
S. Christopher Thomason

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The trial of an incompetent criminal defendant is prohibited by due process of law as established by the United States Constitution.\(^1\) The issue of competency to stand trial is distinguished from the controversial insanity defense in that the competency issue is concerned with the defendant's mental state at the time of trial while the insanity defense is judged in accordance with the defendant's mental condition during the commission of the offense.\(^2\)

In *Cooper v. Oklahoma*,\(^3\) the United States Supreme Court ended the debate over what standard of proof could be required of a criminal defendant during a competency hearing by holding that Fourteenth Amendment due process considerations prohibit a state from requiring defendants to meet a burden of proof greater than preponderance of the evidence in order to prove their lack of competency to stand trial.\(^4\) The decision invalidated laws which had recently developed in a distinct minority of states which required that incompetency to stand trial be shown by clear and convincing evidence.\(^5\) The application of the preponderance of the evidence standard to competency determinations is in accord with a majority of existing state and federal laws on the subject.\(^6\)

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\(^1\) U.S. CONST. amend. XIV. "To be 'competent to stand trial' a defendant must have, at time of trial, sufficient present ability to consult with his or her lawyer with a reasonable degree of understanding and a rational as well as factual understanding of the proceedings against him or her. Due process prohibits the government from prosecuting a defendant who is legally incompetent to stand trial." BLACK'S LAW DICTIONARY 283 (6th ed. 1990) (citations omitted).


\(^3\) 116 S. Ct. 1373 (1996).

\(^4\) See id. at 1384.

\(^5\) See Cynthia A. Martin, *Cooper v. Oklahoma: Standard of Proof in Competency Hearings*, 20 AM. J. TRIAL ADVOC. 223, 224 (1996). Clear and convincing proof is "[t]hat proof which results in reasonable certainty of the truth of the ultimate fact in controversy. Proof which requires more than a preponderance of the evidence but less than proof beyond a reasonable doubt. [I]t is... shown where the truth of the facts asserted is highly probable." BLACK'S LAW DICTIONARY 251 (6th ed. 1990) (citations omitted). In contrast, the preponderance of the evidence is demonstrated by "evidence which is of greater weight or more convincing than the evidence which is offered in opposition to it, that is, evidence which as a whole shows that the fact sought to be proved is more probable than not. That [evidence] which best accords with reason and probability." Id. at 1182 (citations omitted).

\(^6\) See Martin, supra note 5, at 226. Federal criminal procedure requires the defendant be hospitalized in a treatment facility where a "court finds by a preponderance of the evidence that the defendant is presently suffering from a mental disease or defect rendering him mentally incompetent... the court shall commit the defendant to the custody of the Attorney General" for hospitalization in a treatment facility. 18 U.S.C. § 4241(d) (1985) (emphasis added).
Part II of this casenote discusses the specific facts that surrounded *Cooper*. Part III of the casenote presents an historical examination of the Incompetency Doctrine; a discussion of the underlying justifications for such a doctrine; a view of the relevant due process concerns requiring its application; and an overview of modern practice. Part IV provides a detailed analysis of the reasoning of the Court in *Cooper*. In conclusion, Part V addresses the significance of the decision within the criminal justice system.

II. SUMMARY OF FACTS

On September 8, 1989, a family friend discovered the body of Harold Sheppard, an eighty-six-year old widower, in his Oklahoma residence. Police determined that Mr. Sheppard died as a result of a stabbing which they

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7. See *Cooper v. State*, 889 P.2d 293, 298 (Okla. Crim. App. 1995). Harold Sheppard, the victim of the homicide, shared his home with only a small dog since his wife had passed away several years earlier and his only daughter lived out of state. See id. When authorities entered the victim's home they found his small dog protecting his body. See id. The mental image of this small dog protecting his fallen master conjures up the memory of the famous hunting dog "Old Drum." In the 1869 case over Old Drum's death, George Vest delivered a classic closing argument extolling the virtues of man's best friend.

The best friend a man has in this world may turn against him and become his enemy. His son or daughter that he has reared with loving care may prove ungrateful. Those who are nearest and dearest to us, those whom we trust with our happiness and our good name, may become traitors to their faith. The money that a man has he may lose. It flies away from him, perhaps when he needs it most. A man's reputation may be sacrificed in a moment of ill-considered action. The people who are prone to fall on their knees to do us honor when success is with us may be the first to throw the stone of malice when failure settles its cloud upon our heads. The one absolutely unselfish friend that a man can have in this selfish world, the one that never deserts him, the one that never proves ungrateful or treacherous, is his dog. Gentlemen of the jury, a man's dog stands by him in prosperity and in poverty, in health and in sickness. He will sleep on the cold ground, where the wintry winds blow and the snow drives fierce, if only he may be near his master's side. He will kiss the hand that has no food to offer; he will lick the wounds and sores that come in encounter with the roughness of the world. He guards the sleep of his pauper master as if he were a prince. When all other friends desert he remains. When all riches take wings and reputation falls to pieces, he is as constant in his love as the sun in its journey through the heavens. If fortune drives the master forth an outcast in the world, friendless and homeless, the faithful dog asks no higher privilege than that of accompanying to guard against danger, to fight against his enemies, and when the last scene of all comes, and death takes the master in his embrace and his body is laid away in the cold ground, no matter if all other friends pursue their way, there by his graveside will the noble dog be found, his head between his paws, his eyes sad but open in alert watchfulness, faithful and true even in death.

estimated to have occurred on September 4, 1989.\(^8\) The police concluded that Mr. Sheppard was murdered in conjunction with a burglary.\(^9\)

