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Criminal Law: Oklahoma's New Standard of Proof in Competency Proceedings: Due Process, State Interests, and a Murderer Named Cooper — *Cooper v. Oklahoma*

I. Introduction

On April 16, 1996, the United States Supreme Court decided *Cooper v. Oklahoma* and declared unconstitutional Oklahoma's standard of proof in criminal competency cases. Competency refers to whether a defendant has the ability: (1) to understand the nature of the charges and proceedings brought against her, and (2) to effectively and rationally assist in her defense. Oklahoma and three other states required the accused to prove incompetency by "clear and convincing evidence." The Court rejected this approach and mandated that a defendant can only be required to prove incompetency by a "preponderance of the evidence." The right to be tried only while competent is deemed fundamental, but the competing state interest — to protect against false findings of competence caused by malingering — is also important. The major reason behind Oklahoma's heightened burden of proof was to require the defendant to produce more convincing evidence of incompetency so as to avoid false findings that delayed speedy imposition of justice in criminal cases.

In the aftermath of *Cooper*, the question remains whether this state interest will be undermined by the lower "preponderance of the evidence" standard mandated by the Court. Based upon Oklahoma's experience with the insanity defense, this note will argue that the state's interest in preventing false findings of incompetence will not be significantly frustrated. It is also improbable that a larger number of defendants will be found incompetent by reason of a lower standard of proof.

Initially, this note examines the *Addington v. Texas* and *Medina v. California* decisions and how they have shaped the law of competency prior to 1996. Also, the evolution of Oklahoma's competency statute is discussed. Next, the case of *Cooper v. Oklahoma* is explored. Finally, this note will conclude with a comparative analysis of Oklahoma's experience with both the insanity defense and competency proceedings. Predictions regarding the impact the preponderance standard will have on the state interest in accurate findings of incompetence will also be examined.

2. See id. at 1384.
5. 441 U.S. 418 (1979).
II. Historical Background

A. Addington v. Texas

An examination of Addington is necessary to understand the genesis of Oklahoma's "clear and convincing" competency standard. As discussed below, this decision is important because it is one factor that likely influenced legislative enactment of the "clear and convincing" standard. Although Addington involved civil commitment proceedings, the case represents the Supreme Court's initial leap into considering what burden of proof should apply when mental health law and fundamental rights collide.

In Addington, the defendant appealed his involuntary civil commitment to a state mental hospital. The defendant had previously been committed to Texas mental hospitals on ten occasions over a six-year period. After being arrested for misdemeanor assault by threat, the defendant's mother filed a petition to have her son committed indefinitely under Texas's involuntary civil commitment statute. At trial, the State offered evidence that the defendant suffered from delusions, that he routinely threatened to injure his parents as well as others, and that he had caused property damage at his own apartment and his parents' home. Two psychiatrists testified that the defendant suffered from psychotic schizophrenia and had paranoid tendencies that made him dangerous both to himself and to others. In the opinions of the two experts, the defendant required hospitalization because in the past he had refused to attend outpatient treatment and had escaped from mental hospitals.

The defendant conceded that he suffered from mental illness. However, he denied that he was a danger to himself or others. The trial judge instructed the jury with two questions: "1. Based on clear, unequivocal and convincing evidence, is Frank O'Neal Addington mentally ill? 2. Based on clear, unequivocal and convincing evidence, does Frank O'Neal Addington require hospitalization in a mental hospital for his own welfare and protection or the protection of others?" The jury found the defendant mentally ill and concluded that he needed treatment for his own and others' welfare.

The defendant renewed on appeal his objection to the trial court's refusal to require the "beyond a reasonable doubt" standard of proof. The defendant claimed that requiring the prosecution to prove incompetence by any standard less than that used for criminal convictions violated his Fourteenth Amendment due process rights.

8. See id. at 420.
9. See id. at 420-21.
10. Id. at 421.
11. See id.
12. See id. at 421-22.
The Texas Court of Civil Appeals agreed with the defendant and reversed the trial court's judgement. The Texas Supreme Court, however, reversed the Court of Civil Appeals, relying upon its decision in State v. Turner. The Turner court held that a "preponderance of the evidence" standard in a civil commitment proceeding met due process considerations and declined to adopt the "beyond a reasonable doubt" standard. The court expressed concern whether the state could ever prove a person's future dangerousness under such a heavy standard.

The United States Supreme Court held that it is unnecessary for states to apply the "beyond a reasonable doubt" standard to civil commitment proceedings but rather must apply, at a minimum, the "clear and convincing" evidence standard. Given the uncertain nature of psychiatric diagnosis, the Court questioned whether a state could ever prove mental illness and future dangerousness beyond a reasonable doubt. The Court reasoned that the reasonable doubt standard was functional in criminal law proceedings because the standard "is addressed to specific, knowable facts." The basis of civil commitment proceedings — psychiatric diagnosis — on the other hand, is based on impressions drawn from subjective analysis tempered by the diagnostician's own experience. The Court held that this uncertainty, under a heightened standard of proof, would impede the legitimate state and patient interests in treating mentally ill persons who needed it.

By the same token, however, the Court recognized that the lower preponderance standard created the risk that some individuals would be erroneously committed. Reasoning that every person demonstrates abnormal behavior at some point in his or her life, the Court feared that a preponderance standard would allow a factfinder to commit a person based on only a few instances of bizarre or unusual conduct. Because an individual's liberty interest is so great in the outcome of civil commitment proceedings, the Court reasoned that the state must justify confinement by proof greater than a preponderance of the evidence. Increasing the burden of proof was one way to indicate to the factfinder the seriousness of the decision, thereby reducing the chance that incorrect commitments are made. As a result, the Court turned to the standard of "clear and convincing" evidence, the great middle level of proof that "strikes a fair balance between the rights of the

13. Id. at 422.
14. 556 S.W.2d 563 (Tex. 1977).
15. See Addington, 441 U.S. at 422 (discussing Turner, 556 S.W.2d at 566).
16. See id. at 431 (discussing Turner, 556 S.W.2d at 566).
17. See id.
18. See id.
19. See id. at 429.
20. Id. at 430.
21. See id.
22. See id.
23. See id. at 426.
24. See id. at 426-27.
25. See id. at 427.
26. See id.
individual and the legitimate concerns of the state."²⁷ Increasing the burden of proof was an attempt to reduce the possibility that inappropriate commitments would be made.²⁸

B. Oklahoma's Change in Competency Law: Dateline 1980

The procedures governing Oklahoma competency trials prior to 1980 afforded a seemingly lesser burden to be met by a defendant and was contained in the now-repealed title 22, sections 1171-1174 of the Oklahoma Statutes.²⁹ The statutes provided that if a doubt as to the defendant's competency arose, he was to be examined at a state hospital.³⁰ Simply put, a pre-1980 criminal defendant was only required to make an initial showing of incompetence "sufficient to create in the trial judge's mind a legal doubt of the defendant's [competency]."³¹ Upon such showing, all criminal proceedings were to be suspended until doctors determined

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²⁷ Id. at 431.
²⁸ See id. at 427.
²⁹ 22 Okla. Stat. §§ 1171-1174 (repealed 1980). Those sections provided:

§ 1171. Doubt as to present sanity prior to calling of indictment or information for trial or preliminary hearing. — If any person is held in confinement because of criminal charges, or if he has criminal charges pending or likely to be filed against him, or if he has been taken into custody because of a criminal act or acts, and prior to the calling of an indictment or information for trial or preliminary hearing, a doubt arises as to his present sanity, either such individual or the district attorney may make application to the District Court for an order committing such individual to a state hospital within the Department of Mental Health for observation and examination for a period not to exceed sixty (60) days. Provided, however, where an adequate examination can be had in the county where the charge is pending, such examination shall be held in such county. Provided, however, the court may extend the sixty-day period where a need for such extension is shown. Any criminal proceedings against such individual shall be suspended pending the hearing of the application by the District Court.

