indeed, these procedural protections are the most stringent known to our law").

Only if a court determines that a penalty imposed on an individual is a criminal one will the person be entitled to the protections afforded by the Bill of Rights concerning a

Court explained that the test applied in civil commitment proceedings concerns whether the person to be committed has a mental illness and poses a danger to himself or to society.[199] Justice Stevens contrasted this test with the one used in competency hearings where the court is asked to determine whether the defendant has the ability to understand the charges against him and communicate effectively with his counsel.[200] As a result of these differing inquiries, the Justice explained that even by upholding the Oklahoma standard, "the comparable standards in the two proceedings would not guarantee parallel results."[201]

Furthermore, the Court proffered that the decision in the present case complemented the ruling in *Addington,* because both cases concerned the proper level of protection that a fundamental right warrants when a state "proposes to take drastic action against an individual."[202] Justice Stevens explained that the *Addington* standard safeguards an individual's fundamental interest in liberty, and the prohibition against a clear and convincing standard protects a defendant's fundamental right against being tried when incompetent.[203]

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criminal prosecution. *See* NOWAK & ROTUNDA, *supra* note 1, § 13.9, at 534 n.1. While there is no precise standard for determining whether a sanction is criminal or civil, the court often looks at factors underlying the legislation, such as whether the behavior to which it applies is a crime itself, legislative history, and the interests promoted by the penalty. *See id.* Generally, however, courts must examine the statutes to determine whether the system imposed is "punitive in nature." *See id.* Even if the state designates a system as civil, a statute that clearly imposes a punitive penalty will be deemed criminal, triggering the protections afforded by the Bill of Rights. *See id.*

For a general discussion of the distinction between civil and criminal procedures, see Mary M. Cheh, *Constitutional Limits on Using Civil Remedies to Achieve Criminal Law Objectives: Understanding and Transcending the Criminal-Civil Law Distinction,* 42 HASTINGS L.J. 1325 (1991); John C. Coffee, Jr., *Paradigms Lost: The Blurring of the Criminal and Civil Law Models—And What Can Be Done About It,* 101 YALE L.J. 1875 (1992); Kenneth Mann, *Punitive Civil Sanctions: The Middleground Between Criminal and Civil Law,* 101 YALE L.J. 1795 (1992); Franklin E. Zimring, *The Multiple Middlegrounds Between Civil and Criminal Law,* 101 YALE L.J. 1901 (1992).

[199] *See Cooper,* 116 S. Ct. at 1383 (citing O'Connor v. Donaldson, 422 U.S. 563, 573-74 (1975)).

[200] *See id.* at 1384 (citing Dusky v. United States, 362 U.S. 402, 402 (1960)); *see also supra* notes 60-66 and accompanying text (discussing *Dusky*).

[201] *Cooper,* 116 S. Ct. at 1384. "For example, a mentally retarded defendant accused of a nonviolent crime may be found incompetent to stand trial but not necessarily be subject to involuntary civil commitment." *Id.* n.24.

[202] *Id.* at 1384.

[203] *See id.* The Court noted that *Addington* did not attempt to determine the rights of a criminal defendant. *See id.* n.25 Instead, Justice Stevens explained, the *Addington* Court contrasted the situations of a criminal and a civil defendant, because the rules applied in criminal cases are designed "to exclude as nearly as possible the likelihood of an erroneous judgment." *Id.* (quoting *Addington,* 441 U.S. at 423) (internal quotation marks omitted).

As a result of finding that the Oklahoma standard did not properly safeguard Cooper's fundamental right to be free from trial when incompetent,[204] the Court struck down the statute and reversed and remanded Cooper's case to the Oklahoma Court of Criminal Appeals.[205]

Since the initial formulation of the *Dusky* incompetency standard in 1960, the Supreme Court has had multiple opportunities to clarify the procedures necessary to fully guarantee a defendant's due process rights in this area.[206] These cases have been vital to protecting defendants' constitutional rights, and the Court's decision in *Cooper* further meets this goal; the decision is also surprising, however, considering the recent Court trend towards withdrawing itself from criminal law,[207] typically considered the province of the states.[208]

The *Cooper* decision also stands in stark contrast to other court decisions regarding the mental state of criminal defendants, most notably

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[204] For an in-depth analysis of the *Cooper* decision, see *supra* notes 118-203 and accompanying text.