On September 19, 1989, the police apprehended Byron Keith Cooper after he attempted to flee from detectives investigating the Sheppard murder.\(^10\) During a subsequent interrogation, Cooper initially admitted committing the murder, but then withdrew his admission and denied ever being at the murder scene.\(^11\) Toward the conclusion of the interrogation, however, Cooper conceded the possibility that he was responsible for Sheppard’s death.\(^12\)

The police recovered two cameras and a watch belonging to Sheppard from an apartment where Cooper had been living.\(^13\) In addition, investigating officers discovered traces of blood and two hairs, consistent with those of the victim, on clothing identified as belonging to Cooper.\(^14\) Authorities uncovered Cooper’s fingerprints on several items in the victim’s home, including credit card receipts from a card issued in Sheppard’s name.\(^15\) Later that same year, the state charged Cooper with the murder of Mr. Sheppard.\(^16\) After the trial, the jury found Cooper guilty of first degree murder and the court imposed the death penalty.\(^17\)

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8. See Cooper, 889 P.2d at 298.
10. See Cooper, 889 P.2d at 298.
11. See id.
12. See id. at 299.
13. See id.
14. See id.
15. See Cooper, 889 P.2d at 299. Cooper used Harold Sheppard’s credit card to purchase two watches from two nearby J.C. Penney department stores the day after the murder. See id. at 298.
17. See id. During the sentencing stage of Cooper’s trial, the jury acknowledged the existence of five aggravating circumstances:
   [T]hat the Petitioner had previously been convicted of a felony involving violence; that the murder was committed to avoid arrest or lawful prosecution; that the murder was especially heinous, atrocious, or cruel; that the murder was committed by one serving a term of imprisonment; and the existence of a probability that Petitioner would pose a continuing threat to society. See id.
Before and during his trial Cooper exhibited bizarre behavior\(^{18}\) which led to questions regarding his competency.\(^{19}\) The District Court of Oklahoma County examined the issue of whether Cooper was competent to stand trial on five different occasions.\(^{20}\) The court’s first pretrial determination on the issue resulted in Cooper being declared incompetent and committed to a mental health facility for three months.\(^{21}\) However, in four subsequent competency determinations the court found that Cooper was mentally competent.\(^{22}\) In

18. *See* Petitioner’s Brief at 2-11, Cooper v. Oklahoma, 116 S. Ct. 1373 (1996) (No. 95-5207). During the two months preceding his trial, Cooper would not communicate with his defense attorney. *See id.* at 4. On the first day of trial, Cooper refused to wear the court clothes provided him because he claimed that the clothing burned him. *See id.* In a competency hearing held during his trial, Cooper stated repeatedly the belief that his defense counsel tried to kill him. *See id.* at 5. Cooper stated that on one specific occasion his counsel, the prosecutor, and two other persons used a rope to try to choke him. *See id.* In addition, Cooper testified he carried on conversations with a spirit named “Noryb” who saved Cooper from being choked. *See* Petitioner’s Brief at 5, Cooper (No. 95-5207). At one point during his testimony Cooper fell backwards out of the witness stand when approached by defense counsel causing Cooper to strike his head on a marble wall. *See id.* Five inmates testified that Cooper cleaned his jail cell constantly. *See id.* at 6. He often stirred his toilet with his hands, talked to himself in a manner that could not be understood, and had “rub[bed] feces on his face and pour[ed] toilet water over his head.” *Id.* Cooper refused to communicate with his defense counsel during his trial. *See id.* at 10. In the courtroom, Cooper sat in a corner where he often spoke out loud to himself and would occasionally sleep in the fetal position. *See id.* At one point during the trial, a court bailiff and deputy spotted Cooper eating his own feces. *See id.*

19. *See* Cooper, 116 S. Ct. at 1375. Competence is defined by statute in Oklahoma “as ‘the present ability of a person arrested for or charged with a crime to understand the nature of the charges and proceedings brought against him and to effectively and rationally assist in his defense.’” *Id.* at 1377 n.5 (quoting OKLA. STAT., tit. 22, § 1175.1(1) (West Supp. 1996)).

20. *See* Cooper, 116 S. Ct. at 1375. The first pretrial competency hearing resulted in Cooper’s commitment in a mental health facility. *See* Petitioner’s Brief at 2, Cooper (No. 95-5207). The trial judge considered Cooper’s competency subsequent to his release from the state mental health facility, at a pretrial hearing held a week before the trial, on the first day of Cooper’s criminal trial, and at the conclusion of the state’s presentation of evidence. *See* Cooper, 116 S. Ct. at 1375-76.

21. *See* Cooper, 116 S. Ct. at 1375. The first evaluation occurred in August 1990. *See* Petitioner’s Brief at 2, Cooper (No. 95-5207). A state employed psychologist found Cooper “to be inattentive, irrational, incoherent, delusional, unable to focus on her questions, and unable to communicate effectively.” *Id.*

22. *See* Cooper, 116 S. Ct. at 1375-76. The second competency hearing occurred in December 1990, and January 1991, upon Cooper’s return from treatment in the mental health facility. *See* Petitioner’s Brief at 2, Cooper (No. 95-5207). A defense psychologist from the first hearing testified that Cooper exhibited a thought disorder and might be experiencing hallucinations. *See id.* at 3. However, the state’s psychologist opined that “Cooper understood the nature of the charges, was able to consult with counsel, and was not a mentally ill person as defined by statute.” *Id.* At the conclusion of the second hearing, the court determined that Cooper was competent. *See id.* Over a year later, the defense counsel requested that the court reconsider Cooper’s competency for the third time because of questions about abnormal behavior that Cooper exhibited. *See id.* The judge denied the request and in so doing stated that “if an incompetent person is convicted of a crime that he committed when he was sane, I don’t see any harm’s done.” *Id.* at 4. On the day that Cooper’s trial was scheduled to start the
Oklahoma pursuant to statute, the defendant is presumed mentally competent to stand trial. In addition, the defendant carries the burden of proving his lack of mental competence by clear and convincing evidence.