§ 1172. Determination by District Court as to sanity — Commitment. — In the event the District Court determines that there is a doubt as to the present sanity of the individual, he shall be ordered committed to a State Hospital and proceedings against such individual shall be further suspended pending the report of the doctors of said hospital.

§ 1173. Finding of present sanity — Dissolving of order suspending proceedings. — If, in the opinion of the doctors of said hospital, after the observation and examination as provided, such individual is presently sane, the order of the District Court suspending proceedings shall be dissolved, and the question of his present sanity shall not again be questioned until the calling of the indictment or information for trial.

§ 1174. Finding of present insanity — Further commitment and treatment — Jury trial. — If in the opinion of the doctors, such individual is presently insane, the District Court, unless good cause to the contrary be shown, shall order him committed to a State Hospital for treatment until such time as he may be declared presently sane by the doctors thereof. Provided, that in the event of such order by the District Court such individual shall have the right to a jury trial in the manner as provided in 22 O.S.1961, § 1162 and § 1164 and provided such jury trial is requested within ten days from the issuance of such order.

Id.

the defendant was competent to stand trial.31 When found competent, the district
court's order suspending proceedings dissolved and criminal proceedings resumed.32 In all cases where a district court found a defendant incompetent and
ordered commitment to a state hospital for treatment, the defendant was entitled
to a jury trial.33 However, no post-examination competency hearing was required
in cases where the court found the defendant competent.34 Hence, juries appeared
only to have a role in determining competency when a defendant was ordered
committed for treatment. Further, the pre-1980 statutes did not articulate a clear
test for competency35 and no requisite standard of proof was assigned for a
showing of incompetency.

On June 25, 1980, the Oklahoma legislature repealed title 22, sections 1171-
1174 of the Oklahoma Statutes.36 These statutes were replaced with title 22,
sections 1175.1-1175.8.37 The basic test for competency, however, remained

32. See Hatch, 924 P.2d at 293.
33. See id.
1982) (evidentiary hearing on questions of competence not required under pre-1980 Oklahoma
competency statute where examining doctors determined defendant was competent).
36. The test was instead articulated in case law: "whether the accused has sufficient ability to
consult with his lawyer and has a rational as well as actual understanding of the proceedings against
him." Beck v. State, 626 P.2d 327, 328 (Okla. Crim. App. 1981); see also Colbert, 654 P.2d at 626 (the
"critical determination" under pre-1980 competency statute was whether defendant was "mentally unable
to consult with his lawyer and aid in his own defense").
(Supp. 1997). These sections provide:
§ 1175.1. Definitions
As used in this act:
1. "Competent" or "competency" means 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.
2. "Incompetent" or "incompetency" means the present inability 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.
3. "Criminal proceeding" means every stage of a criminal prosecution after arrest and
before judgment, including, but not limited to, interrogation, lineup, preliminary hearing,
motion dockets, discovery, pretrial hearings and trial; and
4. "Doctor" means any physician, psychiatrist, psychologist or equivalent expert.
§ 1175.2. Application for determination of competency — Service — Notice — Suspension
of criminal proceedings
A. No person shall be subject to any criminal procedure after he is determined to be
incompetent except as provided in Sections 1175.1 through 1175.8 of this title. The
question of the incompetency of a person may be raised by the person, the defense
attorney, or the district attorney, by an application for determination of competency. The
application for determination of competency shall allege that the person is incompetent
to undergo further proceedings, and shall state facts sufficient to raise a doubt as to the
competency of the person. The court, at any time, may initiate a competency determination
on its own motion, without an application, if the court has a doubt as to the
competency of the person.
If the court so initiates such an application, it may appoint the district attorney for the purpose of proceeding with the application. If the district attorney opposes the application of the court, and by reason of conflict of interest could not represent the court as applicant, then the court shall appoint private counsel. Said private counsel shall be reasonably compensated by the court fund.

... C. Any criminal proceedings against a person whose competency is in question shall be suspended pending the determination of the competency of the person.

§ 1175.3. Hearing — Date — Evidence — Orders — Examination of accused — Instructions to physician

A. Upon filing of an application for determination of competency, the court shall set a hearing date, which shall be as soon as practicable, but at least one (1) day after service of notice as provided by Section 1175.2 of this title.

B. The court shall hold a hearing on the date provided. At the hearing, the court shall examine the application for determination of competency to determine if it alleges facts sufficient to raise a doubt as to the competency of the person. Any additional evidence tending to create a doubt as to the competency of the person may be presented at this hearing.

C. If the court finds there is no doubt as to the competency of the person, it shall order the criminal proceedings to resume.

D. If the court finds there is a doubt as to the competency of the person, it shall order the person to be examined by doctors or appropriate technicians. If the court determines that the person whose competency is in question may be a threat to the safety of himself or others, it shall order the person retained in a secure facility until the completion of the competency hearing provided in Section 1175.4 of this title.

E. The doctor or doctors shall receive instructions that they shall examine the patient to determine:

1. Is this person able to appreciate the nature of the charges against him?
2. Is this person able to consult with his lawyer and rationally assist in the preparation of his defense?
3. If the answer to question 1 or 2 is no, can the person attain competency within a reasonable time if provided with a course of treatment, therapy or training?
4. Is the person a mentally ill person or person requiring treatment as defined by Section 1-103 of Title 43A of the Oklahoma Statutes?
5. If the person were released without treatment, therapy or training, would he probably pose a significant threat to the life or safety of himself or others?

§ 1175.4. Post-examination competency hearing — Evidence — Presumptions — Jury trial — Presence of accused — Witnesses — Instructions

B. The court, at the hearing on the application, 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. The jury shall be composed of six (6) persons having the qualifications required of jurors in courts of record, summoned to determine the questions of the person's competency and need for treatment. Whenever a jury is required, the court shall proceed to the selection of such jury in the manner as provided by law and such jury shall determine the questions of the competency and need for treatment of the person whose competency is in question. ...
unchanged. As noted above, a competent defendant is one who: (1) has the present ability to understand the nature of the charges and proceedings brought against him, and (2) can effectively and rationally assist his attorneys with a defense.\textsuperscript{39} However, the repeal brought, inter alia, a clear standard and burden of proof to Oklahoma competency proceedings. The presumption of competency remains and the movant (in most cases the defendant) retains the burden of proving incompetency by clear and convincing evidence.\textsuperscript{40}

for any purpose except for proceedings under this act. No such statement, admission or confession may be used against such person in any criminal action whether pending at the time the hearing is held or filed against such person at any later time, directly, indirectly or in any manner or form . . . .

E. If the question of competency is submitted to a jury, the court shall instruct the jury as to the law regarding competency, and the findings they are to make. If the trial of the question is to the court, the court shall make the required findings.

\textsection 1175.5. Questions to be answered in determining competency

The jury or the court, as the case may be, shall answer the following questions in determining the disposition of the person whose competency is in question:

1. Is the person incompetent to undergo further criminal proceedings at this time? If the answer is no, criminal proceedings shall resume. . . .

