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REJECTING THE CLEAR AND CONVINCING EVIDENCE STANDARD FOR PROOF OF INCOMPETENCE

Cooper v. Oklahoma, 116 S. Ct. 1373 (1996)

I. INTRODUCTION

In *Cooper v. Oklahoma*,¹ the United States Supreme Court examined whether a state could require a defendant to prove his incompetence to stand trial by clear and convincing evidence.² Though the Court had already upheld one state statute that required a defendant to prove his incompetence by a "preponderance of the evidence,"³ *Cooper* held that the heightened "clear and convincing evidence" standard was an impermissible violation of a defendant's fundamental right under the Due Process Clause not to be tried while incompetent because it greatly increased the potential for an erroneous decision.⁴ The Court relied on a two-part argument, first looking at historical precedent and then examining whether Oklahoma's rule exhibited "fundamental fairness in practice."⁵

This Note argues that the Supreme Court was correct to strike down Oklahoma's heightened statutory requirement for proof of incompetence. By setting such a high standard, Oklahoma virtually guaranteed that its courts would convict many defendants who were more likely than not incompetent. This result would have been contrary to due process and had no rational justification.

II. BACKGROUND

Incompetency is a mental disability that impairs a defendant to the extent that he cannot grasp the nature of the charges against him nor assist counsel in his defense.⁶ Because such an impairment could jeopardize a defendant's opportunity to receive a fair trial, the Supreme Court has long held that the trial and conviction of an in-

¹ 116 S. Ct. 1373 (1996).

² *Id.* at 1374-75.

³ *Medina v. California*, 505 U.S. 437, 452 (1992).

⁴ *Cooper*, 116 S. Ct. at 1384.

⁵ *Id.* at 1377-80, 1380-83.

⁶ HENRY WEIHOFEN, MENTAL DISORDER AS A CRIMINAL DEFENSE 429 (1954).

competent defendant violates the Fourteenth Amendment Due Process Clause.⁷

There are several underlying rationales behind the Due Process Clause's prohibition of trying an incompetent defendant. First, it increases the accuracy and reliability of the trial since an incompetent defendant cannot, for example, adequately testify on his behalf.⁸ The requirement also enhances fairness, since an incompetent defendant cannot make decisions regarding the course and nature of his defense.⁹ In addition, it maintains the "dignity" of the trial, in that an incompetent defendant may behave in an offensive or inappropriate manner.¹⁰ Finally, a competent defendant's comprehension of why he is being punished makes the punishment more just.¹¹

The Court first laid out the modern two-part test for determining competency in *Dusky v. United States*.¹² a defendant must have (1) "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding" and (2) "a rational as well as factual understanding of the proceedings against him."¹³ Six years later, in *Pate v. Robinson*,¹⁴ the Court gave a more formal definition of incompetency, emphasizing that state procedures must be sufficient to protect a defendant's fundamental constitutional right to a fair trial.¹⁵

Although *Dusky* established a two-part test for competence, the Court had not yet been entirely clear as to the evidentiary burden that defendants needed to meet to satisfy the test.¹⁶ In the 1977 case of

⁷ *Medina*, 505 U.S. at 439 (citing *Pate v. Robinson*, 383 U.S. 375 (1966); *Drope v. Missouri*, 420 U.S. 162 (1975)). It is important to note that incompetency is distinguishable from insanity in that "it involves the defendant's mental state at the time of trial rather than at the time of the offense." Stephanie M. Herseth, *Competency to Stand Trial*, 84 GEO. L.J. 1066, 1076 n.1418 (1996).

The Due Process Clause provides that "No State shall . . . deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV, § 1.

⁸ WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., *SUBSTANTIVE CRIMINAL LAW* § 4.4(a) (2d ed. 1986).

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² 362 U.S. 402 (1960) (per curiam).

¹³ *Id.* (internal quotations omitted). The Solicitor General actually suggested this test in his brief to the Court. *See id.*

¹⁴ 383 U.S. 375 (1966).

¹⁵ *Id.* at 378.

¹⁶ While the Supreme Court had not yet formally considered the appropriate evidentiary standard, there is a long history of application of the "preponderance of the evidence" requirement for a defendant raising the claim of incompetence in both English courts and lower American courts. Early English cases did not provide a specific standard, but judges' instructions tended to use disjunctive language, calling for a determination of whether or not the defendant was incompetent. *See, e.g., Queen v. Goode*, 112 Eng. Rep. 572 (K.B. 1837); *King v. Pritchard*, 173 Eng. Rep. 135 (1836); *King v. Frith*, 22 How. St. Tr.

Patterson v. New York,¹⁷ which dealt with raising an affirmative defense of extreme emotional disturbance, the Court discussed the evidentiary burden defendants must meet in order to prevail.¹⁸ Justice White, writing for the majority, relied on *Leland v. Oregon*¹⁹ and *Rivera v. Delaware*²⁰ for the proposition that the appropriate standard necessary to raise an affirmative defense of insanity was "a preponderance of evidence."²¹ Because this case dealt with insanity, however, significant questions still existed as to the constitutionally required standard of proof for incompetence.

Two years later, the Court addressed the appropriate standards for competency in *Addington v. Texas*,²² where the issue arose in the context of a civil proceeding for involuntary commitment to a mental hospital.²³ The Court, per Justice Burger, held that "the individual's interest in the outcome of a civil commitment proceeding is of such weight and gravity that due process requires the state to justify confinement by proof more substantial than . . . [a] preponderance of the evidence."²⁴ The Court remanded the case back to the lower court with the suggestion that the proper standard should be something "equal to or greater than the clear and convincing standard which . . . is required to meet due process guarantees."²⁵ The Court distinguished civil commitment proceedings from criminal prosecutions, noting that different standards were both appropriate and necessary.²⁶ In justifying the distinction, Justice Burger emphasized that a

307 (1790). A more modern English case cited earlier authority for the proposition that the appropriate evidentiary standard was a preponderance of evidence. *Queen v. Podola*, 43 Crim. App. 220 (1959). Early American cases explicitly used a preponderance of evidence standard. *See, e.g.*, *State v. O'Grady*, 5 Ohio Dec. 654 (1896); *State v. Helm*, 61 S.W. 915 (Ark. 1901); *State v. Bethune*, 71 S.E. 29 (S.C. 1911); *Commonwealth v. Simanowicz*, 89 A. 562 (Pa. 1913); *People v. Lawson*, 174 P. 885 (Cal. 1918); *People v. Geary*, 131 N.E. 652 (Ill. 1921); *State v. Seminary*, 115 So. 370 (La. 1927); *State v. Bruntlett*, 36 N.W.2d 450 (Iowa 1949).

¹⁷ 432 U.S. 197 (1977) (upholding New York requirement that defendant in murder trial prove defense of extreme emotional disturbance).

¹⁸ *Id.* at 206.

¹⁹ 343 U.S. 790 (1952).

²⁰ 429 U.S. 877 (1976).

²¹ *Patterson*, 432 U.S. at 206.

²² 441 U.S. 418 (1979).

²³ *Id.* at 419-20.

²⁴ *Id.* at 427.

²⁵ *Id.* at 432. In suggesting that the state establish the necessary facts by clear and convincing evidence, the *Addington* Court placed involuntary commitment proceedings among a select group of situations where the individual liberty issues at stake demand this rigid standard. *See, e.g.*, *Cruzan v. Director, Mo. Dep't of Health*, 497 U.S. 261 (1990) (guardians seeking to end the life of a patient on life support); *Santosky v. Kramer*, 455 U.S. 745 (1982) (ending parents' rights in their child); *Woodby v. INS*, 385 U.S. 276 (1966) (deportation proceedings for resident aliens).

