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## United States Supreme Court: 1991-92 Term

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## UNITED STATES SUPREME COURT: 1991-92 TERM

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This article summarizes many of the U.S. Supreme Court's criminal law decisions of the last term. Once again the Court explored the relationship between the hearsay rule and the Confrontation Clause. The Court also revisited the use of peremptory challenges based on race. Special attention is given to these two topics because of the continuing recent litigation in these areas.

### PEREMPTORY CHALLENGES

The Court again considered the use of peremptory challenges on a racial basis in *Georgia v. McCollum*, 112 S. Ct. 2348 (1992). The defendants were charged with aggravated assault and battery. They were white, the victims were African-American, and the prosecution expected to show that race was a factor in the alleged assaults. The prosecution moved pretrial for an order prohibiting the defense from using its peremptory challenges to exclude African-American jurors.

### Early Cases

The Supreme Court had long held that racial discrimination in the jury selection process offended the Equal Protection Clause. In *Strauder v. West Virginia*, 100 U.S. 303 (1880), decided soon after the adoption of the 14th Amendment, the Court invalidated a state statute providing that only white men could serve as jurors. However, it was not until 1965 in *Swain v. Alabama*, 380 U.S. 202 (1965), that the Court for the first time considered the use of peremptory challenges as a device to exclude jurors because of their race. The Court rejected *Swain's* challenge, but indicated that the systematic exclusion of African-Americans through the use of peremptories over a period of time might establish an Equal Protection violation. This burden, however, was difficult to satisfy.

### Batson v. Kentucky

In *Batson v. Kentucky*, 476 U.S. 79 (1986), the Court departed from *Swain* by holding that a defendant could establish a prima facie case of purposeful discrimination in the selection of the petit jury solely on the prosecutor's exercise of peremptory challenges in that case. Establishing systematic exclusion over a period of time, as suggested in *Swain*, was not required. Once the

defendant makes a prima facie showing of the racial basis for the peremptory strikes, the burden shifts to the prosecution to offer a race-neutral explanation for the strikes. The Court rested its decision on Equal Protection grounds.

### Sixth Amendment Fair Cross-Section Requirement

In a subsequent decision, *Holland v. Illinois*, 493 U.S. 474 (1990), the defendant made a Sixth Amendment challenge, based on the "fair cross section" guarantee of the right to trial by jury. The Court ruled that the "fair cross section" requirement applied to the jury pool and not to the petit jury chosen from that pool. Thus, peremptory challenges could not be attacked on Sixth Amendment grounds. Five Justices, however, suggested that an Equal Protection challenge might be successful. Justice Kennedy, writing a concurring opinion, indicated that he would side with the four dissenting Justices if a Fourteenth Amendment challenge had been raised: "I find it essential to make clear that if the claim here were based on the Fourteenth Amendment Equal Protection Clause, it would have merit." *Id.* at 488.

### Standing

In *Powers v. Ohio*, 111 S.Ct. 1364 (1991), a white defendant challenged the prosecutor's use of peremptory challenges to exclude black venirepersons from a jury in an aggravated murder prosecution. The principal problem with the Equal Protection argument raised in *Powers* concerned the issue of standing. *Batson*, a black man, had challenged the exclusion of other blacks from the jury. *Powers*, however, was a white defendant challenging the exclusion of black jurors. The issue turned on whether a white defendant suffered any harm in this situation. The Court held that *Powers* had suffered harm:

The purpose of the jury system is to impress upon the criminal defendant and the community as a whole that a verdict of conviction or acquittal is given in accordance with the law by persons who are fair. The verdict will not be accepted or understood in these terms if the jury is chosen by unlawful means at the outset. Upon these considerations, we find that a criminal defendant suffers a real injury when the

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prosecutor excludes jurors at his or her own trial on account of race. *Id.* at 1372.

This analysis was also supported by a third-party standing argument, with the Court finally concluding "that a defendant in a criminal case can raise the third-party equal protection claims of jurors excluded by the prosecution because of their race." *Id.* at 1373.

### Civil Cases

In *Edmonson v. Leesville Concrete Company, Inc.*, 111 S.Ct. 2077 (1991), the Court extended *Batson* to civil litigation. This case is important because it suggested the answer to another issue: Does *Batson* apply to the defendant's use of peremptory challenges? The principal issue is whether there is state action when the defendant strikes jurors on racial grounds, an issue also critical in analyzing whether *Batson* applies to civil litigation. The Court in *Edmonson* wrote:

Though the motive of a peremptory challenge may be to protect a private interest, the objective of jury selection proceedings is to determine representation on a governmental body. Were it not for peremptory challenges, there would be no question that the entire process of determining who will serve on the jury constitutes state action. The fact that the government delegates some portion of this power to private litigants does not change the governmental character of the power exercised. *Id.* at 2086.

### Defense Peremptory Challenges

In *McCullum* the Court ruled that the defense also came within the *Batson* rule. Citing *Edmonson*, the Court found that the defense use of peremptory challenges amounted to "state action" within the meaning of the 14th Amendment. According to the Court, the jury fulfills a "unique and constitutionally compelled governmental function" and the peremptory challenge system could not exist without significant governmental participation. 112 S. Ct. at 2355. The Court went on to note: "Regardless of who precipitated the jurors' removal, the perception and the reality in a criminal trial will be that the court has excused jurors based on race, an outcome that will be attributed to the State." *Id.* at 2356.