On appeal, Cooper argued that imposing on him the burden of overcoming the presumption of competency by clear and convincing evidence resulted in a standard which violated due process. The Oklahoma Court of Criminal Appeals rejected this argument determining that the utilization of such a standard in competency hearings does not violate the Due Process Clause. In accordance with its holding, the Court of Criminal Appeals affirmed both the judgment handed down in the trial court and the death penalty imposed on Cooper.

The United States Supreme Court granted certiorari to determine if the Due Process Clause of the Fourteenth Amendment was violated by the application of a clear and convincing standard of proof for a competency to stand trial determination. The Court held that a clear and convincing standard of proof was not in line with the Due Process Clause because it created the risk of an unfair trial.

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23. See Cooper, 889 P.2d at 300 (citing OKLA. STAT., tit. 22, § 1175.4 (1985)). Oklahoma law dealing with competence hearings provides that "[t]he 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." Cooper, 116 S. Ct. at 1376 n.3 (quoting OKLA. STAT., tit. 22, § 1175.4(B) (1985)).

24. See Cooper, 116 S. Ct. at 1376.

25. See Cooper, 889 P.2d at 299.

26. See id. at 303. The Court found that "forcing a criminal defendant to prove by clear and convincing evidence he is incompetent is not subject to proscription under the Due Process Clause, because it does not 'offend [ ] some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.'" Id. (quoting Medina v. California, 505 U.S. 437, 445 (1992) (citations omitted)). In addition, the court grounded its holding on the basis that "[t]he State has great interest in assuring its citizens a through and speedy judicial process, ... [and a] truly incompetent criminal defendant, through his attorneys and experts, can prove incompetency with relative ease." Id. at 303.

27. See id. at 318.


29. See Cooper, 116 S. Ct. at 1375.
of forcing an individual to stand trial who is more likely than not incompetent.  

III. BACKGROUND

A. Historical Examination of the Incompetency Doctrine

The principle that no mentally incompetent defendant should stand trial had its birth in the English common law which dates back to the mid-seventeenth century. Lord Hale commented specifically as to the consequences of being incompetent to stand trial. Blackstone stated that a criminal defendant who has become mad after the commission of the offense has no capability of defending himself and thus should not stand trial.

The prohibition against trying mentally incompetent defendants arises from many related factors. The English courts reasoned by analogy to the ban on trials in absentia and relied also on the practical problems that incompetent defendants presented for the common law practice of pleading to the charges.

The Incompetency Doctrine is based on factors that originated from the Anglo-American adversarial trial system. In the adversarial trial system, the defendant must be able to understand the charges against him and the nature and purpose of the trial proceedings to insure that he can effectively assist his

30. See id. at 1384.
32. See 1 Matthew Hale, PLEAS OF THE CROWN 34, 35 (1678). "If a man in his sound memory commits a capital offence, and before his arraignment he becomes absolutely mad, he ought not by law to be arraigned during such his phrenzy, but be remitted to prison until that incapacity be removed." Id. at 34. Lord Hale further opined that in the event a defendant should become incompetent at any point during the criminal trial process the effect would be to halt the proceedings against the defendant. See id. at 35.
33. See 4 WILLIAM BLACKSTONE, COMMENTARIES 24 (9th ed. 1783).
34. See Winick, supra note 31, at 574.
35. See Winick, supra note 31, at 574. In the English courts, if a defendant did not plea to the charges, the trial had to cease so that the court could determine if the "defendant was 'mute by visitation of God' or 'mute of malice.'" Id. If the court determined that the defendant remained silent out of malice, he was subject to a form of torture which entailed the placing of an increasing number of weights on the defendant's chest until he was forced to state his plea. See id. Those defendants who the court found to be "mute by visitation of God" escaped the imposition of torture. See id. Deaf and dumb defendants originally made up the category that the courts determined to be "mute by visitation of God," but over time the category was enlarged to encompass those individuals termed as lunatics. See id.
36. See Linda C. Fentiman, Whose Right is it Anyway?: Rethinking Competency to Stand Trial in Light of the Synthetically Sane Insanity Defendant, 40 U. MIAMI L. REV. 1109, 1114 (1986).
counsel.\textsuperscript{37} Allowing a defendant, who is mentally unable to assist his counsel, to stand trial creates the unjustifiable risk of an erroneous finding of guilt.\textsuperscript{38} The adversarial trial process simply does not function with an incompetent defendant.\textsuperscript{39}

B. Justifications for the Incompetency Doctrine

Chief Justice Burger clearly stated the broad underlying justification for the Incompetency Doctrine in \textit{Drope v. Missouri}.\textsuperscript{40} Although \textit{Drope} recognized specific historical justifications, Chief Justice Burger felt compelled to characterize the ban on trying incompetent defendants as a fundamental feature of our adversary system of justice.\textsuperscript{41} The prohibition is fundamental to the criminal justice process because it serves as the baseline safeguard for criminal defendants who suffer from severe mental impairment.\textsuperscript{42} Therefore, the Incompetency Doctrine functions as a shield against unfairness for those criminal defendants who cannot understand the criminal justice process and do not possess the mental abilities or aptitude necessary to aid their attorney in their own defense.\textsuperscript{43}

