# 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 BLACKMUN, with whom JUSTICE STEVENS joins, dissenting.

Teofilo Medina, Jr., may have been mentally incompetent when the State of California convicted him and sentenced him to death. One psychiatrist testified he was incompetent. Another psychiatrist and a psychologist testified he was not. Several other experts testified but did not express an opinion on competence. Instructed to presume that petitioner Medina was competent, the jury returned a finding of competence. For all we know, the jury was entirely undecided. I do not believe a Constitution that forbids the trial and conviction of an incompetent person tolerates the trial and conviction of a person about whom the evidence of competency is so equivocal and unclear. I dissent.

The right of a criminal defendant to be tried only if competent is "fundamental to an adversary system of justice," *Drope* v. *Missouri*, 420 U. S. 162, 172 (1975). The Due Process Clause forbids the trial and conviction of persons incapable of defending themselves—persons lacking the capacity to understand the nature and object of the proceedings against them, to consult with counsel, and to assist in preparing their defense. *Id.*, at 171.[1] See also *Pate* v.

[1] "[I]t is not enough for the district judge to find that the defendant is oriented to time and place and has some recollection of events, but that the test must be whether he has sufficient present ability to consult with his lawyer with a reasonable degree of rational

*Robinson*, 383 U. S. 375, 378 (1966).

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understanding—and whether he has a rational as well as factual understanding of the proceedings against him," *Dusky* v. *United States*, 362 U. S. 402 (1960) (internal quotations and bracketing omitted); cf. *Riggins* v. *Nevada*, 504 U. S. ___, ___ (1992) (slip op. 3) (KENNEDY, J., concurring in the judgment) (noting distinction between "functional competence" and higher-level "competence to stand trial").

The right to be tried while competent is the foundational right for the effective exercise of a defendant's other rights in a criminal trial. "Competence to stand trial is rudimentary, for upon it depends the main part of those rights deemed essential to a fair trial, including the right to effective assistance of counsel, the rights to summon, to confront, and to cross examine witnesses, and the right to testify on one's own behalf or to remain silent without penalty for doing so." *Riggins* v. *Nevada*, 504 U. S. ___, ___ (1992) (slip op. 2) (KENNEDY, J., concurring in the judgment). In the words of Professor Morris, one of the world's leading criminologists, incompetent persons "are not really present at trial; they may not be able properly to play the role of an accused person, to recall relevant events, to produce evidence and witnesses, to testify effectively on their own behalf, to help confront hostile witnesses, and to project to the trier of facts a sense of their innocence." N. Morris, Madness and the Criminal Law 37 (1982).

This Court's cases are clear that the right to be tried while competent is so critical a prerequisite to the criminal process that "state procedures *must be adequate* to protect this right." (Emphasis added.) *Pate*, 383 U. S., at 378. "[T]he failure to observe procedures adequate to protect a defendant's right not to be tried or convicted while incompetent to stand trial deprives him of his due process right to a fair trial." *Drope*, 420 U. S., at 172. In other words, the Due Process Clause does not simply forbid the State from trying and convicting a person who is incompetent. It also demands adequate *anticipatory, protective procedures* to minimize the risk that an incompetent person will be convicted. Justice Frankfurter recognized this in a related context: "If the deeply rooted principle in our society against killing an insane man is to be respected, at least the minimum provision for assuring a fair application of

that principle is inherent in the principle itself." *Solesbee* v. *Balkcom*, 339 U. S. 9, 23 (1950) (dissenting opinion). Anticipatory protective procedures are necessary as well because "we have previously emphasized the difficulty of retrospectively determining an accused's competence to stand trial." *Pate*, 383 U. S., at 387. See also *Drope*, 420 U. S., at 183; *Dusky*, 362 U. S., at 403. See generally Miller & Germain, The Retrospective Evaluation of Competency to Stand Trial, 11 Int'l J. Law and Psych. 113 (1988).

This Court expressly has recognized that one of the required procedural protections is "further inquiry" or a hearing when there is a sufficient doubt raised about a defendant's competency. *Drope*, 420 U. S., at 180; *Pate*, 383 U. S., at 385–386. In my view, then, the only question before the Court in this case is whether—as with the right to a hearing—placing the burden of proving competence on the State is necessary to protect adequately the underlying due process right. I part company with the Court today, because I believe the answer to that question is in the affirmative.