[205] *See Cooper*, 116 S. Ct. at 1384. On remand, Cooper argued that the Supreme Court's disposition of the case left "no other option than to remand his case for retrial." Cooper v. State, 924 P.2d 749, 749-50 (Okla. Crim. App. 1996). Yet the Court of Criminal Appeals of Oklahoma refused to remand automatically for a new trial. *see id.* The court instead ordered the lower court to

> determine the feasibility of conducting an appropriate post-examination competency hearing; and if such a hearing is feasible, to conduct the hearing to determine whether the defendant was competent to stand trial at the time his trial was held, using a constitutionally approved standard of preponderance of the evidence.

Cooper v. State, 924 P.2d 751, 752 (Okla. Crim. App. 1996). Finally, the Court of Criminal Appeals instructed the trial court to grant Cooper a new trial because it was determined that a "post-examination competency hearing . . . would not be feasible." Cooper v. State, 924 P.2d 753, 753 (Okla. Crim. App. 1996).

[206] *See generally* Godinez v. Moran, 509 U.S. 389 (1993); Medina v. California, 505 U.S. 437 (1992); Drope v. Missouri, 420 U.S. 162 (1975); Pate v. Robinson, 383 U.S. 375 (1966). For an in-depth examination of these cases, see *supra* notes 60-115 and accompanying text.

[207] *See, e.g.*, Harmelin v. Michigan, 501 U.S. 957, 994-96 (1991) (holding that a mandatory life sentence for possession of 650 grams or more of drugs does not violate the Eighth Amendment).

[208] *See* Schad v. Arizona, 501 U.S. 624, 636 (1991). Justice Marshall noted that "enforcement of criminal laws is indeed a legitimate goal, but in our system achievement of that goal is left primarily to the States." United States v. Salerno, 481 U.S. 739, 759 n.4 (1987) (Marshall, J., dissenting). Furthermore, Justice Black once commented that a true system of federalism entails:

> a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in separate ways.

Younger v. Harris, 401 U.S. 37, 44 (1971).

the limitations allowed on the "not guilty by reason of insanity"[209] defense. States, responding to public outcry over the "abuse" of the insanity defense, have increasingly attempted to either limit the defense or abolish it altogether.[210] Yet the Supreme Court in *Cooper*, in effect, further distinguished an incompetency determination from an insanity defense,[211] implicitly recognizing the distinct due process issues raised in each. The Court's discussion, beginning with *Dusky* and continuing through *Cooper*, has led to substantial uniformity among the states regarding the procedures governing incompetency determinations, unlike the varying standards applied in jurisdictions concerning the insanity defense.[212] Simply, the Court has increasingly narrowed the ability of the states to prescribe differing procedures, ranging from the substantive standards to be applied[213] to the procedural protections required.[214]

In conclusion, the Court's decision in *Cooper* correctly stands in the way of a public whose intensifying hatred of criminals[215] drives state and federal legislatures to pass increasingly restrictive criminal laws, such as community notification laws, or so-called "Megan's Laws."[216] Yet,

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[209] BLACK'S LAW DICTIONARY 794 (6th ed. 1990) (defining "insanity" as "that degree of mental illness which negates the individual's legal responsibility or capacity").

[210] *See, e.g.*, IDAHO CODE § 18-207(1) (Supp. 1996) (abolishing the insanity defense in criminal trials). Idaho courts have upheld this abolition as constitutional. *See* State v. Odiaga, 871 P.2d 801, 805 (Idaho 1994). Many other courts and commentators have similarly called for the abolition of the insanity defense in other jurisdictions. *See, e.g.*, Washington v. United States, 390 F.2d 444, 457 n.33 (D.C. Cir. 1967) ("[W]e may be forced to eliminate the insanity defense altogether, or refashion it in a way which is not tied so tightly to the medical model.").