The Incompetency Doctrine serves to create a more accurate process by which the criminal court system determines the guilt of the accused.\textsuperscript{44} The defendant, apart from the prosecution, represents the only remaining party with the requisite knowledge and understanding of all the facts that are vital to the issue.\textsuperscript{45} The criminal proceedings may only be assured of accuracy by complete cooperation of the defendant in bringing to light all relevant facts within his knowledge.\textsuperscript{46} Accuracy and fairness in the process is dependent on the ability of the defendant to exercise those rights which society has

\begin{itemize}
  \item \textsuperscript{37} See id.
  \item \textsuperscript{38} See id.
  \item \textsuperscript{39} See id. For a general overview of the ban on adjudicating an “insane” defendant in the nineteenth century American jurisprudence, see Underwood v. People, 32 Mich. 1 (1875); Crocker v. State, 19 N.W. 435 (Wis. 1884); State v. Reed, 7 So. 132 (La. 1889).
  \item \textsuperscript{40} 420 U.S. 162 (1975).
  \item \textsuperscript{41} See id. at 171-72.
  \item \textsuperscript{42} See Winick, \textit{supra} note 31, at 572. Winick recognized the validity of the protection as the basis of the Incompetency Doctrine but questioned the efficiency of the modern practices used to implement that protection as contrary to the overall objectives of the doctrine. See Winick, \textit{supra} note 31, at 572.
  \item \textsuperscript{43} See Bruce J. Winick, \textit{Restructuring Competency to Stand Trial}, 32 UCLA L. REV. 921, 949 (1985).
  \item \textsuperscript{44} See id.
  \item \textsuperscript{45} See \textsc{Samuel J. Brakel et al.}, \textit{The Mentally Disabled and the Law} 694 (3rd ed. 1985).
  \item \textsuperscript{46} See id.
\end{itemize}
deemed important and thus bestowed upon the accused. The structure of trial proceedings demands that a defendant be capable of performing an active role in his defense, a role that may be too tremendous for one who is restrained by mental deficiencies. The process culminates with sentencing and imposition of punishment, thus insuring that a defendant is competent fosters a more accurate practice of sentencing and promotes efficacy of punishment. For any form of societal punishment to be effective and serve its intended purpose, it is imperative that the punished comprehend the punishment and understand why they are being subjected to it.

The justifications for the Incompetency Doctrine are not linked exclusively to the protection of the accused. The doctrine serves as a valuable protection to the dignity of the criminal trial process in the face of society. A policy of requiring only competent individuals to stand trial provides an assurance of societal support and respect for the decisions handed down by our criminal courts. Conversely, the practice of requiring an incompetent defendant to withstand the rigors of a criminal trial creates a perception that justice has not been served. The mere occurrence of such a trial erodes society’s respect for the judicial system and law enforcement as a whole.

C. Due Process Concerns

The Incompetency Doctrine rests on the necessity of procedural due process of law. Federal courts addressed Due Process concerns related to the issue of competency as early as 1899. The Youtsey decision plainly recognized the fundamental quality of the prohibition against unleashing the criminal process on incompetent defendants.

47. See id. Included in the rights recognized by society are “the right[ ] to choose and assist counsel, to act as a witness in one’s own behalf, and to confront opposing witnesses.” Id.
48. See id. A criminal defendant must possess the capacity “to help counsel in presentation of a defense, understand his role in the proceedings, and have some grasp of the substantive and tactical options open to him or his attorney.” Id.
50. See Brakel et al., supra note 45, at 694.
52. See Winick, supra note 43, at 949-50.
53. See Fentiman, supra note 36, at 1116.
54. See Winick, supra note 43, at 949.
55. See Brakel et al., supra note 45, at 694.
56. See Norma Schrock, Note, Defense Counsel’s Role in Determining Competency to Stand Trial, 9 GEO. J. LEGAL ETHICS 639, 641 (1996).
57. See Youtsey v. United States, 97 F. 937 (6th Cir. 1899).
58. See id. at 940. Thomas B. Youtsey worked as a cashier for a Kentucky bank. See id. at 938. The government charged and convicted Youtsey of embezzlement and related crimes committed while in the banks employ. See id. The defense requested that the trial judge allow
The requirement that a criminal defendant must be competent in order to stand trial is fundamental to the adversarial process of justice because it is an element of the Fifth and Fourteenth Amendments, guarantee of due process of law. The Supreme Court, in *Pate v. Robinson*, recognized for the first time, although in dicta, that the Due Process Clause of the Fourteenth Amendment prohibited the prosecution of an incompetent defendant. The premise that the prohibition of such trial practice is mandated by due process finds support primarily in two policies. The first policy is centered on the belief that the prohibition is fundamental to the adversarial justice system. A

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a continuance on the grounds that Youtsey was not mentally or physically capable of standing trial. See id. Youtsey's attorney argued that his client was suffering from severe epileptic seizures which resulted in major memory loss that precluded his aid in the defense. See id. Three physicians' affidavits supporting the defense's argument were filed with the court, but the motion was denied and the trial process continued. See id. at 938-39. The Sixth Circuit, in reversing the trial court, stated that "[i]t is fundamental that an insane person can neither plead to an arraignment, be subjected to a trial, or, after trial, receive judgment, or, after judgment, undergo punishment." *Id.* at 940.

59. "No person shall... be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law... ." U.S. CONST. amend. V.

60. The Fourteenth Amendment provides:
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 the laws.

U.S. CONST. amend. XIV.