²⁶ *Addington*, 441 U.S. at 428.

civil commitment proceeding did not have the same impact as a criminal trial.²⁷ Specifically, Justice Burger observed that the “standard applied in criminal cases manifests our concern that the risk of error to the individual must be minimized even at the risk that some who are guilty might go free.”²⁸

Finally, in 1992, the Court directly addressed the appropriate standard of proof that a state could place on a defendant to prove his incompetence at a criminal trial. Justice Kennedy, writing for a five-justice majority in *Medina v. California*,²⁹ examined a California statute requiring the defendant to prove his incompetence by a preponderance of evidence.³⁰ The Court upheld the statute, finding it did not violate the Due Process Clause.³¹ Significantly, the Court rejected the petitioner’s claim that the balancing test from *Mathews v. Eldridge*³² was the proper method to analyze the burden of proof standard for competency.³³ *Mathews* dealt with a challenge on due process grounds to administrative procedures for termination of Social Security disability payments, and the *Mathews* Court adopted a three-part balancing test for assessing due process claims.³⁴

Justice Kennedy rejected the *Mathews* balancing test as the appropriate way to determine requirements in a criminal procedural case.³⁵ For criminal cases, Justice Kennedy instead adopted the more “narrow” due process test used in *Patterson v. New York* in the context of a defendant’s burden in proving extreme emotional disturbance.³⁶ Under this test, a state’s regulating procedures are not subject to due process regulation unless they offend a fundamental principle of justice.³⁷

Justice Kennedy then undertook both a historical and operational analysis, ultimately concluding that placing the burden of proof on a criminal defendant to establish his incompetence by a prepon-

²⁷ *Id.*

²⁸ *Id.* (citing *Patterson v. New York*, 432 U.S. 197, 208 (1977)).

²⁹ 505 U.S. 437 (1992).

³⁰ *Id.* at 439.

³¹ *Id.* at 452-53.

³² 424 U.S. 319 (1976).

³³ *Medina v. California*, 505 U.S. 437, 443 (1992).

³⁴ The test for analyzing a procedural due process claim involves assessing (1) “the private interest that will be affected by the official action,” (2) “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 (3) “the Government’s interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.” *Mathews*, 424 U.S. at 335.

³⁵ *Medina*, 505 U.S. at 444.

³⁶ *Id.* at 445.

³⁷ *Id.*

derance of the evidence did not violate a fundamental principle of justice.³⁸ Significantly, the Court based this holding largely on the fact that it would only affect a limited class of cases in California, those in which "the evidence that a defendant is competent is just as strong as the evidence that he is incompetent."³⁹

Although *Medina* established that a state could require a defendant to prove his incompetence by a preponderance of the evidence, it did not address whether a state could impose a more stringent standard. *Cooper v. Oklahoma* is factually different from *Medina* in that *Cooper* required the Court to consider whether a State could continue a trial "after the defendant has demonstrated that he is more likely than not incompetent."⁴⁰ At the time *Cooper* came before the Supreme Court, Oklahoma was one of only four states that statutorily required a defendant to prove his incompetence by clear and convincing evidence.⁴¹ Oklahoma's statute provided, in relevant part, that "[t]he court . . . shall determine, by clear and convincing evidence, if the . . . [defendant] is incompetent."⁴² The general consensus was that state competency statutes such as Oklahoma's mistakenly adopted *Addington's* "clear and convincing" standard of proof for competency in a civil commitment procedure by applying it to the wholly dissimilar context of a criminal trial.⁴³ Yet, prior to *Cooper*, the Supreme

³⁸ *Id.* at 452. The majority's historical approach has been criticized. See, e.g., Bruce J. Winick, *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, 827 (1993) (arguing that the "exclusively historical approach . . . seems artificial in light of the fact that both the Court in *Patterson* and the majority in *Medina* considered the underlying fairness of the challenged procedural rules").

³⁹ *Medina*, 505 U.S. at 449. A strong dissent by Justice Blackmun, joined by Justice Stevens, argued that where evidence regarding incompetency was so unclear as in *Medina's* case, the defendant should not by default be ruled competent. *Id.* at 456 (Blackmun, J., dissenting). Justice Blackmun emphasized that the right of an incompetent defendant not to be tried was so fundamental and rudimentary that a state must take every possible precaution to "minimize the risk that an incompetent person will be convicted." *Id.* at 458 (Blackmun, J., dissenting). The dissent thus advocated placing the burden of proof on the state to demonstrate a defendant's incompetency. *Id.* at 463 (Blackmun, J., dissenting).

⁴⁰ *Cooper v. Oklahoma*, 116 S. Ct. 1373, 1377 (1996).

⁴¹ The other states were Connecticut, Pennsylvania, and Rhode Island. See *id.* at 1380.

⁴² OKLA. STAT. ANN. tit. 22, § 1175.4(B) (West 1995).

⁴³ See Transcript of Oral Argument, *Cooper v. Oklahoma*, 116 S.Ct. 1373 (1996) (No. 95-5207), available in 1996 WL 21695, at *8-*9. (In the oral arguments before the Supreme Court, Justice O'Connor noted that "the reason States are now experimenting with requiring a higher standard of proof of competency is because of *Addington's* requirement that to civilly commit someone the proof must be by clear and convincing evidence of dangerousness to self or others and of mental illness." *Id.*). Pennsylvania was the only state to have a clear and convincing requirement prior to the *Addington* decision. Brief for Petitioner at 22, *Cooper* (No. 95-5207). Oklahoma and Connecticut switched to a clear and convincing standard in 1980 and 1981, respectively, while Rhode Island amended its statute in 1993.

Court had not yet addressed the issue.

III. FACTS AND PROCEDURAL HISTORY

On September 8, 1989, investigators discovered Harold Sheppard, an eighty-six-year-old man, dead in his home from stab wounds.⁴⁴ They placed the date of death as September 4, and later discovered that Byron Cooper had purchased two watches with the victim's credit card on September 5.⁴⁵ Testimony indicated that Cooper intended to trade the purchases for cocaine.⁴⁶ On September 19, police officers spotted Cooper in a parking lot and apprehended him after chasing him down.⁴⁷ A search revealed that Cooper had a device known to function as a pipe for crack cocaine.⁴⁸

Investigators then discovered substantial evidence indicating that Cooper was indeed responsible for Sheppard's death.⁴⁹ During interrogation, Cooper gave conflicting testimony to police officers.⁵⁰ Cooper first admitted to killing Harold Sheppard as well as a second party.⁵¹ He then retracted this admission and ultimately stated that he simply could not remember.⁵² Authorities later found some of Mr. Sheppard's possessions in Cooper's residence as well as Cooper's fingerprints on items that may have been used in the burglary.⁵³ Investigators also found a butcher knife that, when sprayed with a chemical, displayed swipe marks commonly exhibited when blood is wiped off a blade.⁵⁴

In light of this evidence, on December 4, 1989, the State of Oklahoma charged Cooper with murder in the first degree for killing Mr. Sheppard in the course of a burglary.⁵⁵ Before trial began, questions arose concerning Cooper's sanity.⁵⁶ Cooper would not communicate with his attorneys and apparently believed that his lead counsel was the devil.⁵⁷ In August of 1990, Cooper's counsel obtained a judi-

Id. Wisconsin initially adopted the clear and convincing evidence requirement after *Addington*, but later changed it. *Id.*

⁴⁴ *Cooper v. Oklahoma*, 889 P.2d 293, 298 (Okla. Crim. App. 1995).

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.* at 299. These items included a flashlight, metal can, and watch case. *Id.*

⁵⁴ *Id.*

⁵⁵ Brief for Petitioner at 2, *Cooper v. Oklahoma*, 116 S.Ct. 1373 (1996) (No. 95-5207).

⁵⁶ *Cooper*, 889 P.2d at 299.

