



Fall 9-1-1996

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Supreme Court**

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Recommended Citation

COOPER v. OKLAHOMA 116 S. Ct. 1373 (1996) *United States Supreme Court*, 9 Cap. DEF J. 11 (1996).
Available at: <https://scholarlycommons.law.wlu.edu/wlucdj/vol9/iss1/5>

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COOPER v. OKLAHOMA

116 S. Ct. 1373 (1996)
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FACTS

Byron Keith Cooper was charged with the murder of Harold Sheppard, an eighty-six year old widower, in the course of a burglary. Cooper was linked to the crime by forensic and circumstantial evidence, including fingerprints and possession of the victim's property. Furthermore, Cooper made inconsistent statements to police regarding his involvement.¹

Cooper's "competence was the focus of significant attention both before and during the trial."² Under the relevant Oklahoma statute,³ Cooper was presumed to be competent unless he could prove differently by "clear and convincing evidence."⁴ On five different occasions, "a judge questioned whether Cooper had the ability to understand the charges against him and to assist defense counsel."⁵

Initially, a judge determined pretrial, based on the opinion of a clinical psychologist employed by the state, that Cooper should be sent to a state mental facility for treatment. After Cooper's subsequent release from the hospital, the trial judge heard testimony from two state employed psychologists. Although the psychologists expressed differing opinions as to whether Cooper was able to assist defense counsel in preparation of his defense, the judge ordered Cooper to stand trial.⁶

A week before the trial, defense counsel again raised the issue of Cooper's competence. Counsel informed the court that "Cooper was behaving oddly and refusing to communicate with him."⁷ Nonetheless, the judge declined to reconsider his earlier determination that Cooper was competent to stand trial.⁸

On the first day of trial, Cooper's "bizarre behavior" prompted the court to look at Cooper's competency for a fourth time. Another competency hearing was held, at which the judge heard testimony from lay witnesses, another psychologist, and Cooper himself.⁹ The expert stated that Cooper was incompetent and could not communicate effectively

with counsel, but with aggressive treatment he would probably achieve competence within six weeks.¹⁰ Although the trial court "voiced uncertainty," the judge stated he did not believe Cooper had demonstrated he was incompetent by clear and convincing evidence.¹¹ The trial was held, and the jury found Cooper guilty of first-degree murder and recommended punishment by death.¹²

During the sentencing phase, testimony was given regarding Cooper's childhood that seemed to bolster the conclusions of the experts that Cooper was incompetent and unable to assist counsel with his defense. At the conclusion of the testimony defense counsel moved for a mistrial or a renewed investigation into Cooper's competence. The court summarily dismissed these motions and sentenced Cooper to death.¹³

Cooper appealed, contending that Oklahoma's presumption of competence, combined with its statutory requirement that a criminal defendant establish competence by clear and convincing evidence, placed such an onerous burden on him as to violate his right to due process of law. The Court of Criminal Appeals of Oklahoma rejected Cooper's argument, holding that the clear and convincing "standard was justified because the 'State has a great interest in assuring its citizens a thorough and speedy judicial process,' and because a 'truly incompetent criminal defendant, through his attorneys and experts, can prove incompetency with relative ease.'"¹⁴ Cooper petitioned for writ of *certiorari*, challenging that Oklahoma's clear and convincing standard for determining competency violated due process.¹⁵

HOLDING

The United States Supreme Court found the Oklahoma statute, which allowed the State to try an individual who may be more likely than not incompetent, to be unconstitutional.¹⁶

¹ *Cooper v. State*, 889 P.2d 293, 298-299 (Okla. Crim. App. 1995). Cooper initially admitted killing Sheppard, but later recanted his story claiming that he had never been in the home of the victim. Before the interview was concluded, however, Cooper again changed his story. Although he conceded that it was possible he committed the murder, he claimed he could not remember. *Id.*

² *Cooper v. Oklahoma*, 116 S. Ct. 1373, 1375 (1996).

³ Okla. Stat., tit. 22, § 1175.4(B) (West 1986 & Supp. 1996). Section 1175.4(B) provides, in relevant part: "The court, at the hearing on the application [for determination of competency], shall determine, by clear and convincing evidence, if the person is incompetent. The person shall be presumed to be competent for the purposes of the allocation of the burden of proof and burden of going forward with the evidence."

⁴ *Cooper v. Oklahoma*, 116 S. Ct. at 1375.

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ *Id.* During the hearing, Cooper refused to change out of prison overalls because, he said, the clothes he was given to wear were

"burning" him. Further, Cooper talked to an imaginary spirit who, he claimed, gave him counsel, and on the witness stand Cooper stated that he believed that the lead defense attorney wanted to kill him. *Id.* at 1375 n.1.

¹⁰ *Id.* at 1375.

¹¹ *Id.* at 1375-1376. In making his determination, the trial judge said: "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. . . . 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 he has carried the burden by clear and convincing evidence of his incompetency and I'm going to say we are going to trial." *Id.* at 1376.

¹² *Id.*

¹³ *Id.* at 1375.