2. Can the incompetency of the person be corrected within a reasonable period of time, as defined by the court, by treatment, therapy or training? If the answer is yes, the court shall make the appropriate order. If the answer is no, the following questions shall be answered:

3. Is the person mentally ill, mentally retarded or a person requiring treatment as defined by Section 3 of Title 43A?

4. Is the person a threat to the safety of himself or others if released?

\textsection 1175.6. Disposition orders — Placement in maximum security mental ward

A. Upon the finding by the jury or the court as provided by Section 1175.5 of this title, the court shall issue the appropriate order regarding the person.

1. If the person is found to be competent, the criminal proceedings shall be resumed.

2. If the person is found to be incompetent, but capable of achieving competence with treatment, therapy, or training, the court shall remand the person to the Department of Mental Health and Substance Abuse Services, the Department of Human Services, other appropriate state agencies or a private care provider for appropriate treatment, therapy or training . . . .

\textsection 1175.7. Persons incompetent but capable of achieving competency within reasonable time — Treatment order — Medical supervisor — Commitment — Private treatment

A. If the person is found incompetent, but capable of achieving competency within a reasonable period of time, as defined by the court, the court shall order such person to undergo such treatment, therapy or training which is calculated to allow the person to achieve competence . . . .

\textsection 1175.8. Resumption of competency

If the medical supervisor reports that the person appears to have achieved competency after a finding of incompetency, the court shall hold another competency hearing to determine if the person has achieved competency. If competency has been achieved, the criminal proceedings shall be resumed.

22 OKLA. STAT. §§ 1175.2-1175.8 (Supp. 1997).


40. Title 22, section 1175.4(B) provides in pertinent part: "The court, at the hearing on the application, 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
The 1980 competency law was passed shortly after the decision in Addington.\textsuperscript{41} While no record of the legislative history behind sections 1175.1-1175.8 appears to exist,\textsuperscript{42} several reasons have been tendered to explain this statutory scheme. Robert A. Ravitz, attorney for Byron Keith Cooper in the principal case below, argued that the Oklahoma legislature intended to combine the finding of dangerousness required in civil commitment proceedings with the standard of proof used in competency proceedings.\textsuperscript{43} According to Ravitz, this was a misapplication of the Supreme Court's decision in Addington.\textsuperscript{44} Attorney General Drew Edmondson, however, argued that the 1980 statute was designed to do two things, namely: "minimize the risk of false findings of incompetency based upon fabricated symptoms . . . while preserving, protecting and safeguarding the fundamental due process right not to be tried while incompetent."\textsuperscript{45}

Regardless of the precise rationale, Oklahoma's new statute provided a clear and distinct set of procedures for competency evaluations. The presumption of competency remained,\textsuperscript{46} the movant retained the burden of proof,\textsuperscript{47} and a standard of proof — "clear and convincing evidence" — was mandated.\textsuperscript{48} As a result, Oklahoma became only the fourth state to adopt the "clear and convincing" standard in competency proceedings.\textsuperscript{49} Nearly twelve years would pass, however, until the United States Supreme Court in Medina addressed the constitutionality of the presumption of competency, and, placement of the burden of proof on the defendant in competency determinations.

\textbf{C. Medina v. California}

In Medina,\textsuperscript{50} the defendant was charged with, inter alia, three counts of first degree murder stemming from his one-month crime spree. Prior to trial, defense counsel moved for a competency hearing to determine whether the defendant was competent to stand trial. Over a period of six days, the jury heard conflicting...
expert testimony concerning the defendant's competency.\textsuperscript{51} Five expert witnesses testified. Three of these experts concluded that the defendant was competent to stand trial.\textsuperscript{52} The jury was instructed pursuant to California law, which presumes a defendant to be competent, and requires the defendant to prove by a preponderance of the evidence that he is mentally incompetent to stand trial because of some mental disorder or disability.\textsuperscript{53} The defendant was found competent to stand trial and was later found guilty on all three murder counts by a separate jury. He was subsequently sentenced to death.\textsuperscript{54}

The defendant appealed his conviction. He challenged California's competency statute as a violation of his Fourteenth Amendment due process rights because the statute: (1) placed the burden of proof on the defendant to prove his incompetency, and (2) established a presumption of competency.\textsuperscript{55} The California Court of Criminal Appeals rejected these arguments.

The United States Supreme Court held that California's competency statute did not violate due process.\textsuperscript{56} The Court applied the historical due process analysis articulated in \textit{Patterson v. New York}.\textsuperscript{57} Since no settled tradition concerning the proper allocation of the burden of proof in competency proceedings existed, the Court reasoned that California's allocation did not offend "some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental."\textsuperscript{58} Unlike the rule that a defendant must not be forced to stand trial while incompetent — a rule with a strong, consistent basis in the common law — prior decisions are inconsistent as to the allocation of the burden of proof.\textsuperscript{59} The Court further rejected the claim that California's presumption of competency violated due process. The Court agreed with the California Supreme Court that such presumption is merely a restatement of the burden of proof which, as noted above, did not violate due process considerations.\textsuperscript{60}

Justices O'Connor and Souter, in a concurring opinion, recognized the practical considerations behind placing the burden of proof on the defendant in competency hearings. Placing the burden on the state, O'Connor wrote, might provide less of an incentive to defendants to cooperate in psychiatric evaluation and produce

\footnotesize{51. See \textit{id}. at 440.  
52. Dr. Gold, a psychiatrist, testified that the defendant suffered from paranoid schizophrenia and was incompetent to stand trial. Dr. Echeandia, a clinical psychologist, disputed Gold's paranoid schizophrenia diagnosis but could not form an opinion as to the defendant's competency. Dr. Sharma, a psychiatrist, also doubted the paranoid schizophrenia diagnosis and believed the defendant was competent. Dr. Pierce, a psychologist, believed the defendant was schizophrenic and suffered from impaired memory and hallucinations but nonetheless was competent. Dr. Sakuri, a psychiatrist, testified that the defendant suffered depression but was competent to stand trial. \textit{See id}. at 440-41.  
54. See \textit{Medina}, 505 U.S. at 441.  
55. See \textit{id}. at 442.  
56. See \textit{id}. at 452-53.  
59. See \textit{id}. at 446-47.  
60. See \textit{id}. at 452-53.
witnesses who might have information about the disputed mental state. Because of this, states choose to obtain a more accurate picture of defendant's mental condition by placing the burden of proof on the defendant. As such, the potential for false findings of competence "in close cases" is outweighed by the more complete picture of the defendant's competence provided by this allocation of proof.

D. State of the Law Prior to 1996, Due Process and a Murderer Named Cooper

Prior to Cooper, the United States Supreme Court had affirmed the practice of placing the burden of proof on the defendant in competency proceedings. The Court also held that for a civil commitment, the state must prove the defendant's dangerousness by a heightened burden of proof, namely, clear and convincing evidence. Besides the decision in Medina, however, there had been no other major Supreme Court consideration of competency cases to suggest problems with Oklahoma's competency standard. While competency's big sister, the insanity defense, received much media attention throughout the 1980s and 1990s, all seemed well with Oklahoma's competency statute.