⁵⁷ *Id.*

cial order to evaluate Cooper's competency to stand trial.⁵⁸ Dr. Edith King testified that Cooper was incompetent to stand trial, finding him delusional and irrational.⁵⁹ The court ordered Cooper to the state mental hospital.⁶⁰

Upon Cooper's release, the court conducted a second hearing on his competency to stand trial that began in December, 1990.⁶¹ Dr. King again testified that she believed Cooper was incompetent to stand trial.⁶² However, the court sided with the prosecution's witness, a psychologist from the state mental hospital who testified that Cooper was simply malingering.⁶³ The psychologist believed that Cooper was not mentally ill, and was both fully aware of the nature of the charges against him and capable of assisting his attorney.⁶⁴

The next dispute over Cooper's competency arose over a year later during a motion hearing.⁶⁵ Cooper's counsel informed the court that the defendant had displayed unusual behavior in the courtroom and county jail.⁶⁶ Investigators from the Public Defender's Office who had spent a great deal of time with Cooper observed that he was "cracking up."⁶⁷ Still, the trial judge declined to change his previous ruling.⁶⁸

Trial began on May 4, 1992, at which time Cooper displayed visibly abnormal courtroom behavior.⁶⁹ To begin with, Cooper resisted changing into his court clothes because they "burned" him.⁷⁰ Cooper's attorney then requested another competency evaluation and, as he was speaking, Cooper crouched in a fetal position.⁷¹ When Cooper took the stand to testify during the competency hearing, he stated that his lawyer was trying to kill him, his mother had died a long

⁵⁸ Petitioner's Brief at 2, *Cooper* (No. 95-5207).

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.* at 3.

⁶² *Id.*

⁶³ *Id.* Cooper's counsel notes in the brief that Russell "did not actually participate on the team that treated Mr. Cooper, but she had conducted a screening interview . . . and evaluated his progress." *Id.*

⁶⁴ Brief for Respondent at 6, *Cooper v. Oklahoma*, 116 S. Ct. 1373 (1996) (No. 95-5207).

⁶⁵ Petitioner's Brief at 3, *Cooper* (No. 95-5207).

⁶⁶ *Id.*

⁶⁷ *Id.* It is not clear from the record exactly what caused this determination.

⁶⁸ *Id.* The judge made the daft and seemingly ignorant observation that:

We're talking about two things. Insanity as a defense to a crime or incompetence to assist counsel. So, 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.

⁶⁹ *Cooper v. Oklahoma*, 116 S. Ct. 1373, 1375 (1996).

⁷⁰ *Id.*

⁷¹ Petitioner's Brief at 4, *Cooper* (No. 95-5207).

time ago (when in fact she had testified in that very courtroom several days earlier), and he thought he had already been acquitted of the murder charge.⁷²

The most bizarre portion of Cooper's testimony concerned the existence of "Noryb," a spirit with whom Cooper supposedly communicated.⁷³ During testimony about Noryb, Cooper's attorney approached the witness box.⁷⁴ Apparently out of fear that his lawyer was trying to kill him, Cooper became so agitated that he fell backwards out of his chair and over the railing, hitting his head forcefully against the courtroom wall.⁷⁵ In recounting this episode, Cooper's attorney remarked that, "[t]he thud on that marble when he [fell] . . . could be heard at the back of that courtroom. . . . [H]e's just busted his head, tears are streaming down his eyes."⁷⁶

Later in the hearing, five of Cooper's fellow inmates testified about his strange behavior, stating that in recent weeks Cooper had cleaned his jail cell as often as ten times a day, talked to himself constantly, and repeatedly handled feces—swirling his hand in his unflushed toilet and rubbing it on his face.⁷⁷ Cooper's counsel also produced the expert testimony of Dr. Philip Murphy, who stated that Cooper suffered from a severe, episodic affective disorder.⁷⁸ The prosecution countered with testimony from three prison officials who had not observed any irrational behavior in Cooper in recent weeks.⁷⁹ After hearing this evidence, the trial court again refused to rule Cooper incompetent to stand trial.⁸⁰ The judge noted Dr. Murphy's credibility and the presence of a significant question as to Cooper's mental health.⁸¹ Nonetheless, the trial judge ultimately concluded that in his opinion, Cooper failed to meet his burden of proving incompetency by "clear and convincing evidence."⁸²

⁷² *Id.* at 5.

⁷³ *Id.* at 6.

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Cooper v. Oklahoma*, 116 S. Ct. 1373, 1375 (1996). The attorney further noted that "[nobody] in the courtroom, Marlon Brando in his finest hour could not have faked that [incident] under that kind of pain and that kind of trauma, it cannot be done. . . . [Cooper's] afraid because he has this fear that Noryb's going to be angry with him." Petitioner's Brief at 6, *Cooper* (No. 95-5207).

⁷⁷ *Cooper v. Oklahoma*, 889 P.2d 293, 304 (Okla. Crim. App. 1995); Petitioner's Brief at 6, *Cooper* (No. 95-5207).

⁷⁸ Petitioner's Brief at 6, *Cooper* (No. 95-5207).

⁷⁹ *Id.* at 9. These employees testified that they had engaged in rational conversations with Cooper about current events and this led them to believe that Cooper was more cognizant about his trial than he let on. Respondent's Brief at 9, *Cooper* (No. 95-5207).

⁸⁰ Petitioner's Brief at 9, *Cooper* (No. 95-5207).

⁸¹ *Id.*

⁸² *Id.* at 10; Respondent's Brief at 11, *Cooper* (No. 95-5207).

During the trial, Cooper did not interact with his attorney.⁸³ Instead, he either slept, talked to himself, or curled up in a fetal position in the corner of the courtroom.⁸⁴ A defense investigator testified that he was unable to help Cooper with his case because the defendant refused to speak to him: "I go up to talk to [Cooper] . . . and I get nothing. His pants are on fire, our office is trying to kill him, nothing to help me with his case, nothing that I can use. Nothing. . . . I get nothing from him."⁸⁵

Cooper's behavior forced the court to address his competency yet again as the prosecution wrapped up its presentation of evidence.⁸⁶ This time, the court bailiff and deputy observed Cooper eating feces that he had collected in his hand.⁸⁷ Again, however, the judge denied a reevaluation of Cooper's competency.⁸⁸

After the jury found Cooper guilty, Cooper's counsel presented additional evidence regarding the defendant's mental condition at the sentencing hearings.⁸⁹ His counsel outlined a history of extreme mental and physical abuse: Cooper's mother was an alcoholic who suffered from schizophrenia; Cooper was without adult supervision as a child and often lived without food, water, gas, or electricity; Cooper's mother beat him with her fists as well as a hammer, a baseball bat, brooms, and electric cords, once even firing a gun at him; Cooper was placed in a foster home at an early age and often spent the night in an outdoor geese pen or locked in a closet with a pot to urinate in; Cooper later went to a state facility where the administrators lied and told him that his parents had been killed; when Cooper was eleven, his mother shot and killed her husband and forced Cooper to bring money into the house by stealing; and, finally, Cooper was sexually abused in prison at the age of eighteen.⁹⁰ Notwithstanding these highly unusual circumstances, the jury voted to impose the death penalty.⁹¹

⁸³ Petitioner's Brief at 10, *Cooper* (No. 95-5207).

⁸⁴ *Id.*

⁸⁵ Amicus Brief of National Association of Criminal Defense Lawyers at 2, *Cooper v. Oklahoma*, 116 S. Ct. 1373 (1996) (No. 95-5207).

⁸⁶ Petitioner's Brief at 10, *Cooper* (No. 95-5207).

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.* at 11.

⁹⁰ *Id.* at 11-12. A developmental psychologist testified that Cooper's history was among the worst she had seen in over twenty years of practice. *Id.* at 12.