[211] *See* ROBINSON, *supra* note 12, § 208(a), at 501 (stating that the insanity defense "considers the defendant's mental capacity at the time of the offense and serves to fully exculpate the defendant for his conduct" while an incompetency finding serves "simply to bar his trial").

[212] *Compare* State v. Harris, 141 N.J. 525, 552, 662 A.2d 333, 346 (1995) (applying *M'Naghten* rules to the insanity defense in state proceedings) *with* United States v. Brawner, 471 F.2d 969, 973 (D.C. Cir. 1972) (adopting the American Law Institute's rules regarding the insanity defense in federal proceedings).

[213] *See generally* Dusky v. United States, 362 U.S. 402 (1960) (per curiam).

[214] *See generally* Cooper v. Oklahoma, 116 S. Ct. 1373 (1996); Godinez v. Moran, 509 U.S. 389 (1993); Pate v. Robinson, 383 U.S. 375 (1966).

[215] *See, e.g.*, Peter Davis, *The Sex Offender Next Door*, N.Y. TIMES MAG., July 28, 1996, at 43 (noting a released sex offender "could not be more of an outcast if he were a leper").

[216] *See, e.g.*, GA. CODE ANN. § 42-9-44.1 (1994); LA. REV. STAT. ANN. § 15:546(A) (West Supp. 1997); MISS. CODE ANN. § 45-33-17 & -19 (Supp. 1995); N.D. CENT. CODE § 12.1-32-15 (Supp. 1995); TENN. CODE ANN. § 40-39-106 (Supp. 1996). Megan's Laws became part of the national consciousness in 1994 as a result of the sexual assault and murder of seven-year-old Megan Kanka in New Jersey. *See* Elga A. Goodman, Comment, *Megan's Law: The New Jersey Supreme Court Navigates Uncharted Waters*, 26 SETON HALL L. REV. 764, 764 (1996). The public outcry against sex offenders has also prompted federal legislation, and in 1994, Congress passed its own version of

whether *Cooper* is a complete roadblock, rather than a temporary speed bump, remains to be seen.

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Megan's Law. *See* 42 U.S.C. § 14071(b)(1)(A)(I) (1994) (providing a duty of sexual predators to register with local law enforcement authorities). In May 1996, President Clinton vowed to fight to uphold such statutes "all the way to the Supreme Court," noting, in a statement eerily reminiscent of the vengeful cowboys of the Old West, that "there is no greater right than a parent's right to raise a child in safety and love. Today, America warns: If you dare to prey on our children, the law will follow you wherever you go, State to State, town to town." Remarks on Signing Megan's Law and Exchange with Reporters, 32 WEEKLY COMP. PRES. DOC. 878 (May 17, 1996).

New Jersey's statute, passed in 1994, is typical of Megan's Laws around the country. *See* Goodman, *supra*, at 765 (noting that "New Jersey's response to the danger posed by violent sexual offenders is not entirely novel"). The principal elements of these bills provide for registration of sex offenders and community notification upon the offenders' release from incarceration. *See* N.J. STAT. ANN. § 2C:7-1 to -11 (West 1995). The constitutionality of New Jersey's Megan's Law, and by implication other states' laws as well, is currently a subject of heated debate. *Compare* Doe v. Poritz, 142 N.J. 1, 110-11, 662 A.2d 367, 422-23 (1995) (upholding New Jersey's Megan's Law) *with* Artway v. Attorney Gen., 876 F. Supp. 666, 692 (D.N.J. 1995) (striking down New Jersey's Megan's Law as unconstitutional) *aff'd in part, vacated in part,* 81 F.3d 1235 (3d Cir.) *reh'g denied,* 83 F.3d 594 (3d Cir. 1996). For an in-depth discussion of New Jersey's Megan's Law, see generally Goodman, *supra*.

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