Previous decisions of the Supreme Court gave no indication that Oklahoma's "clear and convincing" standard of proof violated the right to be tried only while competent—a principle of justice declared fundamental, and therefore, applicable

61. See id. at 455 (O'Connor, J., concurring).
62. See id. (O'Connor, J., concurring).
63. See id. (O'Connor, J., concurring).
64. See id. (O'Connor, J., concurring).
65. See id. at 442.
67. The acquittal of John Hinckley for the assassination of President Ronald Reagan, and use of the insanity defense by other defendants who upon acquittal committed subsequent crimes, caused more than a few state legislatures to consider abolishing the insanity defense. See Robert E. L. Richardson, Should We Allow The Hinckley Backlash to Cause Bad Law? The Insanity Defense, 53 OKLA. B.J. 2180 (1982), for details on the early movement in the Oklahoma Legislature to abolish the insanity defense. However, Idaho, Montana and Utah led the initial movement for abolishment by actually passing repeal statutes between 1979 and 1983. See Note, Recent Developments: Due Process — Insanity Defense — Idaho Supreme Court Upholds Abolition of Insanity Defense Against State and Federal Constitutional Challenges, 104 HARV. L. REV. 1132, 1132 (1991).
68. Lorena Bobbitt (who cut off her husband's penis with a kitchen knife) and Lyle and Erik Menendez (who gunned down their sleeping parents) are the most recognizable defendants to invoke successful insanity defenses (actually derivative "abuse excuses") in the 1990s. See Richard J. Bonnie, Excusing and Punishing in Criminal Adjudication: A Reality Check, 5 CORNELL J.L. & PUB. POLY 1, 5-6, 11 (1995). Colin Ferguson (who killed six people and wounded 19 others in the Long Island railroad massacre), however, had arguably the most bizarre trial so far in the 1990s. Ferguson's attorneys, which included William Kunstler, planned to assert a standard insanity defense prior to Ferguson firing them. See id. at 5. Instead, Ferguson represented himself in what his former attorneys later described as "an obscene spectacle, a cross between bear-baiting and some weird skit in which inmates take over a mental institution and perform a play, the theme of which is a trial." Ronald L. Kuby and William M. Kunstler, So Crazy He Thinks He Is Sane: The Colin Ferguson Trial and the Competency Standard, 5 CORNELL J.L. & PUB. POLY 19, 19 (1995).
to the states. However, that was before a defendant named Byron Keith Cooper appeared in front of an Oklahoma County judge who took great pains to analyze competency in relation to abstract legal concepts. What resulted was a colossal misapplication that doomed Oklahoma's "clear and convincing" standard for good.

E. Cooper v. Oklahoma

Cooper was charged with first degree murder for the stabbing death of an eighty-six-year-old Oklahoma County man. On the day he was scheduled to go to trial, Cooper's competence was brought into question for the fourth time. Cooper had refused to change out of his prison coveralls because he said his clothes were burning him. Cooper told others that he talked to an imaginary spirit, and that his defense attorney wanted to kill him. Most startling, however, was Cooper's reaction on the stand at the competency hearing when his attorney approached him. Cooper backed up against a rail behind the witness stand and without looking behind, jackknifed over the railing to avoid the attorney. In the process, Cooper busted his head open when he fell against the marble courtroom wall.

In addition to this spectacle, the trial judge heard testimony from several lay witnesses and another psychologist. The psychologist testified that Cooper was likely incompetent but that competence could be achieved within six weeks. Despite his bizarre behavior and the testimony of the expert, the trial judge found Cooper competent to stand trial. In his reasoning, the trial judge recognized that Cooper was not normal, but that he had not shown incompetency by "clear and convincing" evidence. As a result, the trial judge ordered Cooper to stand trial.

69. See Medina, 505 U.S. at 445.
70. The Honorable Richard J. Freeman, District Judge, presided over the trial.
72. See id. At Cooper's first competency evaluation, a judge found him incompetent based upon the opinion of a clinical psychologist; Cooper was committed to a state mental hospital for three months. Upon his release, Cooper's competency was revisited. At that time, a trial judge heard testimony from two state-employed psychologists. The two experts held conflicting opinions concerning Cooper's ability to stand trial. The trial judge found Cooper competent and ordered him to trial. Finally, one week before trial, Cooper's defense counsel raised the issue of competency a third time. The judge was told that Cooper refused to communicate with his attorney and was behaving oddly. The judge was unpersuaded, however, and refused to take more evidence on Cooper's competency. See id.
73. See id. at 1375 n.1.
74. See id. at 1375.
75. See id. at 1376.
76. In ordering Cooper to trial, the trial judge said this:
   Well, I think I've used the expression... in the past that normal is like us. Anybody that's not like us is not normal, so I don't think normal is a proper definition that we are to use with incompetence. My shirtsleeve opinion of Mr. Cooper is that he's not normal. Now, to say he's not competent is something else.
   But you know, all things considered, I suppose its possible for a client to be in such
Review of the transcript indicates that Cooper continued to demonstrate odd behavior at trial:

[The following discussion took place at the bench on May 14, 1992.]

DEPUTY WILLIAM GRIMSLEY: ** * Deputy Albertson asked me what he [Cooper] had in his hand. I said it looks like candy, which he had access to through commissary in the jail. And there's a real heavy odor of feces in the area. And I look at it close, and it doesn't look like candy.

THE COURT: Do you think it's feces?
DEPUTY WILLIAM GRIMSLEY: Yes, sir, I do.
MR. MILDFELT: I'd tell the Court that it is. I smelled something, but I thought it was just bad breath, or something, and I thought, boy it's pretty strong, but I did not say anything about it. I just didn't know that my client was over there . . . eating feces.
MR. MILLER: Well, now, did anybody see him eat it?
MR. MILDFELT: Apparently, the bailiff did.
DEPUTY WILLIAM GRIMSLEY: Both of us did, Your Honor.

. . .

THE COURT: Let the record reflect that Mr. Cooper was taken upstairs by the deputies at my request . . . and now they are returning to the courtroom. And . . . what do you have to tell us?
DEPUTY GRIMSLEY: We took Mr. Cooper upstairs, put on a pair of rubber gloves, extracted the material from his hand, and I smelled it and it had the definite odor [sic] of human feces to it, at which time I placed it into a rubber glove, tied a knot in it, and placed it in a paper bag . . .

MR. RAVITZ: And in your opinion, that is what he was eating?
DEPUTY GRIMSLEY: That is correct, sir.
MR. RAVITZ: You have no doubt about that?
DEPUTY GRIMSLEY: No doubt."

Despite strenuous objections by defense counsel and the fact that the defendant did not speak with his attorneys, remained in a fetal position, and talked to himself for most of the proceedings, the trial judge insisted upon continuing with

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a predicament that he can't help his defense and still not be incompetent. I suppose that's a possibility, too.

I think it's going to take smarter people than me to make a decision here. I'm going to say that I don't believe that he has carried the burden by clear and convincing evidence of his incompetency and I'm going to say we're going to go to trial.

Id. at 1376.

the trial. In the end, the jury convicted Cooper of first degree murder, and he was subsequently sentenced to death.

Cooper appealed his conviction to the Oklahoma Court of Criminal Appeals. He argued that Oklahoma's presumption of competence, combined with the requirement that the defendant prove incompetency by clear and convincing evidence, violated his due process rights. The court rejected this argument based upon the inherent uncertainty involved in determining competency. Because of this uncertainty, the standard was justified because of the state interest in a thorough and speedy judicial process, and because counsel for a truly incompetent defendant "can prove incompetency with relative ease."