As an initial matter, I believe the Court's approach to this case effectively asks and answers the wrong doctrinal question. Following the lead of the parties, the Court mistakenly frames its inquiry in terms of whether to apply a standard it takes to be derived from language in *Patterson* v. *New York*, 432 U. S. 197 (1977), or a standard based on the functional balancing approach of *Mathews* v. *Eldridge*, 424 U. S. 319 (1976). *Ante*, at 4–7. The Court is not put to such a choice. Under *Drope* and *Pate*, it need decide only whether a procedure imposing the burden of proof upon the defendant is "adequate" to protect the constitutional prohibition against trial of incompetent persons.

The Court, however, chooses the *Patterson* path,

announcing that there is no violation of due process unless placing the burden of proof of incompetency upon the defendant "`offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.'" *Ante*, at 7 (quoting *Patterson*, 432 U. S., at 202). Separating the primary right (the right not to be tried while incompetent) from the subsidiary right (the right not to bear the burden of proof of incompetency), the Court acknowledges the primary right to be fundamental in "our common-law heritage," but determines the subsidiary right to be without a "settled tradition" deserving of constitutional protection. *Ante*, at 8. This approach is mistaken, because it severs two integrally related procedural rights that cannot be examined meaningfully in isolation. The protections of the Due Process Clause, to borrow the second Justice Harlan's words, are simply not "a series of isolated points pricked" out in terms of their most specific level of historic generality. *Poe* v. *Ullman*, 367 U. S. 497, 543 (1961) (dissenting opinion). Had the Court taken the same historical-categorical approach in *Pate* and *Drope*, it would not have recognized that a defendant has a right to a competency hearing, for in neither of those cases was there any showing that the mere denial of a hearing where there is doubt about competency offended any deeply rooted traditions of the American people.

In all events, I do not interpret the Court's reliance on *Patterson* to undermine the basic balancing of the government's interests against the individual's interest that is germane to any due process inquiry. While unwilling to discount the force of tradition and history, the Court in *Patterson* did not adopt an exclusively tradition-based approach to due process analysis. Relying on *Morrison* v. *California*, 291 U. S. 82 (1934), the Court in *Patterson* looked to the "convenience" to the government and "hardship or

oppression" to the defendant in forming its allocation of the burden of proof. 432 U. S., at 203, n. 9, and 210.

> "`The decisions are manifold that within limits of reason and fairness the burden of proof may be lifted from the state in criminal prosecutions and cast on a defendant. The limits are in substance these, that the state shall have proved enough to make it just for the defendant to be required to repel what has been proved with excuse or explanation, *or at least that upon a balancing of convenience or of the opportunities for knowledge the shifting of the burden will be found to be an aid to the accuser without subjecting the accused to hardship or oppression.* Cf. Wigmore, Evidence, Vol. 5, §§2486, 2512, and cases cited.'" *Id.*, at 203, n. 9, quoting *Morrison* v. *California*, 291 U. S., at 88–89 (emphasis added).

See also *Speiser* v. *Randall*, 357 U. S. 513, 524 (1958) (same).

In *Morrison* v. *California*, the historical cornerstone of this Court's decisions in the area of due process and allocation of the burden of proof, the Court considered the constitutionality of a California criminal statute forbidding aliens not eligible for naturalization to farm. The statute provided that, once the State proved the defendant used or occupied farm land, the burden of proving citizenship or eligibility for naturalization rested upon the defendant. See 291 U. S., at 84. At the time, persons of Asian ancestry were generally not eligible for naturalization. See *id.*, at 85–86. The Court observed that in the "vast majority of cases," there would be no unfairness to the distribution of the burden, because a defendant's Asian ancestry could plainly be observed. *Id.*, at 94. But, where the evidence is in equipoise—as when the defendant is of mixed blood

and his outward appearance does not readily reveal his Asian ancestry—"the promotion of convenience from the point of view of the prosecution will be outweighed by the probability of injustice to the accused." *Ibid.* Thus, the Court concluded: "There can be no escape from hardship and injustice, outweighing many times any procedural convenience, unless the burden of persuasion in respect of racial origin is cast upon the People." *Id.*, at 96.