⁹¹ *Id.* at 13. The jury recommended the death penalty because of five aggravating circumstances: (1) previous conviction for a violent felony; (2) committing murder to avoid arrest or prosecution; (3) an especially heinous murder; (4) committing murder while serving a prison term; and (5) high likelihood that the murderer would continue to be a threat to society. Respondent's Brief at 1, *Cooper* (No. 95-5207).

On appeal, Cooper argued that Oklahoma's requirement of clear and convincing evidence to establish incompetency was sufficiently burdensome to violate his right to due process of law.⁹² The Oklahoma Court of Criminal Appeals rejected this claim, upholding Oklahoma's statute on the basis that "[t]he State has great interest in assuring its citizens a thorough and speedy judicial process . . . [and] a truly incompetent criminal defendant . . . can prove incompetency with relative ease."⁹³ The Supreme Court granted certiorari to consider whether the court of criminal appeals correctly held that the clear and convincing evidence standard did not violate due process.⁹⁴

IV. SUMMARY OF THE OPINION

Writing for a unanimous Court, Justice Stevens overruled the Oklahoma Court of Criminal Appeals, holding that the "clear and convincing" evidentiary burden on a defendant to prove his incompetence "is incompatible with the dictates of due process."⁹⁵ The bulk of Justice Stevens' decision consisted of a historical analysis of cases in which courts refused to try incompetent defendants.⁹⁶ He concluded by holding that a clear and convincing standard for proof of incompetency violates due process by placing too high a burden on a defendant to demonstrate his incompetency and hence depriving his fundamental right to a fair trial.⁹⁷

Justice Stevens began his analysis by noting the general, long-standing recognition by the Supreme Court that "the criminal trial of an incompetent defendant violates due process."⁹⁸ He then noted a well-established standard for incompetence: a defendant must (1) be able to consult rationally with his counsel and (2) have some basic conceptual understanding of the charges against him.⁹⁹

The Court next examined the recent case of *Medina v. California*¹⁰⁰ for support, commenting that *Medina* allows a state to require proof of incompetence by a "preponderance of the evidence."¹⁰¹ Justice Stevens emphasized that *Medina's* holding was relatively narrow, applicable only in those cases where the evidence for and against in-

⁹² *Cooper v. Oklahoma*, 116 S. Ct. 1373, 1376 (1996).

⁹³ *Cooper v. Oklahoma*, 889 P.2d 293, 303 (Okla. Crim. App. 1995).

⁹⁴ *Cooper v. Oklahoma*, 116 S. Ct. 282 (1995).

⁹⁵ *Cooper*, 116 S. Ct. at 1384.

⁹⁶ *Id.* at 1377-80.

⁹⁷ *Id.* at 1384.

⁹⁸ *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)).

⁹⁹ *Id.* at 1377.

¹⁰⁰ 505 U.S. 437 (1992).

¹⁰¹ *Cooper*, 116 S. Ct. at 1377.

competence was virtually equal.¹⁰² Importantly, in adopting the rule of *Medina*, the Court was careful to point out that the issue in *Cooper* was fundamentally different.¹⁰³ Most significantly, unlike *Medina*, Oklahoma's evidence standard affected "a class of cases in which the defendant has *already demonstrated* that he is more likely than not incompetent."¹⁰⁴

Justice Stevens then began the core of his argument, a historical overview of the standard required to prove a defendant's incompetency.¹⁰⁵ He noted at the outset that Oklahoma's "clear and convincing evidence" requirement was without any apparent precedent.¹⁰⁶ Justice Stevens also observed that the general rule against trying an incompetent defendant traced back to Hale and Blackstone, and that the first cases supporting this notion appeared in the late 1700s.¹⁰⁷

In tracing the development of the preponderance standard, Justice Stevens examined a series of English cases from the 18th and early 19th centuries in which the judge instructed the jury to determine whether or not the defendant was competent to stand trial.¹⁰⁸ Justice Stevens then noted that a modern English case, *Queen v. Podola*,¹⁰⁹ relied upon the precedent of these earlier decisions to explicitly apply the preponderance standard for incompetence.¹¹⁰ Justice Stevens next turned to American precedent, noting that early American cases relied upon the English standard.¹¹¹ As Justice Stevens noted, by 1896, judges explicitly instructed juries that a defendant must prove insanity by a preponderance of the evidence.¹¹²

Justice Stevens then surveyed modern practice, noting that only four states require a defendant to prove his incompetence by clear

¹⁰² *Id.* In that sense, the *Medina* Court was not substantially increasing the risk of incompetent defendants facing trial because the rule only affected a narrow class of cases.

¹⁰³ *Id.*

¹⁰⁴ *Id.* (emphasis added). Justice Stevens later wrote that:

Oklahoma's practice of requiring the defendant to prove incompetence by clear and convincing evidence imposes a significant risk of an erroneous determination that the defendant is competent. In *Medina* we found no comparable risk because the presumption would affect only the narrow class of cases in which the evidence on either side was equally balanced.

Id. at 1381.

¹⁰⁵ *Id.* at 1377.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at 1377-78.

¹⁰⁸ *Id.* at 1378. Examples of these cases include *King v. Pritchard*, 7 Car. & P. 303 (1836) and *King v. Frith*, 22 How. St. Tr. 307 (1790).

¹⁰⁹ 43 Crim. App. 220 (1959).

¹¹⁰ *Cooper*, 116 S. Ct. at 1378-79.

¹¹¹ *Id.* at 1379. Justice Stevens cites, for example, *State v. Harris*, 78 Am. Dec. 272, 272-75 (N.C. 1860), which relied on *King v. Dyson* and *King v. Pritchard*.

¹¹² *Id.* (citing *State v. O'Grady*, 5 Ohio Dec. 654, 655 (1896)).

and convincing evidence.¹¹³ Furthermore, Justice Stevens noted that “a number of States place no burden on the defendant *at all*, but rather require the prosecutor to prove the defendant’s competence.”¹¹⁴ The Court also looked to the federal courts, observing that Congress adopted a preponderance of evidence standard for proof of incompetence under 18 U.S.C. § 4241.¹¹⁵ Justice Stevens concluded his historical analysis with the observation that a clear and convincing standard “offends a principle of justice that is deeply ‘rooted in the traditions and conscience of our people.’”¹¹⁶

Justice Stevens next addressed whether the Oklahoma standard was “fundamentally fair.”¹¹⁷ He observed that Oklahoma, in setting such a high standard for proof of incompetency, greatly increased the likelihood of an erroneous finding of competency.¹¹⁸ To Justice Stevens, the most egregious aspect of Oklahoma’s heightened standard was that a court may artificially find “competent” a defendant who is more likely than not incompetent.¹¹⁹ Because a defendant who is more likely than not incompetent may be unable to effectively communicate with counsel nor understand the charges against him, he will not receive a fair trial.¹²⁰ Significantly, Justice Stevens concluded that the risk to the state of erroneously finding the defendant incompetent posed a comparatively “modest” harm.¹²¹ Justice Stevens concluded this section with the observation that in cases where the defendant is more likely than not incompetent but does not quite meet the standard of clear and convincing evidence, the defendant’s “fundamental right to be tried only while competent outweighs the State’s interest in the efficient operation of its criminal justice system.”¹²²

Finally, the Court examined and rejected Oklahoma’s two additional arguments in support of its clear and convincing evidence stan-

¹¹³ *Id.* at 1380. These states are Connecticut, Oklahoma, Pennsylvania, and Rhode Island. *Id.*

¹¹⁴ *Id.* (emphasis added).

¹¹⁵ *Id.*

¹¹⁶ *Id.* (quoting *Medina v. California*, 505 U.S. 437, 445 (1992)).