¹⁴ *Id.* at 1376 (quoting *Cooper v. State*, 889 P.2d at 303).

¹⁵ *Id.*

¹⁶ *Id.* at 1384.

ANALYSIS/APPLICATION IN VIRGINIA

At the outset of the opinion, the Court reaffirmed the fundamental principle that the criminal trial of an incompetent defendant violates due process.¹⁷ In fact, this principle is so fundamental that a defendant's rights must be protected "even if [he] has failed to make a timely request for a competency determination."¹⁸ Nonetheless, the Court has held that a principle of "fundamental fairness" is not violated by allowing the State to presume that the defendant is competent and requiring him to prove his incompetence by a preponderance of the evidence.¹⁹ However, the more likely than not standard is much different than the clear and convincing evidence standard put forth by the State of Oklahoma.

The imposition of clear and convincing standard creates a significant possibility that the competency determination may be erroneous. Under the rule espoused by the state of Oklahoma, it is possible that a defendant could prove that he was more likely than not incompetent and still be required to stand trial. An erroneous determination of this nature could be dire because it may be impossible for the defendant to exercise other rights the Supreme Court has deemed essential to a fair trial.²⁰ Although the Court conceded that the state's interest in assuring the efficient operation of the criminal justice system was at stake,²¹ it found that this interest was clearly outweighed by the fundamental right of the defendant to be tried only while competent.²²

Because Virginia adheres to the more likely than not standard,²³ *Cooper* has little practical application for capital defense attorneys in Virginia. However, it is important to note that the competency hearing can play a vital role in preparing for a capital trial.

In Virginia, a competency hearing will be ordered if the court determines that the defendant "lacks substantial capacity to understand the proceedings against him or to assist his attorney in his own defense."²⁴ If counsel believes that the defendant may be unable to adequately assist in his defense, he should consider asking for a competency hearing. However, before making such a request, defense counsel must consider the possibility that information to be learned at the examination could be damaging to his client, especially in light of the Fourth Circuit's recent opinion in *Payne v. Netherland*.²⁵ Likewise, because trial court rulings are discretionary and unlikely to be overturned without a clear showing of abuse,²⁶ defense counsel may want to investigate prior competency determinations of the particular judge in his case.

Similarly, if a defendant is found incompetent, but a mental health expert claims that the defendant could be restored to a competent state through the use of medication, counsel should consider advising his client to refuse such treatment. The issue of whether a defendant can forcibly be ordered to take medication to "restore" competency has not been definitively answered by the United States Supreme Court, but there are indications in the case law that the answer is no. Virginia Capital Case Clearinghouse staff have had recent and successful experience with this issue, working with skilled and dedicated defense counsel. If the issue arises, please contact the Virginia Capital Case Clearinghouse for assistance in drafting arguments.

Summary and Analysis by:
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¹⁷ *Id.* at 1376 (citations omitted).

¹⁸ *Id.* at 1376 n.4 (citations omitted).

¹⁹ *Id.* at 1376. (citations omitted).

²⁰ *Id.* at 1381-1382.

²¹ *Id.* at 1382.

²² *Id.* at 1381-1382. The Court also noted that the infringement on the State's interest by an incorrect determination of competency could be corrected in a future proceeding. Likewise, because the State can detain an incompetent defendant for "the reasonable period of time necessary to determine whether there is a substantial probability that he will attain [competence] in the foreseeable future," the burdensome effect on the State's interest is lessened. *Id.* at 1382 (citations omitted).

²³ At a competency hearing in Virginia, "the party alleging that the defendant is incompetent shall bear the burden of proving by a preponderance of the evidence the defendant's incompetency." Va. Code Ann. § 19.2-169.1(E).

²⁴ Va. Code Ann. § 19.2-169.1(A).

²⁵ 1996 WL 467642 (4th Cir.(Va.)) (upholding the admission of testimony in support of future dangerousness, even though it was based

on a competency evaluation requested by the defense). See Case Summary of *Payne v. Netherland*, Capital Defense Journal, this issue. Payne was tried prior to the enactment of Va. Code Ann. § 19.2-264.3:1, which entitles capital defendants to a mental mitigation expert. Further evidence that Virginia courts and the Fourth Circuit will place no limits on future dangerousness aggravating testimony derived by the Commonwealth's experts under that statute can be found in *Savino v. Murray*, 58 F.3d 593 (4th Cir. 1996). See Case Summary of *Savino v. Murray*, Capital Defense Journal, this issue.

²⁶ See *Thomas v. Cunningham*, 313 F.2d 934 (4th Cir. 1963) (holding that the trial court's denial of the defendant's motion for a pre-trial mental examination was "so arbitrary as to constitute a denial of due process" since the defendant had established his insanity by "reliable and uncontroverted sworn medical testimony"); *Poteat v. Peyton*, 270 F. Supp. 220 (W.D. Va. 1967) (holding that the trial court's denial of defendant's motion for a mental examination would not be disturbed unless it was clearly shown that the trial court abused its discretion).