Consistent with *Morrison*, I read the Court's opinion today to acknowledge that *Patterson* does not relieve the Court from evaluating the underlying fairness of imposing the burden of proof of incompetency upon the defendant. That is why the Court not only looks to "the historical treatment of the burden of proof in competency proceedings" but also to "the operation of the challenged rule, and our precedents." *Ante*, at 8. That is why the Court eventually turns to determining "whether the rule [placing upon the defendant the burden of proof of incompetency] transgresses any recognized principle of `fundamental fairness' in operation." *Ante*, at 10.

Carrying out this inquiry, the Court points out that the defendant is already entitled to the assistance of counsel and to a psychiatric evaluation. *Ante*, at 12. It suggests as well that defense counsel will have "the best-informed view" of the defendant's ability to assist in his defense. *Ibid.* Accordingly, the Court concludes: "[I]t is enough that the State affords the criminal defendant on whose behalf a plea of incompetence is asserted a reasonable opportunity to demonstrate that he is not competent to stand trial." *Ante*, at 13. While I am unable to agree with the Court's conclusion, it is clear that the Court ends up engaging in a balancing inquiry not meaningfully distinguishable from that of the *Mathews* v. *Eldridge* test it earlier appears to forswear.[2]

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[2]Recently, several members of this Court have

I am perplexed that the Court, while recognizing "the *careful balance* that the Constitution strikes between liberty and order," *ante*, at 5 (emphasis added), intimates that the apparent "expertise" of the States in criminal procedure and the "centuries of common-law tradition" of the "criminal process" warrant less than careful balancing in favor of "substantial deference to legislative judgments."

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expressly declined to limit *Mathews* v. *Eldridge* balancing to the civil administrative context and determined that *Mathews* provides the appropriate framework for assessing the validity of criminal rules of procedure. See *Burns* v. *United States*, 501 U. S. ___, ___-___ (1991) (SOUTER, J., joined in relevant part by WHITE and O'CONNOR, JJ., dissenting) (applying *Mathews* to federal criminal sentencing procedures, stating that *Mathews* does not apply only to civil "administrative" determinations but "[t]he *Mathews* analysis has thus been used as a general approach for determining the procedures required by due process whenever erroneous governmental action would infringe an individual's protected interest"). The Court also acknowledges that it has previously relied on *Mathews* v. *Eldridge* in at least two cases concerning criminal procedure. *Ante*, at 6 (citing *Ake* v. *Oklahoma*, 470 U. S. 68 (1985) (due process requires appointment of psychiatrist where defendant's sanity at the time of the offense is to be significant factor at trial), and *United States* v. *Raddatz*, 447 U. S. 667 (1980) (due process does not require federal district judges to make *de novo* determination with live testimony of issues presented in motion to suppress)).

The Court claims that "it is not at all clear" that *Mathews* was "essential to the results reached in" *Ake* and *Raddatz*. *Ante*, at 6. I am not sure what the Court means, because both cases unquestionably set forth the full *Mathews* test and evaluated the

*Ante*, at 7. Because the *Due* Process Clause is not the *Some* Process Clause, I remain convinced that it requires careful balancing of the individual and governmental interests at stake to determine what process is due.

I believe that requiring a possibly incompetent person to carry the burden of proving that he is incompetent cannot be called "adequate," within the meaning of the decisions in *Pate* and *Drope*, to protect a defendant's right to be tried only while competent. In a variety of other contexts, the Court has allocated the burden of proof to the prosecution as part of the protective procedures designed to ensure the integrity of specific underlying rights. In *Lego* v. *Twomey*, 404 U. S. 477 (1972), for example, the Court determined that when the prosecution seeks to use at trial a confession challenged as involuntary, "the prosecution must prove at least by a preponderance of the evidence that the confession was voluntary," because the defendant is "entitled to a reliable and clear-cut determination that the confession was in fact voluntarily rendered." *Id.*, at 489. See also *Colorado* v. *Connelly*, 479 U. S. 157, 167–169 (1986) (burden on prosecution to show defendant waived *Miranda* rights); *Nix* v. *Williams*, 467 U. S. 431, 444, and n. 5 (1984) (burden on prosecution 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 prosecution to show voluntariness of

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interests. See *Ake*, 470 U. S., at 77–83; *Raddatz*, 447 U. S., at 677–679. What the Court should find clear, if anything, from these two cases is that the *specific* rights asserted there were historically novel and could hardly be said to have constituted "principle[s] of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental."

consent to search). Equally weighty concerns warrant imposing the burden of proof upon the State here.