¹¹⁷ *Id.* (quoting *Medina*, 505 U.S. at 448 (internal quotation marks omitted)).

¹¹⁸ *Id.* at 1381.

¹¹⁹ *Id.*

¹²⁰ *Id.* at 1381-82.

¹²¹ *Id.* at 1382. Justice Stevens bases this conclusion on the fact that, if an error is made, the state can always correct it in a later proceeding, and that an incompetent defendant may be placed in an institution until authorities can determine whether it is possible he will become competent anytime soon. *Id.* Part of Justice Stevens’ distaste for Oklahoma’s heightened standard for incompetency stems from his observation that “even the most artful malingerer [cannot] . . . feign incompetence successfully for a [long] period of time while under professional care.” *Id.*

¹²² *Id.* at 1383.

dard.¹²³ First, Oklahoma argued that *Patterson v. New York*¹²⁴ afforded the state discretion to set procedures for the burden of persuasion and presenting evidence.¹²⁵ However, Justice Stevens observed that *Patterson* also subjected a state to review in instances where its regulation of procedural burdens upsets a fundamental principle of justice.¹²⁶ Second, Oklahoma argued that the Supreme Court's decision in *Addington v. Texas*,¹²⁷ which requires a clear and convincing standard of proof in an involuntary civil commitment proceeding, supports the argument that this standard should apply to competency hearings as well.¹²⁸ Justice Stevens quickly dispatched with this contention by noting that competency and commitment proceedings are highly dissimilar.¹²⁹ He also pointed out that the *Addington* ruling in fact protected the same interest, "the proper protection of fundamental rights in circumstances in which the State proposes to take drastic action against an individual."¹³⁰

Justice Stevens concluded by re-emphasizing that, in requiring such a heightened standard of evidence for incompetency, Oklahoma allowed a defendant who was "more likely than not incompetent" to stand trial.¹³¹ By permitting this to take place, Oklahoma's statute violated the Fourteenth Amendment guarantee of due process.¹³² Hence, the Court remanded Cooper's incompetency case to be retested under the appropriate standard of "preponderance of the evidence."¹³³

¹²³ *Id.* at 1383-84.

¹²⁴ 432 U.S. 197 (1977).

¹²⁵ *Cooper*, 116 S. Ct. at 1383.

¹²⁶ *Id.*

¹²⁷ 441 U.S. 418 (1979).

¹²⁸ *Cooper*, 116 S. Ct. at 1383.

¹²⁹ *Id.*

¹³⁰ *Id.* at 1384. Justice Stevens went on to comment that:

The [*Addington*] requirement that the grounds for civil commitment be shown by clear and convincing evidence protects the individual's fundamental interest in liberty. The prohibition against requiring the criminal defendant to demonstrate incompetence by clear and convincing evidence safeguards the fundamental right not to stand trial while incompetent.

Id.

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Id.* Upon remand, the Oklahoma Court of Criminal Appeals directed the District Court to determine whether a "retrospective post-evaluation competency hearing" was feasible. 1996 WL 528403, at *1 (Okla. Crim. App. 1996). The District Court determined that such a hearing was not feasible, so the Court of Criminal Appeals reversed and remanded Cooper's case for a new trial. *Cooper v. Oklahoma*, 889 P.2d 293 (Okla. Crim. App. 1995) *Id.*

V. ANALYSIS

This Note argues that the Supreme Court's decision is both appropriate and well crafted. In Part A, this Note observes that the lower court's opinion was based largely on faulty logic and did not deserve to stand. Part B finds that the Court correctly argued that case precedent supports a preponderance of evidence standard for proof of incompetence. In Part C, this Note supports the Court's rejection of Oklahoma's state interest claim on the grounds that the individual defendant's fundamental right to a fair trial outweighs any interest the State may have in a speedy judicial process. Finally, in Part D, this Note examines the potential impact of *Cooper*, finding that it appears to provide grounds for appeal by defendants ruled incompetent under the clear and convincing standard.

A. THE LOWER COURT USED FAULTY REASONING IN UPHOLDING THE CLEAR AND CONVINCING EVIDENCE REQUIREMENT

The Oklahoma Court of Criminal Appeals used severely flawed logic in upholding the clear and convincing evidence standard. To begin with, the court correctly noted that "in criminal cases, the interests of the defendant are of such magnitude that they . . . [require] standards of proof designed to exclude as nearly as possible the likelihood of an erroneous judgment."¹³⁴ Yet this is the very reason that a clear and convincing standard cannot stand, for it imposes an unreasonably high burden on the defendant. It is not only likely but *probable* that a court will erroneously judge a defendant competent when he is in fact more likely than not incompetent, simply because he does not meet the heightened standard.

A related flaw in the lower court's opinion concerned Oklahoma's argument that its interest in a speedy trial necessitated a higher standard of proof for incompetence.¹³⁵ In accepting this argument, the lower court correctly observed that the determination of incompetency was prone to "inexactness and uncertainty . . . based on diagnoses which are . . . [largely] drawn from subjective analysis and filtered through . . . the diagnostician."¹³⁶ However, in the *same paragraph*, the court justified imposing a clear and convincing evidence standard since "[a] truly incompetent criminal defendant, through his attorneys and experts, can prove incompetency with relative ease."¹³⁷

The lower court was correct in asserting that incompetency pro-

¹³⁴ *Cooper*, 889 P.2d at 302.

¹³⁵ *Id.* at 303.

¹³⁶ *Id.* (citing *Medina v. California*, 505 U.S. 437 (1992) (internal quotations omitted)).

¹³⁷ *Id.*

ceedings are uncertain and based to a large extent on subjective evaluations. Indeed, this is the very reason why the standard for incompetency should *not* be as high as clear and convincing evidence, for such a level of proof would be nearly impossible to meet. It is absurd to suggest that a “truly incompetent” defendant can easily meet this higher standard of evidence in an age where psychological “experts” are readily available to the defense and prosecution. The lower court was so eager to uphold its statute on the basis of the State’s interest in a speedy trial that it did not even formulate a cohesive argument.

The injustice of this clear and convincing evidentiary standard is especially clear from the particular facts of *Cooper*. Despite the lower court finding no evidence that Cooper was incompetent during the trial,¹³⁸ even a cursory reading of the facts of the case suggests that there was ample evidence to find Cooper more likely than not incompetent. Expert testimony was sharply divided, and in light of this balance, the scales certainly should have tipped in favor of Cooper’s incompetence in light of his bizarre actions in court and in jail, his inability to communicate with counsel or investigators, and his grisly history of past abuse (which, although not entirely relevant to prove his incompetency at the time of trial, nonetheless lent a credible backdrop to the argument that he was currently mentally disabled). The lower court’s upholding of the conviction of a man who ate his own feces in court, thought his attorney was a devil, and crouched in a fetal position during a significant portion of his trial, was a grievous and excessive violation of a defendant’s fundamental right to a fair trial.

B. CASE HISTORY IS CONSISTENT WITH THE SUPREME COURT’S HOLDING

While the Supreme Court did not cohesively analyze the appropriate burden of proof in an incompetence hearing until *Medina*, Justice Stevens correctly observed that all relevant case history from other courts points to a preponderance of evidence standard for a defendant to prove his incompetence.¹³⁹ It is unmistakably clear from a survey of early English and American cases that the common law

¹³⁸ *Id.* at 304. The Court of Criminal Appeals went on to state that the record was “brimming with evidence” that Cooper was malingering. *Id.* at 313.