The United States Supreme Court held that Oklahoma's "clear and convincing evidence" standard violated due process because it allowed a defendant, more likely than not incompetent, to nonetheless be sent to trial. As in Medina, the Court relied upon the historical due process analysis. The Court reviewed common law, modern English and American precedent and reached the conclusion that a preponderance standard had been uniformly subscribed to by most courts since the eighteenth century. Further, only three states besides Oklahoma employed the heightened "clear and convincing" standard. Because of its lack of historical support, Oklahoma's heightened standard of proof offends a principle of justice deeply "rooted in the traditions and conscience of our people."

In the second prong of its analysis, the Court considered whether Oklahoma's statute exhibited fundamental fairness in operation. The Court feared that placing a greater burden of proof on the defendant would result in a greater likelihood of an erroneous decision against that defendant. Under Oklahoma's standard of proof, a defendant who has shown that he is more likely than not incompetent could still be sent to trial because he did not reach the greater "clear and convincing" standard. As such, the defendant's fundamental right to stand trial only while competent could be violated in close cases. Because of this, the Court held that Oklahoma's statute imposed an unconstitutional risk of erroneous determination of competence.

Compared with the possible harm to the state from an erroneous determination of incompetency because of malingering — the expense of keeping defendants at

78. See Cooper, 116 S. Ct. at 1376 n.2.
79. See id. at 1376.
80. See id.
81. Id. (quoting Cooper v. Oklahoma, 889 P.2d 293, 303 (Okla. Crim. App. 1995)).
82. See id. at 1384.
84. See Cooper, 116 S. Ct. at 1377-79.
85. See CONN. GEN. STAT. § 54-56d(b) (1995); 50 PA. CONS. STAT. § 7403(a) (Supp. 1995); R.I. GEN. LAWS § 40.1-5.3-3 (Supp. 1995).
86. See Cooper, 116 S. Ct. at 1380.
87. Id. at 1380 (quoting Medina v. California, 505 U.S. 437, 445 (1992)).
88. See id. at 1381.
89. See id.
90. See id. at 1384.
a state mental facility and delay in trial — the Court reasoned that the defendant's fundamental right in not being tried while incompetent outweighs the state interest in efficient justice.91 After all, the state can continue to detain the defendant until his competency is restored or his malingering is detected. Perhaps most convincing for the Court, early English authorities also recognized the problem of malingering and the uncertainty of psychological evaluations but nonetheless resisted a heightened burden of proof for competency proceedings.92 For the Court, a heightened standard "does not decrease the risk of error, but simply reallocates that risk between the parties."93

As a parting shot, the Court rejected the argument that the decision in Addington supported Oklahoma's "clear and convincing" burden of proof. The Court distinguished between the nature of the two proceedings.94 A defendant's fundamental liberty interest may be protected by the requirement that the grounds for civil commitment be shown by "clear and convincing evidence."95 With competency determinations, however, the defendant's fundamental right is safeguarded only by imposing the lowest burden of proof, namely preponderance of the evidence.96 In both cases, the state intends to take drastic action against the defendant.97 Requiring the state to prove the grounds for an involuntary civil commitment beyond a reasonable doubt would place a nearly impossible burden on the state.98 By contrast, requiring a defendant to prove incompetency by clear and convincing evidence allows a defendant more likely than not incompetent to be sent to trial.99 The Court sees nothing inconsistent with the decisions in Addington and Cooper; in both cases, the state interest is balanced against the defendant's due process rights.100

III. Analysis

In the aftermath of Cooper, Oklahoma prosecutors face not only a barrage of post-conviction appeals,101 but also the articulated possibility that a lower

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91. See id. at 1382-83.
92. See id. at 1382.
93. Id. at 1383.
94. See id. at 1383-84.
95. See id. at 1384.
96. See id. at 1383-84.
98. See Cooper, 116 S. Ct. at 1384.
99. See id.
100. Under Oklahoma's Post-Conviction Relief Act, 22 Okla. STAT. §§ 1080, 1089 (1991 & Supp. 1995), a defendant may allege errors to the state courts that "were not or could not have been raised in a direct appeal and support a conclusion either that the outcome of the trial would have been different but for the errors or that the defendant is factually innocent." McGregor v. State, 935 P.2d 332, 333 (Okla. Crim. App. 1997), cert. denied, 117 S. Ct. 2489 (1997). However, the Oklahoma Court of Criminal Appeals has expressly declined to apply Cooper on post-conviction review. See id. at 334; Mitchell v. State, 934 P.2d 346, 349 (Okla. Crim. App. 1997), cert. denied, 117 S. Ct. 2489 (1997); Walker v. State, 933 P.2d 327, 339 (Okla. Crim. App. 1997), cert. denied, 117 S. Ct. 2524 (1997).
standard of proof in future cases will undermine the state interest in minimizing false findings of incompetency because of malingering. Will criminal defendants more easily engineer a false finding of incompetency under the lower preponderance standard? Despite the claims of some commentators,\textsuperscript{102} malingering is a very real concern in any area where law and mental health intersect. Answers to Oklahoma's future under the preponderance competency standard may be found in the state's experience with the insanity defense.

\textbf{A. The Insanity Defense in Oklahoma}

Under Oklahoma law, the insanity defense is a complete defense to criminal responsibility.\textsuperscript{103} Oklahoma uses the M'Naghten Test for insanity.\textsuperscript{104} Under the M'Naghten Test, a defendant is legally insane if, during the commission of the crime, he suffered a mental disease such that he: (1) could not differentiate between right and wrong, or (2) was unable to understand the nature and consequences of his acts.\textsuperscript{105} When a defendant establishes a reasonable doubt as to his sanity, the presumption of sanity disappears and the burden shifts to the state to prove the defendant's sanity beyond a reasonable doubt.\textsuperscript{106} Hence, when an initial showing is made, the prosecution is required to prove the defendant's sanity beyond a reasonable doubt, along with all other elements of the alleged crime.

In essence, the state of the defendant's mind at a previous time — the time of the alleged crime — is brought into question with insanity. To meet this seemingly tremendous burden, prosecutors rely upon expert testimony, the testimony of lay witnesses, and occasionally, testimony by the defendant himself. Much criticism has been lodged against the use of psychiatric testimony by mental health experts in court proceedings. As the United States Supreme Court

\textsuperscript{102} Michael Perlin argues that "mentally disabled criminal defendants will feign sanity in an effort to not be seen as mentally ill, even where such evidence might serve as powerful mitigating evidence in death penalty cases." \textsc{Michael L. Perlin, The Jurisprudence of the Insanity Defense} 240-41 (1994). Perlin goes on to argue that too many jurists believe the "feigning meta-myth," which he describes as a misconception perpetuated by an hysterical public. \textit{Id.} at 244.

\textsuperscript{103} Title 22, section 1161 provides in pertinent part that "[a]n act committed by a person in a state of insanity cannot be punished as a public offense, nor can said person be tried, sentenced to punishment, or punished for a public offense while he is insane." \textsc{22 Okla. Stat.} § 1161 (1991).

\textsuperscript{104} A few jurisdictions use other tests including the "substantial capacity" test, the irresistible impulse test, or the Durham "Product" Test. Nearly one-third of the states and England, however, use the M'Naghten Test. For an enlightened discussion of the various insanity tests, see Richardson, \textit{supra} note 67, at 2184-86.