Embodied in the due process concept are the basic rights of a defendant in criminal proceedings and the requisites for a fair trial. These rights and requirements have been expanded by Supreme Court decisions and include, timely notice of a hearing or trial which informs the accused of the charges against him or her; the opportunity to confront accusers and to present evidence on one's own behalf before an impartial jury or judge; the presumption of innocence under which guilt must be proven by legally obtained evidence and the verdict must be supported by the evidence presented; the right of an accused to be warned of constitutional rights at the earliest stage of the criminal process; protection against self-incrimination; assistance of counsel at every critical stage of the criminal process; and the guarantee that an individual will not be tried more than once for the same offense (double jeopardy).


63. See id. at 378.

64. See Brian R. Boch, Note, *Fourteenth Amendment—The Standard of Mental Competency to Waive Constitutional Rights Versus the Competency Standard to Stand Trial*, 84 J. CRIM. L. & CRIMINOLOGY 883, 886 (1994).

65. See id. Support for the fundamental nature of the Incompetency Doctrine is demonstrated through justifications analogous to the justifications discussed in Part III, Section
ban of trials in absentia is the second policy lending support to the notion that subjecting an incompetent defendant to the rigors of trial violates due process of law. 66

Through the Due Process Clause, the Fourteenth Amendment guarantees a criminal defendant in a state court the elements of a trial that are fundamental to the fairness of the process. 67 Incorporated into the guarantee of a fair trial are the protections outlined by the Bill of Rights. 68 In order for the fundamental fairness guarantee that is afforded defendants to operate, a defendant must have the mental ability to comprehend the court proceedings. 69

The central issue in Cooper involved a question of procedural due process. 70 Mathews v. Eldridge 71 established the original framework for testing state procedural rules against the requirements of the Due Process Clause. 72 Three factors concerning both private and governmental interests formed the basis of the Mathews test. 73 However, in Medina v. California 74 the Supreme Court rejected the Mathews test as applied to questions of criminal procedure. 75 The Court found that the Mathews test failed to provide the proper analytical framework for judging the correctness of state rules of procedure in criminal cases. 76 Along with its rejection of the Mathews test, the Court established a new standard for testing conformity with the requirements of due process

B of this casenote.

66. See id. at 887.
67. See id. at 884.
68. See id. The procedural safeguards provided throughout the Bill of Rights include "the Fifth Amendment prohibition against compulsory self-incrimination and the Sixth Amendment right to assistance of counsel." Id.
69. See id.
70. See Cooper, 116 S. Ct. at 1383. Procedural due process involves "[t]he guarantee of procedural fairness which flows from both the Fifth and Fourteenth Amendments due process clauses . . . ." BLACK'S LAW DICTIONARY 1203 (6th ed. 1990). In contrast, substantive due process is the "[d]octrine that . . . require[s] legislation to be fair and reasonable in content as well as application." BLACK'S LAW DICTIONARY 1429 (6th ed. 1990).
72. See id. at 335.
73. See id. at 334-335. The Court stated the three factors to be considered as follows:
First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.
Id.
75. See id. at 443.
76. See id.
which centered around determining whether the principles involved were deeply rooted in tradition.  

D. Modern Practice in Competency Law

There exists no more important nexus between the criminal trial process and mental disability than the determination of a defendant’s level of mental competency. In recent years, the Supreme Court has directed increased attention to clarifying the law dealing with competency-to-stand trial issues. While modern Supreme Court opinions have attempted to define the legal operating guidelines for the Incompetency Doctrine, they have failed to address its foundation or the calls for drastic reform.

The Court handed down its most significant opinion concerning mental competency in Dusky v. United States. Dusky established the test applicable when considering the mental competency of a criminal defendant, the inquiry being one of rationality and understanding. The decision in Dusky has been criticized on the grounds that the Court failed to state a precise test which could be applied uniformly to any set of facts. However, insight into details of the test can be seen in federal court cases which have followed Dusky.

Six years later, the Supreme Court addressed the issue of competency once again in Pate v. Robinson. In Robinson, the trial court denied the defendant a mental competency hearing over defense counsel’s strenuous arguments that the defendant’s sanity was a central issue. Justice Clark, writing for the majority, established that due process requires a determination

77. See id. at 445. State rules of criminal procedure are “not subject to proscription under the Due Process Clause unless ‘it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.’” Id.


79. See Winick, supra note 31, at 571.

80. See Winick, supra note 31, at 572.


82. See Ronald Roesch et al., Conceptualizing and Assessing Competency to Stand Trial: Implications and Applications of the MacArthur Treatment Competence Model, 2 PSYCHOL. PUB. POL’y & L. 96, 98 (1996). The Court stated that the test to determine competency was “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.” Dusky, 362 U.S. at 402. It will not suffice that a defendant can recall some of the events in question and “‘is oriented to time and place.’” Id.

83. See Group for the Advancement of Psychiatry, 2 Misuse of Psychiatry in the Criminal Courts: Competency to Stand Trial 881 (1974).


86. See id. at 384.
of the defendant’s competency to be made after there has been a presentation of evidence on the issue. Failure by a trial court to address the issue violates the defendant’s Sixth and Fourteenth Amendment rights to a fair trial.

The Supreme Court further defined the requirements of the Incompetency Doctrine in *Jackson v. Indiana*. *Jackson* provided limits and guidelines on a state’s power to commit a defendant who has been determined to be incompetent to stand trial. In *Jackson*, the trial court ordered the commitment of a deaf and mute defendant to the state mental health facility until such time as he could be deemed competent to stand trial, a commitment which testimony from expert mental health witnesses established was analogous to a life sentence for the defendant. The Supreme Court reversed the decision of the trial court and stated that a defendant who is committed entirely on the grounds of incompetency to stand trial may only be detained for a reasonable amount of time to determine if it is likely that competency can be restored in the near future. The court established no arbitrary time limits to determine the appropriate term of commitment, instead it held it sufficient to state the test as prohibiting unreasonably long commitments.

