SUPREME COURT OF THE UNITED STATES

No. 90–8370

TEOFILO MEDINA, JR., PETITIONER *v.* CALIFORNIA

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA

[June 22, 1992]

JUSTICE O'CONNOR, with whom JUSTICE SOUTER joins, concurring in the judgment.

I concur in the judgment of the Court, but I reject its intimation that the balancing of equities is inappropriate in evaluating whether state criminal procedures amount to due process. *Ante*, at 5–7. We obviously applied the balancing test of *Mathews* v. *Eldridge*, 424 U. S. 319 (1976), in *Ake* v. *Oklahoma*, 470 U. S. 68 (1985), a case concerning criminal procedure, and I do not see that *Ake* can be distinguished here without disavowing the analysis on which it rests. The balancing of equities that *Mathews* v. *Eldridge* outlines remains a useful guide in due process cases.

In *Mathews*, however, we did not have to address the question of how much weight to give historical practice; in the context of modern administrative procedures, there was no historical practice to consider. The same is true of the new administrative regime established by the federal criminal sentencing guidelines, and I have agreed that *Mathews* may be helpful in determining what process is due in that context. See *Burns* v. *United States*, 501 U. S. ___, ___ (1991) (SOUTER, J., dissenting). While I agree with the Court that historical pedigree can give a procedural practice a presumption of constitutionality, see *Patterson* v. *New York*, 432 U. S. 197, 211 (1977), the presumption must surely be rebuttable.

The concept of due process is, "perhaps, the least frozen concept of our law—the least confined to history and the most absorptive of powerful social standards of a progressive society. But neither the unfolding content of `due process' nor the

particularized safeguards of the Bill of Rights disregard procedural ways that reflect a national historic policy." *Griffin* v. *Illinois*, 351 U. S. 12, 20–21 (1956) (Frankfurter, J., concurring in judgment). Against the historical status quo, I read the Court's opinion to allow some weight to be given countervailing considerations of fairness in operation, considerations much like those we evaluated in *Mathews*. See *ante*, at 10–14. Any less charitable reading of the Court's opinion would put it at odds with many of our criminal due process cases, in which we have required States to institute procedures that were neither required at common law nor explicitly commanded by the text of the Constitution. See, *e.g.*, *Griffin* v. *Illinois*, *supra*, (due process right to trial transcript on appeal); *Brady* v. *Maryland*, 373 U. S. 83 (1963) (due process right to discovery of exculpatory evidence); *Sheppard* v. *Maxwell*, 384 U. S. 333 (1966) (due process right to protection from prejudicial publicity and courtroom disruptions); *Chambers* v. *Mississippi*, 410 U. S. 284 (1973) (due process right to introduce certain evidence); *Gagnon* v. *Scarpelli*, 411 U. S. 778 (1973) (due process right to hearing and counsel before probation revoked); *Ake* v. *Oklahoma*, *supra* (due process right to psychiatric examination when sanity is significantly in question).

In determining whether the placement of the burden of proof is fundamentally unfair, relevant considerations include: whether the Government has superior access to evidence; whether the defendant is capable of aiding in the garnering and evaluation of evidence on the matter to be proved; and whether placing the burden of proof on the Government is necessary to help enforce a further right, such as the right to be presumed innocent, the right to be free from self-incrimination, or the right to be tried while competent.

After balancing the equities in this case, I agree with the Court that the burden of proof may constitutionally rest on the defendant. As the dissent points out, *post*, at 10, the competency determination is based largely on the testimony of psychiatrists. The main concern of the prosecution, of course, is that a defendant will feign incompetence in order to avoid trial. If the burden of proving competence rests on the Government, a defendant will have less incentive to cooperate in psychiatric investigations, because an inconclusive examination will benefit the defense, not the prosecution. A defendant may also be less cooperative in making available friends or family who might have information about the defendant's mental state. States may therefore decide that a more complete picture of a defendant's competence will be obtained if the defense has the incentive to produce all the evidence in its possession. The potentially greater overall access to information provided by placing the burden of proof on the defense may outweigh the danger that, in close cases, a marginally incompetent defendant is brought to trial. Unlike the requirement of a hearing or a psychiatric examination, placing the burden of proof on the Government will not necessarily increase the reliability of the proceedings. The equities here, then, do not weigh so much in petitioner's favor as to rebut the presumption of constitutionality that the historical toleration of procedural variation creates.

As the Court points out, *ante*, at 13–14, the other cases in which we have placed the burden of proof on the government are distinguishable. See *Colorado* v. *Connelly*, 479 U. S. 157, 168–169 (1986) (burden of proof on Government to show waiver of rights under *Miranda* v. *Arizona*, 384 U. S. 436 (1966)); *Nix* v. *Williams*, 467 U. S. 431, 444–445, n. 5 (1984) (burden on Government to show inevitable discovery of evidence obtained by unlawful means); *United States* v. *Matlock*, 415 U. S. 164, 177–178, n. 14 (1974)

(burden on Government to show voluntariness of consent to search); *Lego* v. *Twomey*, 404 U. S. 477, 489 (1972) (burden on Government to show voluntariness of confession). In each of these cases, the Government's burden of proof accords with its investigatory responsibilities. Before obtaining a confession, the Government is required to ensure that the confession is given voluntarily. Before searching a private area without a warrant, the Government is generally required to ensure that the owner consents to the search. The Government has no parallel responsibility to gather evidence of a defendant's competence.