¹³⁹ It is important to note that there are many cases “irrelevant” to this discussion that involve placing the burden on the *state* to demonstrate incompetence by a preponderance of evidence. As of 1995, Alabama, Alaska, Delaware, Hawaii, Illinois, Maryland, Massachusetts, Mississippi, New Hampshire, New Jersey, New York, North Dakota, South Dakota, and Wisconsin all placed the burden of proof on the prosecution to prove incompetence, and this was reflected in the relevant case law. Brief for Petitioner at 22-23, n.21 *Cooper v. Oklahoma*, 116 S. Ct. 1373 (1996) (No. 95-5207).

standard was a preponderance of evidence.¹⁴⁰ As Justice Stevens asserted, "a rule significantly more favorable to the defendant [than Oklahoma's] has had a long and consistent application."¹⁴¹

In beginning his historical analysis, Justice Stevens made a somewhat strained argument, reaching far back in history to quote the early English cases of *King v. Frith*,¹⁴² *Queen v. Goode*,¹⁴³ and *King v. Pritchard*.¹⁴⁴ Because these cases did not explicitly mention the standard for proving incompetence, Justice Stevens relied on language such as "diligently inquire . . . whether [the defendant] . . . be of sound mind and understanding or not"¹⁴⁵ to speculate that these cases suggest an instruction of finding the defendant "more likely than not" incompetent by "phrasing the inquiry in a simple disjunctive."¹⁴⁶ Although it is certainly true that the use of "whether . . . or not" in the instructions from these cases indicates that the jury was required to balance the evidence for and against incompetence, it is by no means certain that this entailed a determination of whether the defendant was "more likely than not" incompetent.¹⁴⁷

Justice Stevens placed a better theory regarding the earlier English cases in a footnote, noting that because there was a great deal of disagreement among the courts regarding which party had to prove the defendant's incompetence, "it is unlikely that in cases in which the burden was placed on the defendant that burden was as weighty as clear and convincing evidence."¹⁴⁸ This is a more reasonable inference, as it is certainly unlikely that if there was no set standard among the English courts a requirement as high as clear and convincing evidence could take hold.

Once Justice Stevens begins to cite English and American cases from the twentieth century, it becomes clear that there is simply no precedent for a clear and convincing evidentiary requirement. Courts explicitly adopted the preponderance of evidence standard at the turn of the century. As early as 1896, in *State v. O'Grady*,¹⁴⁹ the court informed an Ohio jury that the "burden is upon the prisoner to show

¹⁴⁰ See, e.g., *State v. O'Grady*, 5 Ohio Dec. 654 (1896); *Queen v. Podola*, 43 Crim. App. 220 (1959).

¹⁴¹ *Cooper*, 116 S. Ct. at 1377.

¹⁴² 22 How. St. Tr. 307 (1790).

¹⁴³ 112 Eng. Rep. 572 (K.B. 1837).

¹⁴⁴ 173 Eng. Rep. 135 (1836).

¹⁴⁵ *Frith*, 22 How. St. Tr. at 311.

¹⁴⁶ *Cooper*, 116 S. Ct. at 1378.

¹⁴⁷ Justice Stevens again relies on his grammatical theory when describing early American cases. *Id.* at 1379. The opinion's historical analysis would have been sufficient without this argument.

¹⁴⁸ *Id.* at 1378 n.10.

¹⁴⁹ 5 Ohio Dec. 654 (1896).

by a preponderance of the proof that he is insane,"¹⁵⁰ while in *Commonwealth v. Simanowicz*,¹⁵¹ the court ruled that competence is "decided by a preponderance of the evidence."¹⁵²

The cases Justice Stevens discusses are by no means the only examples. Early American case history abounds with application of the preponderance of evidence test for proving incompetence at the time of trial. As early as 1901, the Supreme Court of Arkansas explicitly adopted the preponderance standard in ruling on a case in which the defendant could not fully understand the nature of the charges against him because of the cumulative effects of extensive morphine usage.¹⁵³ Ten years later, the Supreme Court of South Carolina considered a case in which the defendant had apparently become insane since conviction, and held that "[t]he plea of [present] insanity is an affirmative defense, and must be established by the party interposing it by the preponderance of evidence."¹⁵⁴

In the 1918 case of *People v. Lawson*,¹⁵⁵ the Supreme Court of California noted that when determining "whether the defendant was insane . . . when arraigned for judgment . . . it was incumbent on the defense to show this [incompetence] by a preponderance of the evidence."¹⁵⁶ Three years later, in *People v. Geary*,¹⁵⁷ the Supreme Court of Illinois, in considering whether the defendant had "become lunatic or insane since the entry of the original judgment" noted that "he is required, under the law, to establish his [present] insanity by the preponderance of the evidence."¹⁵⁸ Similarly, in 1927, the Supreme Court of Louisiana began its analysis in *State v. Seminary*¹⁵⁹ with the observation that, in determining present incompetence to stand trial, "we are confronted with the presumption of law that every man is presumed to be sane until the contrary is proven by a preponderance of evidence."¹⁶⁰ Over twenty years later, the Supreme Court of Iowa, in *State v. Bruntlett*,¹⁶¹ mirrored this analysis with the comment that "[t]he burden of proof is upon appellant to establish by a preponderance of the evidence a claimed plea of insanity" at the time of trial.¹⁶²

¹⁵⁰ *Id.* at 655.

¹⁵¹ 89 A. 562 (Pa. 1913).

¹⁵² *Id.* at 563.

¹⁵³ *State v. Helm*, 61 S.W. 915, 918 (Ark. 1901).

¹⁵⁴ *State v. Bethune*, 71 S.E. 29, 32 (S.C. 1911).

¹⁵⁵ 174 P. 885 (Cal. 1918).

¹⁵⁶ *Id.* at 888.

¹⁵⁷ 131 N.E. 652 (Ill. 1921).

¹⁵⁸ *Id.* at 655.

¹⁵⁹ 115 So. 370 (La. 1927).

¹⁶⁰ *Id.* at 372.

¹⁶¹ 36 N.W.2d 450 (Iowa 1949).

¹⁶² *Id.* at 455.

In light of this long history of requiring a defendant to prove his incompetence to stand trial by a preponderance of the evidence, Oklahoma's clear and convincing evidence requirement is not credible. There is simply no precedent for this heightened standard.

C. OKLAHOMA'S STATE INTEREST ARGUMENT MUST BE REJECTED
BECAUSE OF THE GREATER INTEREST OF THE INDIVIDUAL

Oklahoma's most compelling argument for the heightened standard is that, under the federalist system, it is the State's function to establish guidelines for its criminal justice system.¹⁶³ Hence, because of Oklahoma's strong interest in a speedy judicial process, the clear and convincing evidence requirement must stand.¹⁶⁴ Essentially, Oklahoma argued that an erroneous determination of competency would indefinitely postpone a trial from taking place, which would work to the defendant's advantage and burden the state's resources.¹⁶⁵ Interestingly, fifteen states supported Oklahoma's right to establish this heightened burden of proof in an amicus brief to the Court.¹⁶⁶

However, while a state normally has the power to regulate internal procedures, including the burden of proof, such regulations may be scrutinized and overturned if they offend "some principle of justice so rooted in the traditions and conscience of our people as to be ranked fundamental."¹⁶⁷ Thus, Justice Stevens correctly asserted that while Oklahoma did have the right to determine its criminal burdens and procedures, the clear and convincing evidence standard that it imposed violated a defendant's fundamental right to a fair trial.¹⁶⁸

¹⁶³ See Brief for Respondent at 39, *Cooper v. Oklahoma*, 116 S.Ct. 1373 (1996) (No. 95-5207). "Under the concept of federalism, the states are free to tailor their own standards of proof as applicable to the particular interests at stake."

¹⁶⁴ *Id.* at 30.