In *Medina v. California*, the Supreme Court examined a California statute that established a presumption in favor of competency to stand trial and allocated the burden of proving otherwise to the moving party. *Medina* argued that the California procedural rule constituted a violation of his due process rights. The Court determined that no established practice existed which could preclude a state from requiring that the proponent of incompetency be required to carry the burden of proving the defendant’s asserted frailty. Citing the determination that placing the burden of proof on the defendant in competency determinations violated no aspect of due process, the Court rejected the same constitutional challenge applied to the presumption of competency. The decision restated the Court’s position that due process

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87. See id. at 385.
88. See id.
90. See id. at 738.
91. See id. at 719.
92. See id. at 738. "If it is determined that [competency may not be restored in the foreseeable future] then the State must either institute the customary civil commitment proceeding that would be required to commit indefinitely any other citizen, or release the defendant." Id.
93. See id.
95. See id. at 440 (citing CAL. PENAL CODE ANN. § 1369 (f) (West 1982)).
96. See id. at 442.
97. See id. at 446.
98. See id. at 452.
considerations only mandate the observation of fundamental procedural protections.  

The Supreme Court's recent decision in *Godinez v. Moran*\(^{100}\) tackled the issue of whether a higher standard of competency is required for a defendant to plead guilty to charges or to waive his right to counsel than the competence to stand trial standard.  

Based primarily on the per curiam opinion in *Westbrook v. Arizona*\(^{102}\), the Ninth Circuit Court of Appeals reasoned that a higher standard of competence is required for pleading guilty or waiving counsel than that of competence to stand trial.\(^{103}\) The *Godinez* opinion recognized that a decision by the defendant to plead guilty was of deep importance, but the Court further opined that the decision was not appreciably more compounded than the combined number of choices that may be required of a defendant during the criminal trial process.\(^{104}\) In addition, the Court reasoned that no support existed for the conclusion that a defendant who decides to waive his constitutional right to counsel has to possess a higher level of competence than on who does not.\(^{105}\) The level of mental competency needed for a defendant to stand trial, therefore, is not actually different from or lower than the level of mental competency needed for a defendant to plead guilty and to waive the assistance of counsel.\(^{106}\) However, along with determining if a defendant is competent to stand trial, when a defendant attempts to waive his right to counsel or to enter a guilty plea, the trial court must determine if the defendant's waiver of his rights is knowing and voluntary.\(^{107}\) The knowing and voluntary waiver inquiry represents the only heightened quality between the competency standard and the standard of competence necessary to waive constitutional rights.\(^{108}\) The *Godinez* decision

99. *See id.* at 453. "The Due Process Clause does not . . . require a State to adopt one procedure over another on the basis that it may produce results more favorable to the accused." *Id.* at 451.


101. *See id.* at 391.

102. 384 U.S. 150 (1966) (per curiam). In *Westbrook*, the Supreme Court vacated the affirmation of the defendant's conviction on the grounds that while the trial court had conducted a hearing on the issue of the defendant's competence to stand trial there was no hearing held to determine if the defendant was competent to waive his right to counsel. *See id.*

103. *See Godinez*, 509 U.S. at 396.

104. *See id.* at 398-99. "[A] defendant who was found competent to stand trial would have to make a variety of decisions: whether to testify; whether to seek a jury trial; whether to cross-examine his accusers; and in some cases, whether to raise an affirmative defense." Perlin, *supra* note 78, at 607.


106. *See id.*

107. *See id.* at 400.

108. *See id.* at 401.
establishes that a unitary competency standard is to be applied to all competency inquires made during the trial process. Over the past several decades the United States Supreme Court has been attracted to cases involving competency issues regarding criminal defendants. Commentators have struggled to explain why the Court has seemed so attracted to such a relatively small and distinct section of the law. At least one commentator posited that the opinions resulted "out of the consciousness" of the Court. Cooper represents the Court's latest attempt to provide structure to the Incompetency Doctrine through the establishment of another procedural requirement.

IV. REASONING OF THE COURT

Justice Stevens, who delivered the opinion of the unanimous Court, set the tone by announcing that the "clear and convincing" standard used by Oklahoma when determining issues of competency, allowed for a defendant who has shown that he is more likely than not incompetent to stand trial. The Court stated that the issue presented by the Oklahoma standard was whether its application violated Cooper's due process rights.

The Court's analysis of the issue began with the proposition that there is a consistently recognized fundamental right that one must be competent in order to stand trial. The test established for competency determinations has remained constant in that a defendant must be capable of consulting with and understanding his attorney. Additionally, the defendant must be able to possess a factual and rational understanding of the trial proceedings.

109. See Perlin, supra note 78, at 607.
111. See Perlin, supra note 78, at 605.
112. See Perlin, supra note 78, at 605.
113. See Cooper, 116 S. Ct. at 1374-75.
114. See id. at 1375.
115. See id. at 1376. In emphasizing the importance of the right to only be tried when competent, the Court quoted the following language from an earlier case:
Competence 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 rights 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.
116. See Cooper, 116 S. Ct. at 1377 (citation omitted).
117. See id. (citation omitted).
The decision in *Medina v. California*\(^{118}\) validated the practice of a state presuming the competence of a defendant but differed from the Oklahoma controversy in stating that the burden of proof required of a defendant must be that of a preponderance of the evidence.\(^{119}\) The decision in *Medina* rested on the premise that a presumption of competency did not violate any "fundamental fairness" principle.\(^{120}\) However, the Court distinguished *Medina* from the question presented by *Cooper* because Cooper's argument centered around whether the state can force a defendant, who is more likely than not incompetent, to stand trial.\(^{121}\) The Court rejected Oklahoma's argument that the clear and convincing standard represented a balancing of the State's and the defendant's opposing interests by announcing that such a contention is not supported by traditional and contemporary practice, as well as the magnitude of the constitutional benefit that was involved.\(^{122}\)