The Court suggests these cases are distinguishable because they shift the burden of proof in order to deter lawless conduct by law enforcement and prosecutorial authorities, while in this case deterrence is irrelevant. *Ante*, at 13–14. If anything, this distinction cuts *against* the Court's point of view. Deterrence of official misconduct during the investigatory stage of the criminal process has less to do with the fairness of the trial and an accurate determination of the defendant's guilt than does the defendant's ability to understand and participate in the trial itself. Accordingly, there is greater reason here to impose a trial-related cost upon the government—in the form of the burden of proof—to ensure the fairness and accuracy of the trial. Compare *United States* v. *Alvarez-Machain*, ___ U.S. ___, ___ (1992) (slip op. 5–6) (official misconduct in the form of forcible kidnaping of defendant for trial does not violate defendant's due process rights at trial). Moreover, given the Court's consideration of nontrial-related interests, I wonder whether the Court owes any consideration to the public interest in the appearance of fairness in the criminal justice system. The trial of persons about whose competence the evidence is inconclusive unquestionably "undermine[s] the very foundation of our system of justice—our citizens' confidence in it." *Georgia* v. *McCollum*, ___ U.S. ___, ___ (1992) (slip op. 7).

"In all kinds of litigation it is plain that where the burden of proof lies may be decisive of the outcome." *Speiser* v. *Randall*, 357 U. S., at 525. To be sure, the requirement of a hearing (once there is a threshold doubt as to competency) and the provision for a psychiatric evaluation, see *Ake* v. *Oklahoma*, 470 U. S. 68, 81 (1985), do ensure at least some protection against the trial of incompetent persons. Yet in cases where the evidence is inconclusive, a

defendant bearing the burden of proof of his own incompetency now will still be subjected to trial. In my view, this introduces a systematic and unacceptably high risk that persons will be tried and convicted who are unable to follow or participate in the proceedings determining their fate. I, therefore, cannot agree with the Court that "reasonable minds may differ as to the wisdom of placing the burden of proof" on likely incompetent defendants. *Ante*, at 12.

The Court suggests that "defense counsel will often have the best-informed view of the defendant's ability to participate in his defense." *Ibid.* There are at least three good reasons, however, to doubt the Court's confidence. First, while the defendant is in custody, the State itself obviously has the most direct, unfettered access to him and is in the best position to observe his behavior. In the present case, Medina was held before trial in the Orange County jail system for more than a year and a half prior to his competency hearing. Tr. Vol. 3, pp. 677–684. During the months immediately preceding the competency hearing, he was placed several times for extended periods in a padded cell for treatment and observation by prison psychiatric personnel. *Id.*, at 226, 682–684. While Medina was in the padded cell, prison personnel observed his behavior every 15 minutes. *Id.*, at 226.

Second, a competency determination is primarily a medical and psychiatric determination. Competency determinations by and large turn on the testimony of psychiatric experts, not lawyers. "Although competency is a legal issue ultimately determined by the courts, recommendations by mental health professionals exert tremendous influence on judicial determinations, with rates of agreement typically exceeding 90%." Nicholson & Johnson, Prediction of Competency to Stand Trial: Contribution of Demographics, Type of Offense, Clinical Characteristics, and Psycholegal Ability, 14 Int'l J. Law

and Psych. 287, 287 (1991) (citations omitted). See also S. Brakel, J. Parry, & B. Weiner, The Mentally Disabled and the Law 703 (3d ed. 1985) (same). While the testimony of psychiatric experts may be far from infallible, see *Barefoot* v. *Estelle*, 463 U. S. 880, 916 (1983) (BLACKMUN, J., dissenting), it is the experts and not the lawyers who are credited as the "best-informed," and most able to gauge a defendant's ability to understand and participate in the legal proceedings affecting him.