\textsuperscript{105} See Jones \textit{v.} State, 648 P.2d 1251, 1254 (Okla. Crim. App. 1982); see also 21 \textsc{Okla. Stat.} § 152(4) (1991) (stating that insanity at the time a crime is committed a complete defense to criminal liability); Johnson \textit{v.} State, 841 P.2d 595, 596 (Okla. Crim. App. 1992) (insanity instruction that uses the conjunctive "and" instead of the disjunctive "or" constitutes reversible error because it required the jury to find defendant insane under both prongs of M'Naghten Test, rather than just one before they could acquit).

pointed out in Addington, psychiatric diagnosis holds at its core an element of uncertainty and fallibility. Such testimony is "based on medical 'impressions' drawn from subjective analysis and filtered through the experience of the diagnostician. This process often makes it very difficult for the expert physician to offer definite conclusions about any particular patient." Further contempt for psychiatric expert testimony can be found in Justice Scalia's remarks during oral argument in Cooper:

Once upon a time you could not put on a parade of psychiatrists who will testify that this person has all sorts of new mental afflictions that nobody ever heard of. It's very easy to raise a doubt of concern in competence nowadays, as it was not much earlier. The fact-finder could just look at this person and make his own judgement. Now, he has to listen to a parade of expert witnesses, and it's always — in my experience, you can find a psychiatrist who will say that this person is not competent.

Much frustration for prosecutors stems from this modern reality. However, Oklahoma courts have held that psychiatric testimony is not conclusive on the issue of mental capacity and as such, a jury need not necessarily adopt it. Rather, expert testimony is to be considered along with all other evidence to be presented. A survey of recent case law indicates that testimony of lay witnesses may be more persuasive than the testimony of mental health experts especially when expert witnesses disagree as to the defendant's mental state. Prior to 1984, when federal prosecutors were required to prove the defendant's sanity beyond a reasonable doubt, numerous cases in the federal system had also

108. Id. at 430.
111. See Cheney v. State, 909 P.2d 74, 85-6 (Okla. Crim. App. 1995) (despite conflict in expert witness testimony, lay witness testimony that defendant acted normal just hours before murder and that defendant previously stated he would claim insanity defense was sufficient evidence of sanity); Taylor v. State, 881 P.2d 755, 758 (Okla. Crim. App. 1994) (testimony of arresting officers that defendant took responsibility for his criminal acts support the jury's finding of sanity despite conflicting opinions by expert witnesses); Smallwood v. State, 763 P.2d 142, 145 (Okla. Crim. App. 1988) (testimony of State's lay witnesses sufficient evidence to establish defendant's sanity despite testimony by two defense experts to the contrary); Yates v. State, 703 P.2d 197, 199-200 (Okla. Crim. App. 1985) (expert testimony rebutted by testimony from relatives and arresting officers that defendant's behavior on day of the homicide was not unusual); Kobyluk v. State, 231 P.2d 388, 395 (Okla. Crim. App. 1951) (two psychiatrists testified that defendant was insane at time of assault, no expert witness testified otherwise, but contrary testimony from lay witnesses concerning the actions, demeanor and conduct of the defendant at time of alleged assault allowed jury to reasonably conclude defendant was sane).
112. Prior to 1984, federal prosecutors were required to prove a defendant's sanity beyond a
held that the prosecution could sustain its burden solely on the basis of lay testimony, even when the expert and lay testimony was in conflict.\textsuperscript{113}

Indeed, the testimony of lay witnesses may be the most effective vehicle for prosecutors to prove a defendant's sanity — especially where expert testimony conflicts. At least two commentators have recognized that juries may disregard conflicting psychiatric/psychological expert testimony altogether.\textsuperscript{114} Lay witnesses, on the other hand, fill the void of discounted expert testimony. For example, arresting officers may testify to the defendant's demeanor and behavior immediately after the alleged crime. Witnesses to the crime and acquaintances of the defendant can testify to the defendant's general demeanor prior to and during the alleged offense. Such testimony provides insight into the state of the defendant's mind at the time of the crime, the heart of the insanity inquiry. Perhaps most important, testimony by lay witnesses provides jurors with easily understood, descriptive proof by which to assess the defendant's mental state.

Some commentators argue that jurors are also influenced by the defendant's external appearance when passing judgement on the insanity defense. Michael Perlin argues quite persuasively that jurors (subconsciously or otherwise) require

reasonable doubt upon an initial presentation of evidence showing that the defendant was insane at the time of the alleged offense. \textit{See} Davis \textit{v.} United States, 160 U.S. 469, 492-93 (1895). This changed when Congress enacted the Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, title II, § 402(a), 98 Stat. 1976, 2057 (codified at 18 U.S.C. § 17 (1994)). The act provides:

\textit{§ 17. Insanity defense}

(a) Affirmative defense. — It is an affirmative defense to a prosecution under any Federal statute that, at the time of the commission of the acts constituting the offense, the defendant, as a result of a severe mental disease or defect, was unable to appreciate the nature and quality or the wrongfulness of his acts. Mental disease or defect does not otherwise constitute a defense.

(b) Burden of proof. — The defendant has the burden of proving the defense of insanity by clear and convincing evidence.

\textit{Id.}

\textsuperscript{113} See United States \textit{v.} Mota, 598 F.2d 995, 999-1000 (5th Cir. 1979) (two defense experts testify that defendant was insane and government produced no expert witnesses for rebuttal, but instead relied upon DEA agents who observed defendant before and during the alleged crime); United States \textit{v.} Hudson, 566 F.2d 89, 890 (4th Cir. 1977) (government produced no expert testimony to rebut defendant's expert testimony supporting insanity, rather, government used cross examination of defendant's expert and testimony of lay witness who was acquainted with defendant); United States \textit{v.} Dresser, 542 F.2d 737, 742 (8th Cir. 1976) (where defense expert's opinion of defendant's insanity was based largely on subjective symptoms and narrative statements, governments lay witness evidence was sufficient to satisfy prosecutor's burden of proving defendant's sanity beyond a reasonable doubt, even where lay witnesses had only a brief opportunity to observe defendant); Mims \textit{v.} United States, 375 F.2d 135, 146-47 (5th Cir. 1967) (government successfully rebutted defendant's weak expert witness evidence of insanity using only lay witnesses); Dusky \textit{v.} United States, 295 F.2d 743, 754 (8th Cir. 1961) ("[E]xpert opinion as to insanity rises no higher than the reasons upon which it is based . . . [and] . . . lay testimony can be sufficient to satisfy the prosecution's burden even though there is expert testimony to the contrary.").