The Court then reaffirmed that Oklahoma could not elevate its procedural rule to the level of fundamental because it had no common origin within historical practice.\(^{123}\) Early English cases, prior to the United States Constitution, bolstered the principle in opposition of trying an incompetent individual, but offered the Court no conclusive evidence of an established standard of proof for evaluating competency.\(^{124}\) However, the Court stated that contemporary authority supported the interpretation of several late eighteenth century and early nineteenth century English decisions as having established an application of a preponderance standard.\(^{125}\)

The Court also noted that America's earliest decisions commonly cited English authority on the issue of competency thus affording no basis for suggesting that any state has ever applied the clear and convincing standard, or one similar in operation, until recent history.\(^{126}\) In fact, by the twentieth

\(^{118}\) 505 U.S. 437 (1992).

\(^{119}\) See *Cooper*, 116 S. Ct. at 1377.

\(^{120}\) See id. (citing *Medina v. California*, 505 U.S. 437, 449 (1992)). The presumption is justified in that "fundamental fairness" is not violated because the application of such a rule would only affect the outcome of a small number of cases "where the evidence that a defendant is competent is just as strong as the evidence that he is incompetent." *Cooper*, 116 S. Ct. at 1377 (quoting *Medina v. California*, 505 U.S. 437, 449 (1992)).

\(^{121}\) See *Cooper*, 116 S. Ct. at 1377.

\(^{122}\) See id.

\(^{123}\) See id. ("Historical practice is probative of whether a procedural rule can be characterized as fundamental.") (quoting *Medina v. California*, 505 U.S. 437, 446 (1992)).

\(^{124}\) See *Cooper*, 116 S. Ct. at 1377-78. The Court pointed to the commentaries of Hale and Blackstone to demonstrate that the proposition that no incompetent individual should be tried was a well established principle. See id.

\(^{125}\) See id. at 1378 (citing King v. Frith, 22 How. St. Tr. 307 (1790); Queen v. Goode, 7 Ad. & E. 536, 112 Eng. Rep. 572 (K.B. 1837); King v. Pritchard, 7 Car. & P. 303, 173 Eng. Rep 135 (1836)).

\(^{126}\) See *Cooper*, 116 S. Ct. at 1379.
century, American courts were using the preponderance of the evidence standard.\textsuperscript{127}

The Court supported its disdain of the clear and convincing standard applied in competency determinations by the presentation of an overview of the contemporary practices in a majority of the nation's jurisdictions.\textsuperscript{128} The federal courts employ a preponderance of the evidence standard for proving incompetence, and forty-six of the fifty states refuse to strap the defendant with as heavy a burden as proof by clear and convincing evidence.\textsuperscript{129} Based on the almost universal application of a standard affording greater protection of defendants' rights, the Court concluded that Oklahoma's application of the clear and convincing standard was at odds with modern justice.\textsuperscript{130}

The Court then considered whether the application of the clear and convincing standard operated in a manner that was fundamentally fair.\textsuperscript{131} When a party has been shouldered with a higher burden of proof, the residuary effect is that such party also bears the danger that the heightened burden will result in an inaccurate determination.\textsuperscript{132} From this proposition, the Court reasoned that the standard applied by Oklahoma presented a serious danger that an inaccurate determination of competence might negate an incompetent individual's fundamental right not to be tried by a court of law.\textsuperscript{133} The impact of such an erroneous decision on the defendant would be devastating to the point of compromising the fairness of the trial, while such a decision in opposition to a State's interest would cause only minor injury.\textsuperscript{134} The Court noted that the determination of an individual's level of competence was not an exact science and recognized the possibility of a malinger feigning incompetence.\textsuperscript{135} The Court stated that while such problems made it proper to have the proponent bear the burden of proof, no support existed for the addition of such a elevated level of proof.\textsuperscript{136} The fundamental right of a defendant not to be tried while incompetent outweighs the State's interest of efficiency.\textsuperscript{137}

\textsuperscript{127} See id.
\textsuperscript{128} See id. at 1380.
\textsuperscript{129} See id. Several states place the burden of proving competency to stand trial on the prosecution instead of the defendant. See id.
\textsuperscript{130} See id.
\textsuperscript{131} See id.
\textsuperscript{132} See Cooper, 116 S. Ct. at 1381 (quoting Cruzan v. Director, Mo. Dept. of Health, 497 U.S. 261, 283 (1990)).
\textsuperscript{133} See Cooper, 116 S. Ct. at 1381.
\textsuperscript{134} See id. at 1381-82.
\textsuperscript{135} See id. at 1382.
\textsuperscript{136} See id.
\textsuperscript{137} See id. at 1383.
Limited attention was given to two other points made in defense of the clear and convincing standard established by Oklahoma's procedural rule. The Court recognized the validity of the first contention that the power of establishing procedural rules that allocate the burden of persuasion and production is normally reserved for the realm of state power. However, the Court rejected the application of the principle to Cooper by stating that the states' power in that area, while it did exist, was subject to the constraints of the Due Process Clause. The final argument was related to the Court's decision in Addington v. Texas which ratified the use of a clear and convincing standard for involuntary commitment hearings in the civil setting. This assertion was rejected on the grounds that the Court considered the issue in Addington completely different and inapplicable to the issue presented by Cooper.