Third, even assuming that defense counsel has the "best-informed view" of the defendant's competency, the lawyer's view will likely have no outlet in, or effect on, the competency determination. Unlike the testimony of medical specialists or lay witnesses, the testimony of defense counsel is far more likely to be discounted by the factfinder as self-interested and biased. Defense counsel may also be discouraged in the first place from testifying for fear of abrogating an ethical responsibility or the attorney-client privilege. See, *e.g.*, ABA Criminal Justice Mental Health Standards §7–4.8(b), Commentary Introduction, p 209, and Commentary, pp. 212–213 (1989). By way of example from the case at hand, it should come as little surprise that neither of Medina's two attorneys was among the dozens of persons testifying during the six days of competency proceedings in this case. Tr. Vol. 1, pp. 1–5 (Witness List).

Like many psychological inquiries, competency evaluations are "in the present state of the mental sciences . . . at best a hazardous guess however conscientious." *Solesbee* v. *Balkcom*, 339 U. S., at 23 (Frankfurter, J., dissenting). See also *Ake* v. *Oklahoma*, 470 U. S., at 81; *Addington* v. *Texas*, 441 U. S. 418, 430 (1979); *Drope*, 420 U. S., at 176. This unavoidable uncertainty expands the range of cases where the factfinder will conclude the evidence is in equipoise. The Court, however, dismisses this concern on grounds that "`[d]ue process does not

require that every conceivable step be taken, at whatever cost, to eliminate the possibility of convicting an innocent person.'" *Ante*, at 13 (quoting *Patterson*, 432 U. S., at 208). Yet surely the Due Process Clause requires *some* conceivable steps be taken to eliminate the risk of erroneous convictions. I search in vain for any guiding principle in the Court's analysis that determines when the risk of a wrongful conviction happens to be acceptable and when it does not.

The allocation of the burden of proof reflects a societal judgment about how the risk of error should be distributed between litigants. Cf. *Santosky* v. *Kramer*, 455 U. S. 745, 755 (1982) (standard of proof). This Court has said it well before: "The individual should not be asked to share equally with society the risk of error when the possible injury to the individual is significantly greater than any possible harm to the state." *Addington* v. *Texas*, 441 U. S., at 427. The costs to the State of bearing the burden of proof of competency are not at all prohibitive. The Court acknowledges that several States already bear the burden, *ante*, at 9–10, and that the allocation of the burden of proof will make a difference "only in a narrow class of cases where the evidence is in equipoise." *Ante*, at 11. In those few difficult cases, the State should bear the burden of remitting the defendant for further psychological observation to ensure that he is competent to defend himself. See, *e.g.*, Cal. Penal Code Ann. §1370(a)(1) (West Supp. 1992) (defendant found incompetent shall be "delivered" to state hospital or treatment facility "which will promote the defendant's speedy restoration to mental competence"). See also *Jackson* v. *Indiana*, 406 U. S. 715, 738 (1972) (Due Process Clause allows State to hold incompetent defendant "for reasonable period of time necessary to determine whether there is a substantial probability" of return to competency). In the narrow class of

cases where the evidence is in equipoise, the State can reasonably expect that it will speedily be able to return the defendant for trial.

Just this Term the Court reaffirmed that the Due Process Clause prevents the States from taking measures that undermine the defendant's right to be tried while fully aware and able to defend himself. In *Riggins* v. *Nevada*, *supra*, the Court reversed on due process grounds the conviction of a defendant subjected to the forcible administration of antipsychotic drugs during his trial. Rejecting the dissent's insistence that actual prejudice be shown, the Court found it to be "*clearly possible*" that the medications affected the defendant's "ability to follow the proceedings, or the substance of his communication with counsel." Slip op. 9 (emphasis added). See also *id.*, at ___ (slip op. 3) (KENNEDY, J., concurring in the judgment) (prosecution must show "*no significant risk* that the medication will impair or alter in any material way the defendant's capacity or willingness to react to the testimony at trial or to assist his counsel") (emphasis added).

I consider it no less likely that petitioner Medina was tried and sentenced to death while effectively unable to defend himself. That is why I do not share the Court's remarkable confidence that "[n]othing in today's decision is inconsistent with our longstanding recognition that the criminal trial of an incompetent defendant violates due process." *Ante*, at 14. I do not believe the constitutional prohibition against convicting incompetent persons remains "fundamental" if the State is at liberty to go forward with a trial when the evidence of competency is inconclusive. Accordingly, I dissent.