\textsuperscript{114} See Gertrude Block, \textit{The Semantics of Insanity}, 36 \textit{OKLA. L. REV.} 561, 585 (1983); Richardson, \textit{supra} note 67, at 2182. Professor Richardson opines that when experts in fact disagree as to the accused's insanity, the insanity issue is cancelled by the conflict and the defendant is convicted. \textit{See} Richardson, \textit{supra} note 67, at 2182.
the defendant to demonstrate outward signs of craziness or bizarre behavior before they will acquit by reason of insanity.\textsuperscript{115} Of course, external appearance is conclusive of nothing, and is not necessarily an accurate indicator of a defendant's sanity.\textsuperscript{116} Nonetheless, triers of fact are human and such factors as outward appearance or behavior may have tremendous impact on the determination of a defendant's sanity. It is no coincidence that evidentiary rules take great pains to limit introduction of evidence at trial that may be so prejudicial as to outweigh its usefulness to the trier of fact.\textsuperscript{117} Visual imagery of the defendant's mannerisms at trial falls into this category, but of course, it is constitutionally impermissible to exclude the defendant himself from the presence of the jury based solely on appearance.\textsuperscript{118}

It is generally agreed by most commentators that the insanity defense is invoked in less than one percent of all criminal cases and that the defense rarely results in acquittal.\textsuperscript{119} As such, it would seem that the prosecution has had little difficulty proving a defendant's sanity beyond a reasonable doubt — the highest burden of proof used in all American jurisdictions today — despite the proliferation of, in Justice Scalia's words, a parade of experts, at least some of which can be counted on to declare the defendant insane.\textsuperscript{120}

\textbf{B. Comparison of the Insanity Defense and Competency Proceedings}

These same evidentiary issues surface in competency proceedings. In Oklahoma, competency — like sanity — is presumed.\textsuperscript{121} However, the defendant has the burden of proving his incompetency, now by a preponderance of the

\textsuperscript{115} See Michael L. Perlin, \textit{The Sanist Lives of Jurors in Death Penalty Cases: The Puzzling Role of \textquoteright Mitigating\textquoteright Mental Disability Evidence}, 8 \textsc{Notre Dame J.L. Ethics \\ & Pub. Pol'y} 239, 265-70 (1994).

\textsuperscript{116} See \textit{id.} at 265-66.

\textsuperscript{117} Oklahoma Rule of Evidence 2403 provides: \textquote{Relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury, undue delay, needless presentation of cumulative evidence, or unfair and harmful surprise.} \textsc{Okla. R. Evid.} 2403.

\textsuperscript{118} The Sixth Amendment to the United States Constitution provides that all criminal defendants have the right \textquote{to be confronted with the witnesses against him,\textquoteright} that is, the right to be physically present during the trial. Generally, a defendant can only lose his right to be present at trial if he engages in behavior such that the trial itself is disrupted. \textit{See} Illinois v. Allen, 397 U.S. 337, 343 (1970); Owens v. State, 762 P.2d 962, 965-66 (Okla. Crim. App. 1988).

\textsuperscript{119} See Bonnie, \textit{supra} note 68, at 10. Professor Bonnie indicates that out of the 175,000 criminal convictions in New York in 1993, only 60 resulted in insanity acquittals. In Virginia, Bonnie reports fewer than 20 insanity acquittals per year. \textit{See id.; see also} Richardson, \textit{supra} note 67, at 2182 (reporting that the insanity defense is rarely an issue in criminal cases and is raised in less than one percent of all cases).


\textsuperscript{121} Title 22, section 1175.4(B) provides in pertinent part that \textquote{[t]he court, at the hearing on the application, 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.} 22 \textsc{Okla. Stat.} \textsection 1175.4(B) (1991).
Hence, the State does not suffer the burden of non-persuasion as with insanity — rather, it need only rebut the defendant's testimony. If the defendant produces no evidence, he loses on the competency issue. The general rule that expert testimony is not conclusive, but rather must be considered along with all other evidence presented also applies to competency determinations. The testimony of lay witnesses is also regularly used in competency determinations to provide insight into the defendant's mental state at trial.

Unlike sanity, however, competency proceedings focus on the defendant's present ability to assist defense counsel at trial and to understand the nature of the charges presented. As such, there is less trouble with piecing together history to determine what a defendant's mental state was several months, perhaps years, before trial. At oral argument in Cooper, Justice Scalia pointed out that Oklahoma's standard of proof and burden placement for the insanity defense did not square with the state's competency standard:

General Edmondson, I must say, what Oklahoma has done with respect to the defense of insanity on the merits at trial casts a great deal of doubt in my mind concerning the necessity of the standard that Oklahoma has adopted with respect to sanity to stand trial [competency]. You're willing to accept the burden of proving to a jury beyond a reasonable doubt that this individual was sane 2 years ago when he committed the crime, but you say . . . [i]t's too onerous to have the defendant prove to the jury by a preponderance of the evidence that he's sane [competent] today. It seems to me sanity 2 years ago is a lot harder to prove, and the State accepts a much higher burden with respect to that.

In essence, Oklahoma has accepted the seemingly difficult burden of proving a defendant's sanity beyond a reasonable doubt but cries foul when required to rebut the defendant's evidence on competency, albeit at a lower standard of proof. This concern does not withstand scrutiny. If anything, the State may have greater opportunity to present evidence of a defendant's alleged malingering on the issue of competency. It is probable that more lay witnesses may be called to testify to the defendant's competency than would otherwise be possible in determining insanity. A number of jailers, guards or fellow inmates will observe the actions of the defendant nearly twenty-four hours a day from time of arrest until hearing. Expert witnesses will have the opportunity to examine the defendant's mental

condition at the time it is in dispute — not several months after the fact as with insanity. There is, however, no guarantee that any witnesses — at least none that can be located — may observe the defendant prior to, during or immediately after a crime.

Additionally, written or oral statements or confessions can be presented to the jury as substantive evidence of the defendant's competency. What better way to show that the defendant has an actual understanding of the charges against him than to let the defendant himself tell the jury by means of a videotaped confession that he committed the crime in question. Such evidence presents to the jury the charge(s) brought against the defendant, thus allowing the trier of fact to determine by inference whether the defendant has the capacity to understand the particular charges lodged against him. Similarly, evidence of previous crimes and acts can be admitted to rebut claims by the defendant that he does not understand the nature or consequences of his acts.

As an added bonus, jurors themselves can observe the defendant at the very moment in time his mental state is in dispute. As noted above, some believe jurors weigh the accused's outward appearance in determining sanity, a mental state existing in the past. Assuming this is true, there can be little doubt that such visual imagery comes into play with competency determinations. After all, the accused's present ability to understand the nature of the charges against him and his ability to assist defense counsel with a defense are at issue. This necessarily involves examining the defendant's current mental state. Every part of the competency hearing is designed to impress the point of present competency upon the trier of fact right down to the jury instructions at the end of the proceedings. If jurors consider a defendant's present appearance in determining the defendant's past mental state (insanity), it follows that they would do the same in determining a present mental state (competency).

127. See id. at 502.
128. See id.
129. See OKLAHOMA UNIFORM JURY INSTRUCTIONS (SECOND EDITION) — CRIMINAL 11-1 (1996).

The instruction provides in pertinent part:

You are instructed that under the laws of the State of Oklahoma no person is subject to any criminal procedures unless he is presently "competent," as that term is defined in these instructions, nor is any person subject to any criminal procedures who is determined to be "incompetent," as that term is defined here.

Id. (emphasis added). Instruction 11-3 provides in pertinent part:

It is necessary that you understand what certain terms used in these instructions mean in the law. The following definitions apply here:

1. "Competent" or "competency" means the present ability of a person arrested for or charged with a crime to understand the nature of the charges and proceedings against him/her and to effectively and rationally assist in his/her defense.

2. "Incompetent" or "incompetency" means any person who is not presently competent.

A person may be incompetent due to physical disability.