¹⁶⁵ *Id.*

¹⁶⁶ Amicus Brief of the State of Utah, *Cooper v. Oklahoma*, 116 S. Ct. 1373 (1996) (No. 95-5207). Utah was joined by Colorado, Connecticut, Delaware, Hawaii, Idaho, Kansas, Mississippi, Nebraska, Nevada, New Mexico, Ohio, Pennsylvania, Rhode Island, and Virginia. The brief stated that:

The 'clear and convincing' incompetency proof standard reasonably accommodates conflicting legal and pragmatic pressures. The public and criminal defendants have a powerful interest in expeditious criminal prosecutions. Criminal defendants also have an interest against erroneously being found incompetent. Requiring that incompetency be clearly and convincingly proven, rather than proven merely by a preponderance of evidence, protects all these interests.

Id. at 3. Of the states joining this Amicus Brief, only three applied the clear and convincing evidence standard for a defendant to prove incompetency. The other states apparently were supporting Oklahoma out of federalist concerns, not to support Oklahoma's evidentiary standard.

¹⁶⁷ *Patterson v. New York*, 432 U.S. 197, 202 (1977).

¹⁶⁸ *Cooper v. Oklahoma*, 116 S. Ct. 1373, 1382 (1996).

Justice Stevens made this determination largely by weighing the risk that an incompetent defendant might be convicted against the state's interest in a speedy trial.¹⁶⁹ Hence, it is instructive to examine a few prior cases where the Supreme Court has similarly weighed the interests of the state and individual to determine the appropriate burden of proof.

The most important decision that weighed state and individual interests was *Cruzan v. Director, Missouri Department of Health*.¹⁷⁰ There, the Court considered the appropriate burden of proof when the guardians of an incompetent person on life-support seek to terminate her life.¹⁷¹ Missouri required that the guardians demonstrate the incompetent's wishes by clear and convincing evidence, and the Court upheld this heightened standard by weighing the interest in the "protection and preservation of human life" against mistakenly terminating the surrogate's life.¹⁷² More specifically, making the incorrect decision not to terminate the patient's life would lead to "a maintenance of the status quo" and possible new developments in medicine and science, while incorrectly stopping life support "is not susceptible of correction."¹⁷³ In making its ruling, the Court observed that "[t]he more stringent the burden of proof a party must bear, the more that party bears the risk of an erroneous decision."¹⁷⁴ By requiring a defendant to prove his incompetence by clear and convincing evidence, Oklahoma increased the likelihood of an erroneous finding of competency.

In *Santosky v. Kramer*,¹⁷⁵ the Court considered a New York statute that required a preponderance of evidence to allow the State to permanently end parents' rights in their child.¹⁷⁶ The Court held that a stricter standard of clear and convincing evidence was required, weighing the irrevocable severance of parents' rights in their child against the State's interest in placing the child in an alternate home.¹⁷⁷

In *Woodby v. INS*,¹⁷⁸ the Court looked at two cases involving de-

¹⁶⁹ *Id.* at 1383.

¹⁷⁰ 497 U.S. 261 (1990).

¹⁷¹ *Id.*

¹⁷² *Id.* at 280-81.

¹⁷³ *Id.* at 283.

¹⁷⁴ *Id.*

¹⁷⁵ 455 U.S. 745 (1982).

¹⁷⁶ This includes "[denial of] physical custody, as well as the rights ever to visit, communicate with, or regain custody of the child." *Id.* at 749.

¹⁷⁷ *Id.* at 747-48, 767.

¹⁷⁸ 385 U.S. 276 (1966).

portation orders for resident aliens.¹⁷⁹ Justice Stewart, writing for the Court, concluded that the government must “establish the facts supporting deportability by clear . . . and convincing evidence.”¹⁸⁰ Justice Stewart weighed the “immediate hardship of deportation,” namely expulsion from the United States and the severance of all ties to this country, against the state’s interest in meeting a lower standard of evidence since deportation is not a criminal proceeding.¹⁸¹ As in *Santosky*, which involved the liberty interests of parents’ rights in their child, the *Woodby* Court ruled that a state could only terminate the liberty interests of persons subject to deportation by a heightened standard. Oklahoma ignored this precedent by requiring defendants who have a fundamental right not to be tried while incompetent to bear the burden of demonstrating their incompetence by clear and convincing evidence.

Finally, in *Addington v. Texas*,¹⁸² a case that Oklahoma erroneously relied on for its heightened evidentiary standard, the Court considered the appropriate standard of proof in a civil commitment proceeding for involuntary commitment to a state mental institution.¹⁸³ Chief Justice Burger held that an individual’s interest in being erroneously placed in an institution, and hence deprived of his liberty, outweighed the state’s interest in caring for mentally disturbed individuals as well as protecting the rest of the populous from the “dangerous tendencies of . . . [the] mentally ill.”¹⁸⁴ Hence, Chief Justice Burger required that the *state* demonstrate the need for confinement by clear and convincing evidence.¹⁸⁵

It is clear from these cases that, in considering the appropriate standard of evidence, the Supreme Court has routinely established a heightened standard to protect fundamental individual liberties. In *Cruzan*, the interest at stake was the termination of a patient’s life by guardians.¹⁸⁶ The state’s interest in preserving a human life far outweighed the guardians’ interest in respecting the patient’s wishes to terminate her life.¹⁸⁷ Only if it was nearly certain that the patient had indeed wished to go off life support could the Court find in the guard-

¹⁷⁹ *Id.*

¹⁸⁰ *Id.* at 277.

¹⁸¹ *Id.* at 286. The Court also noted that the clear and convincing evidence standard applies in the related cases of denaturalization and expatriation. *Id.* at 285.

¹⁸² 441 U.S. 418 (1979).

¹⁸³ *Id.*

¹⁸⁴ *Id.* at 426.

¹⁸⁵ *Id.* at 427.

¹⁸⁶ *Cruzan v. Director, Mo. Dep’t of Health*, 497 U.S. 261, 264 (1990).

¹⁸⁷ *Id.* at 286-87.

ians' favor.¹⁸⁸ Similarly, in *Santosky*, the Court required a heightened standard to prevent the state from permanently taking children from their natural home.¹⁸⁹ In *Woodby*, the Court held that the severity of expelling someone from the United States compelled clear and convincing evidence that the facts presented as proof for deportation are true.¹⁹⁰ Finally, in *Addington*, the Court required the state to prove the need for involuntary confinement to a mental institution by clear and convincing evidence because of the individual's liberty interests.¹⁹¹

The Supreme Court has imposed a clear and convincing evidence requirement where it is necessary to protect an individual's fundamental rights. The Court has long held that in criminal cases it is far worse to convict an innocent party than to let a guilty party go free.¹⁹² Applied to the context of incompetency, imposing a clear and convincing evidence requirement on a defendant substantially increases the likelihood that a court will erroneously convict a defendant who is mentally incompetent. In fact, under the Oklahoma standard, a court may convict and punish a defendant who demonstrates that he is more likely than not incompetent. In *Cooper*, the Oklahoma court was prepared to *execute* a defendant who provided ample evidence of incompetence at trial. This is unquestionably an abridgment of the individual's fundamental right to a fair trial. Hence, the interest of the state in a speedy prosecution is outweighed by the defendant's fundamental interest in not being tried while incompetent, as well as the fact that an erroneous finding of incompetence simply means that the defendant will be institutionalized until found sane to stand trial.

D. THE IMPACT OF *COOPER*

The most immediate effect of *Cooper* was that Oklahoma almost immediately revised its statute, changing the language "clear and convincing" to "preponderance of the evidence."¹⁹³ It appears that at

¹⁸⁸ *Id.* at 283.

¹⁸⁹ *Santosky v. Kramer*, 455 U.S. 745, 747-48 (1982).

¹⁹⁰ *Woodby v. INS*, 385 U.S. 276, 286 (1966).

¹⁹¹ *Addington v. Texas*, 441 U.S. 418, 427 (1979).

¹⁹² *See In re Winship*, 397 U.S. 358, 372 (1970) (Harlan, J., concurring).