V. SIGNIFICANCE

The holding in Cooper has unified state and federal law in regards to the burden of proof necessary in competency determinations by establishing a procedural requirement that competency determinations be decided by no more than a preponderance of the evidence. In essence, the decision resulted in settling the debate over what standard states should require for defendants.

138. See Cooper, 116 S. Ct. at 1383.
139. See id. The Court alluded to the decision in Patterson v. New York where they upheld the requirement "that in a prosecution for second-degree murder the defendant must bear the burden of proving the affirmative defense of extreme emotional disturbance in order to reduce the crime to manslaughter." Id. (citing Patterson v. New York, 432 U.S. 197, 207-08 (1977)). In so holding, the Court noted the harmony of such a rule with common-law custom and stated "that '[t]he Due Process Clause . . . does 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 is otherwise within its constitutional powers to sanction by substantial punishment." Cooper, 116 S. Ct. at 1383 (quoting Patterson v. New York, 432 U.S. 197, 207-08 (1977)).
140. See Cooper, 116 S. Ct. at 1383. ("[T]he State's power to regulate procedural burdens [is] subject to proscription under the Due Process Clause if it 'offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.'") (quoting Patterson v. New York, 432 U.S. 197, 201-02 (1977)). The Court stated that Cooper's right to stand trial only when competent was fundamental in character and required constitutional protection. See Cooper, 116 S. Ct. at 1383.
142. See Cooper, 116 S. Ct. at 1383.
143. See id. The Court explained that its holding in Cooper was in harmony with the decision in Addington. See id. at 1384 ("The requirement that the grounds for civil commitment be shown by clear and convincing evidence protects the individual's fundamental interest in liberty.").
144. See Martin, supra note 5, at 226.
attempting to prove their incompetence to stand trial. The Cooper decision stands for more than the addition of a procedural requirement to the Incompetency Doctrine, because the decision represents a reflection of society's desire for accuracy in competency decisions. With the Court's employment of the preponderance of the evidence standard, it becomes less likely that the injustice of trying an incompetent defendant will occur.

The immediate and direct effect of the decision in Cooper is a nullification of those state laws that have required a heightened burden of proof. The Supreme Court stated that the Cooper decision did not effect its earlier decision in Medina that a state may place the burden of proof of incompetence on the defendant and may presume that the defendant is competent. Therefore, if the Cooper and Medina decisions are coupled together, the Court has made a clear statement to the states that due process rights of criminal defendants are not violated by requiring the defendant to prove that he is not competent to stand trial as long as he must do so by only a preponderance of the evidence.

While Cooper has clearly stated the procedural requirement for the burden of proof in competency hearings, the decision is more significant because it demonstrates a continued reliance by the Court on history and tradition when determining the requirements of due process as applied to incompetent criminal defendants. Commentators question whether a policy of basing these decisions on the shoulders of historical practice is appropriate given the speed that scientific research continues to uncover the true clinical and behavioral underpinnings.

In Watts v. Singletary, the Eleventh Circuit Court of Appeals held that the principles of the attorney-client privilege should shape the proper modern analysis for determination of competency rights, rather than seventeenth century English commentators.

145. See Martin, supra note 5, at 223.
146. See Martin, supra note 5, at 225. The Supreme Court has recognized the importance of the burden of proof in other contexts, stating that "the more stringent the burden of proof a party must bear, the more that party bears the risk of an erroneous decision." Martin, supra note 5, at 225 (quoting Cruzan v. Director Mo. Dep't of Health, 497 U.S. 261, 283 (1990)).
147. See Martin, supra note 5, at 226.
148. See Supreme Court—Mental Incompetency Protections Upheld, WORLD NEWS DIGEST, April 18, 1996.
149. See Cooper, 116 S. Ct. at 1377.
151. See Perlin, supra note 78, at 607.
152. See Perlin, supra note 78, at 607.
153. 87 F.3d 1282 (11th Cir. 1996).
154. See id. at 1289 n.9 ("It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV.") (quoting Oliver Wendell Holmes, The Path of the Law, 10 HARV. L. REV. 457, 469 (1897)).
Another problem with the use of "law office history" as a toll in deciding modern conflicts is the accuracy of the historical interpretations. The academic quality of history is often compromised in the legal setting by the forces exerted upon it by the demands of legal advocacy. The structure of our legal system demands that history, like any other device, is shaped to promote one view over another. Furthermore, one author suggests that the Supreme Court has routinely stated propositions as historical absolutes when historians would classify such statements as "tentative" and "speculative." The theoretical and practical differences between legal advocacy and "scholar-historian" has prevented the Court from accurately basing its decisions on historical mandates.

Only the future can determine if Cooper will have its intended impact of insuring that only competent criminal defendants stand trial. What is certain is that the United States Supreme Court has shown its unwillingness to part with the practice of basing its determinations in this area of the law on the basis historical practice. It will be interesting to see at what point in the development of society's scientific and medical understanding of human behavior that the Court will decide to give such information a consideration.

S. Christopher Thomason

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155. See Paul L. Murphy, Time to Reclaim: The Current Challenge of American Constitutional History, LXIX HISTORICAL REVIEW 64, 77-78 (1963) ("If the Court is intent upon building new and dramatic legal structures to meet the requirements of a dynamic society, the historian can at least furnish it with complementary modern architectural materials, so that it does not have to rely upon scrap lumber, salvage bricks, and raw stones for its buildings.").
156. See id. at 77.
157. See id. at 77.
158. See Alfred H. Kelly, Clio and the Court: An Illicit Love Affair, SUP. CT. REV. 119, 155 (1965) ("The Court, in performing its self-assumed role as a constitutional historian, has been, if not a naked king, no better than a very ragged one.").
159. See id. at 155.