Id. at 11-3 (emphasis added).
Perhaps the greatest evidence of the impact mental imagery has on jurors is provided by this brutally honest exchange found in the transcript from voir dire of the jury for Cooper’s trial:

THE COURT: What did you want to say Ms. Ervin?
PROSPECTIVE JUROR ERVIN: Well, I just feel that I think he [Defendant Cooper] comes across to me as just creepy.
THE COURT: As what?
PROSPECTIVE JUROR ERVIN: Creepy. That’s all I can say.
THE COURT: Oh, well, yeah, but you know about judging the book by the cover, don’t you?
PROSPECTIVE JUROR ERVIN: I know that. But —
THE COURT: You know, it would probably be appropriate in a lot of cases for the Defendant not to even be present where you wouldn’t even look at him, and you make a decision based on the evidence without ever seeing the fellow.
PROSPECTIVE JUROR ERVIN: I understand that. I just feel like I couldn’t be fair.

. . . .

THE COURT: . . . He does look creepy, but we’re not going to find him guilty because he looks creepy. . . . Are you saying, though, that you’re leaning toward guilty just because of his appearance and the charge that he’s got against him?
PROSPECTIVE JUROR ERVIN: Right.130

In light of Perlin’s theory and the above excerpt, it would seem that Cooper may have had greater success if his competency had been determined by a jury.

C. The Effect of the New Preponderance Standard

When the defendant’s external appearance is combined with lay witness testimony and any expert testimony indicating competency, it seems likely that Oklahoma prosecutors will continue to effectively rebut the defendant's assertion that he is more likely than not incompetent. Juries tend to place equal, if not greater, emphasis upon the testimony of lay witnesses, especially when expert testimony is in conflict. The State has had much success in proving an accused’s sanity beyond a reasonable doubt using nearly identical means. There is no doubt that many Oklahoma defendants have feigned insanity over the years. Yet, this has not stopped prosecutors from meeting the greater burden of proving a past mental state at a higher standard of proof. Factoring in that the prosecution has distinct advantages in showing the defendant's present mental condition, it can not clearly be said that the state will suffer an increase in false findings of incompetence or that a larger number of defendants will be found incompetent.

The charge that criminal defendants will somehow have an easier time proving incompetence because of the lower burden must be tempered by the attention paid by jurors, and the judge for that matter, to standards of proof. Describing a standard of proof to jurors is a major challenge. Getting a juror to actually understand that standard and use a consistent standard in reaching a verdict is even more difficult. This is especially so considering that judges themselves often disagree as to what a certain standard of proof actually means.131 Jurors are, by necessity, lay people not formally trained in legal concepts. While jury instructions try to convey a uniform definition of "clear and convincing" evidence, there can be no guarantee that a juror will understand it to mean "that the proposition on which the party has this burden of proof is highly probable and free from serious doubt."132 The Court itself conceded as much in Addington by stating that "the ultimate truth as to how the standards of proof affect decision making may well be unknowable, given that factfinding is a process shared by countless thousands of individuals throughout the country."133 Although general comparisons to the standards used in other civil (preponderance) and criminal cases (beyond a reasonable doubt) by the judge may help jurors to visualize the concepts, a more precise description or quantification of the burden may be grounds for reversal.134 In short, the standard of proof instruction may be beyond the grasp of the jury. In light of this confusion,135 and the myriad of evidence available to the state with which it can rebut the defendant's showing, lowering the standard of proof for competency determinations may have only negligible effects. The newly-mandated standard does seem, however, to be the most straight-forward concept to articulate and understand. Simply put, "preponderance of the evidence" — also known as "the greater weight of the evidence" — means that the defendant's claim of incompetence "is more probably true than not true."136 A 1982 survey reflected that a majority of the 171 federal judges polled assigned a numeric value of fifty to sixty percent probability to the "preponderance of the evidence" standard.137 These same judges, however, assigned numeric values of between sixty-five and ninety percent to the "clear and

131. See infra notes 128-30.
134. See Holland v. United States, 348 U.S. 121, 140 (1954) ("attempts to explain the term 'reasonable doubt' do not usually result in making it any clearer to the minds of the jury") (quoting Miles v. United States, 103 U.S. 304, 312 (1880)); McCullough v. State, 657 P.2d 1157, 1158-59 (Nev. 1983) (trial judge's instruction that beyond reasonable doubt was seven and a half on a scale of one to ten violated state constitution's definition of beyond reasonable doubt and thus constituted reversible error); State v. DelVecchio, 464 A.2d 813, 818-21 (Conn. 1983) (trial judge's instruction that jury need not go whole 100 yards of the football field for beyond reasonable doubt, but rather, merely somewhere beyond the fifty yard line, relieved prosecution of its burden and thus constituted reversible error).
135. See generally C.M.A. McCauliff, Burdens of Proof: Degrees of Belief, Quanta of Evidence, or Constitutional Guarantees?, 35 VAND. L. REV. 1293 (1982) (demonstrating the ambiguity inherent in burdens of proof and the wildly varying values that federal judges assign to these standards).
137. See McCauliff, supra note 135, at 1331.
convincing evidence" standard.\textsuperscript{138} For the "beyond a reasonable doubt" standard, the range was anywhere from seventy-five to one hundred percent.\textsuperscript{139} Because the preponderance standard appears easier to follow and has a nearly-uniform meaning, the jury instruction's description of this burden may indeed impress upon jurors that only a minimal, but persuasive, offering of evidence is required for a determination of competency.

This would seem an advantage for the defendant. But the tremendous evidence prosecutors may present will likely produce an accurate portrayal of the defendant's mental state and competence prior to and during the trial. In light of all the evidence presented to jurors by both experts and lay witnesses, and the confusion surrounding jury instructions, it is unclear what difference a lower standard of proof will have with regard to the state interest in speedy adjudication and against false findings of incompetence. However, considering Oklahoma's experience with proving insanity at a higher burden and standard, the impact should be minimal.

\textit{IV. Conclusion}

The decision in \textit{Cooper} will not necessarily undermine the state's interest in preventing false findings of incompetency because of malingering. For many years, prosecutors in Oklahoma have taken on the task of proving a defendant's insanity beyond a reasonable doubt, which is arguably a much tougher task because the inquiry requires proving a past mental state by the highest standard of proof. In addition, the consequences of failing to prove sanity is acquittal. In spite of the high stakes involved and the high burden of proof required, the sanity defense is rarely invoked and hardly ever successful. There is no doubt that many of the defendants claiming insanity were malingering but it does not appear that the Oklahoma justice system is plagued by a rash of false findings of insanity.

Much of the reason for this is that the trier of fact is skeptical of claims of mental infirmity from the start. The testimony of expert witnesses may often be ignored, especially in those cases where two experts conflict. Prosecutors have had tremendous success proving a defendant's sanity by resorting to other evidence like testimony by lay witnesses and presentation of pretrial statements and confessions made by the defendant. In addition, some jurors may demand that a defendant's outward appearance compliment the insanity alleged.

The concepts governing the insanity defense also apply to competency evaluations. The difference is that the State does not suffer the burden of non-persuasion in competency hearings and therefore need only rebut the defendant's offering of evidence. The State also has several advantages when disproving a defendant's claim of incompetency, namely that the jury and expert witnesses can observe and evaluate the defendant at the very moment when his mental state is in dispute. The often onerous burden of reconstructing distant history is non-existent in most competency evaluations.

\textsuperscript{138} See \textit{id.} at 1328.

\textsuperscript{139} See \textit{id.} at 1325.
Although the defendant is now required to meet a lower burden of proof to establish incompetency, it is less than certain that the state interest in preventing false findings of incompetency will be undermined. In light of the state's experience with the insanity defense, there will not likely be an increase in the number of defendants erroneously found competent or a flood of competent defendants being found incompetent solely because of the lower preponderance standard.

Seth Branham