¹⁹³ OKLA. STAT. ANN. tit. 22, § 1175.4(B) (West Supp. 1996). This is not the first time that Oklahoma has changed its statute based on a Supreme Court ruling. In 1988, the Court, also in an opinion by Justice Stevens, ruled that an Oklahoma statute which allowed the death penalty for a child of fifteen who committed murder was unconstitutional under the Eighth and Fourteenth Amendments. *Thompson v. Oklahoma*, 487 U.S. 815, 838 (1988). *Thompson* actually raised very similar issues to *Cooper*. For example, as in *Cooper*, the Court considered federalist concerns, namely that a state should set its own juvenile justice standards. *Id.* at 823-24. The Court also looked at the practice of other states as in *Cooper*, observing that no other state statute permitted execution of children under 16. *Id.*

least two of the other three states that had such a high evidentiary standard have already followed suit.¹⁹⁴ There is certainly every reason to believe that prisoners in Oklahoma, Connecticut, Rhode Island, and Pennsylvania who were found incompetent at trial will now have grounds for appeal.¹⁹⁵ In Oklahoma, one possible limitation is the requirement that a retrospective competency determination can only take place if credible evidence still exists.¹⁹⁶ It is not clear whether this requirement will conflict with Oklahoma's change in statutory language. Certainly it is possible that where credible evidence such as witnesses and testimony no longer exists, the case may simply be remanded and re-tried, as occurred after the Supreme Court's decision in *Cooper*.

In addition to changing its statute to reflect a preponderance of evidence standard, Oklahoma courts have quickly accepted the Supreme Court's ruling. In October, 1996, Roderick Smith, sentenced to death by the District Court of Oklahoma County, appealed to the Court of Criminal Appeals.¹⁹⁷ One ground for his appeal was that Oklahoma's clear and convincing evidence standard was unconstitutional, and the court, relying on *Cooper*, agreed that this standard violated due process.¹⁹⁸ However, the court of appeals did not remand the case because the facts clearly indicated that "[t]he defense failed to prove, even by a *preponderance of the evidence*, that [Smith] was incompetent to stand trial."¹⁹⁹ While this case does not speak directly to an appeal based on conviction under the old statute, it does demonstrate the court's ready acceptance of *Cooper*.

More significantly, the Tenth Circuit has implicitly acknowledged that defendants convicted under Oklahoma's unconstitutional clear and convincing evidence standard will be able to appeal their convictions. In August, 1996, the court considered the claim of Steven Hatch, a defendant sentenced to death who filed a petition for writ of habeas corpus.²⁰⁰ One of Hatch's claims "[contended] that his origi-

at 829.

¹⁹⁴ *Court Tightens Standard of Fitness to Stand Trial*, WALL ST. J., Apr. 17, 1996, at B2. As of the writing of this Note, only Connecticut had not yet changed its standard. See CONN. GEN. STAT. § 54-56d(b) (1995); 50 PA. CONS. STAT. § 7403(a) (West Supp. 1996); R.I. GEN. LAWS § 40.1-5.3-3(b) (West Supp. 1996).

¹⁹⁵ It is also important to realize that it is highly likely that many attorneys did not even attempt to raise the incompetence argument in these states because they knew how difficult it would be to meet such a rigorous standard.

¹⁹⁶ See, e.g., *Tate v. Oklahoma*, 896 P.2d 1182 (Okla. Crim. App. 1995).

¹⁹⁷ *Smith v. Oklahoma*, No. F-94-1199, 1996 WL 557818, at *1 (Okla. Crim. App. Oct. 1, 1996).

¹⁹⁸ *Id.* at *2.

¹⁹⁹ *Id.* at *4 (emphasis added).

²⁰⁰ *Hatch v. Oklahoma*, 92 F.3d 1012, 1013 (10th Cir. 1996).

nal competency determination was constitutionally flawed under *Cooper*, and thus he is entitled to file a second . . . petition."²⁰¹ The court found that Hatch was not entitled to a successive habeas corpus petition because his "competency to stand trial was *not determined under the Oklahoma scheme invalidated in Cooper*."²⁰² In emphasizing that Hatch was found incompetent under an entirely different statute,²⁰³ the court implicitly stated that a defendant ruled incompetent under the statute at issue in *Cooper* would have standing for appeal.²⁰⁴

By amending its statute to a preponderance of the evidence standard for incompetence, readily accepting *Cooper* in its courts within several months of the Supreme Court's decision, and implicitly holding that a defendant convicted under the unconstitutional standard will have grounds for appeal, Oklahoma appears more than willing to consider appeals from convicts found competent under the old standard.²⁰⁵

VI. CONCLUSION

In *Cooper v. Oklahoma*, the Supreme Court found that Oklahoma's requirement that a defendant prove his incompetence by clear and convincing evidence violated Due Process by depriving the defendant of his fundamental right to a fair trial. This holding is wholly consistent with the history of incompetency cases in England and America, which demonstrates consistent application of a preponderance of evidence standard until recently. The only flaw in the Court's decision was its reliance on the language of very early cases as proof of the preponderance standard. Notwithstanding this minor glitch, it is eminently clear that placing a clear and convincing requirement on the defendant has no foundation. Such a standard deprives a defendant of his fundamental right to be competent at trial, enabling an Oklahoma court to convict and punish a defendant who is unable to

²⁰¹ *Id.* at 1015.

²⁰² *Id.* (emphasis added).

²⁰³ "Unlike Mr. Cooper, who was forced to prove his incompetence by clear and convincing evidence, the statutory scheme under which Hatch was found competent simply called for a medical determination by state doctors whether the defendant was 'presently sane' or 'presently insane.'" *Id.* (citations omitted).

²⁰⁴ *Id.*

²⁰⁵ There are several decisions from the past few years where a defendant found competent under the clear and convincing evidence standard may be able to make a successful appeal. In *Valdez v. Oklahoma*, for example, the Court of Criminal Appeals upheld a death sentence for a defendant found incompetent under the old standard, noting that "the trial court's finding of competence did not constitute an abuse of discretion. An accused at the post-examination competency hearing is presumed competent and thus bears the burden of proving incompetence by clear and convincing evidence." *Valdez v. Oklahoma*, 900 P.2d 363, 367, 369 (Okla. Crim. App. 1995) (internal citations omitted).

communicate with his attorney nor understand the nature of the charges and proceedings against him.

Justice Stevens correctly asserted that Oklahoma's requirement of proving incompetence by clear and convincing evidence was far too high. Moreover, as Justice Stevens emphasized, there is comparatively little harm in mistakenly finding a defendant incompetent, for he will simply be sent to a state mental hospital until found sane and then retried. In other words, an erroneous finding of incompetency will do little more than postpone the trial.²⁰⁶ Although somewhat burdensome to the state, this is far less costly than convicting a defendant unable to assist in or understand his defense. By requiring such a high standard of proof for incompetence, Oklahoma simply increased the likelihood that a court would erroneously find a defendant competent even if that defendant is incapable of understanding the proceedings or assisting in his defense. Such a result violates the fundamental due process right to a fair trial.²⁰⁷ This requirement simply could not stand.

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²⁰⁶ There are, of course, more severe consequences of placing a defendant who is not actually incompetent in a mental home, namely that he takes away space that could go to treat those who are truly mentally ill and that he may pose a threat to hospital staff and patients. See Amicus Brief of the State of Utah at 16, *Cooper v. Oklahoma*, 116 S.Ct. 1373 (1996) (95-5207).

²⁰⁷ See, e.g., *Drope v. Missouri*, 420 U.S. 162 (1975). A state violates due process rights when it does not "observe procedures adequate to protect a defendant's right not to be tried or convicted while incompetent to stand trial." *Id.* at 172.