Next, the Court ruled that the prosecution had standing to raise the issue. While the Court acknowledged that third-party standing is the exception rather than the rule, it believed that third-party standing was appropriate in this context. The State suffers injury "when the fairness and integrity of its own judicial process is undermined." *Id.* at 2357. In addition, excluded potential jurors face formidable barriers in filing a civil rights suit to rectify such discrimination.

Finally, the Court ruled that the defendant's rights were not violated by this outcome. The Court observed that "peremptory challenges are not constitutionally protected fundamental rights; rather, they are but one state-created means to the constitutional end of an impartial jury and a fair trial." *Id.* at 2358. The defendants also argued that requiring the defense to explain its reasons for exercising peremptory challenges, a real possibility under *Batson*, would violate the right to counsel and the attorney-client privilege. The Court rejected this argument, noting that the defense could state its reasons in camera if it believed that its trial strategy would be revealed.

Moreover, "neither the Sixth Amendment right nor the attorney-client privilege gives a criminal defendant the right to carry out through counsel an unlawful course of conduct." *Id.*

### RIGHT OF CONFRONTATION

During the last term, the Supreme Court once again considered the relationship between the hearsay rule and the Confrontation Clause. The case was *White v. Illinois*, 112 S. Ct. 736 (1992), a child sexual abuse prosecution, in which the child's hearsay statements were admitted in evidence. The trial court ruled the statements admissible under two hearsay exceptions: excited utterances and statements made for the purpose of medical treatment. An understanding of *White* requires an appreciation of the Court's earlier decisions.

### Roberts v. Ohio: The Two-Pronged Test

In *Roberts v. Ohio*, 448 U.S. 56 (1980), the Court identified two values underlying the Confrontation Clause: the "Framers' preference for face-to-face accusation" and an "underlying purpose to augment accuracy in the factfinding process." *Id.* at 65. From these values, the Court derived a two-pronged analysis that focused on (1) the unavailability of the declarant and (2) the reliability of the hearsay statement. The Court wrote:

In sum, when a hearsay declarant is not present for cross-examination at trial, the Confrontation Clause normally requires a showing that [the declarant] is unavailable. Even then, his statement is admissible only if it bears adequate "indicia of reliability." Reliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception. In other cases, the evidence must be excluded, at least absent a showing of particularized guarantees of trustworthiness. *Id.* at 66.

This summation of confrontation requirements immediately raised problems. *Roberts* involved the admissibility of a preliminary hearing transcript as former testimony, a hearsay exception that traditionally required a showing of unavailability. Most hearsay exceptions, however, do not require such a showing. Did the Court intend to impose an unavailability requirement on every exception? As one commentator noted, "Beneath [*Roberts*'] apparently orthodox disposition . . . lies an interpretation of possibly far-reaching significance." Lilly, *Notes on the Confrontation Clause and Ohio v. Roberts*, 36 U. Fla. L. Rev. 207, 224 (1984).

### The Demise of the Two-Pronged Test

In 1986 the Court modified *Roberts*' two-pronged approach, which required a showing of both reliability and unavailability. *United States v. Inadi*, 475 U.S. 387 (1986), which involved the coconspirator exception to the hearsay rule, appeared to limit *Roberts*' unavailability requirement to cases in which former testimony is introduced. The Court wrote:

*Roberts* should not be read as an abstract answer to questions not presented in that case, but rather as a resolution of the issue the Court said it was examining: "the constitutional propriety of the introduction in evidence of the preliminary hearing testimony of a witness not produced at the defendant's subsequent state criminal trial." *Id.* at 392-93 (quoting *Ohio v. Roberts*, 448 U.S. 56, 58 (1980)).

The Court also wrote that *Roberts* should not be read “to stand for the radical proposition that no out-of-court statement can be introduced by the government without a showing that the declarant is unavailable.” *Id.* at 394.

The Court reaffirmed this position in *White*: “*Roberts* stands for the proposition that unavailability analysis is a necessary part of the Confrontation Clause inquiry *only when* the challenged out-of-court statements were made in the course of a prior judicial proceeding.” *Id.* at 741 (emphasis added). Thus, despite the language in *Roberts*, a showing of unavailability is not always demanded.

### Dispensing With the Unavailability Requirement

*Inadi* and *White* not only limit the unavailability requirement set forth in *Roberts*, they also establish blanket rules dispensing with the requirement for at least some hearsay exceptions — the coconspirator exception in *Inadi* and the excited utterance and medical diagnosis exceptions in *White*. The Court offered two reasons for these rulings.

First, these exceptions differed from the former testimony exception at issue in *Roberts*. Unlike former testimony, coconspirator statements “provide evidence of the conspiracy’s context that cannot be replicated, even if the declarant testifies to the same matters in court.” *Inadi*, 475 U.S. at 395. Similarly, the Court in *White* noted that excited utterances and statements made for the purpose of medical diagnosis had substantial probative value that “could not be duplicated simply by the declarant later testifying in court.” 112 S. Ct. at 743.

The second reason concerned what the Court perceived to be an unnecessary burden on the prosecution. The prosecution subpoenas those witnesses that it needs, and the same opportunity is guaranteed to the defense under the Compulsory Process Clause. Thus, an unavailability rule would operate only in those cases where neither side wanted to call the witness. According to the Court, this would “impose substantial additional burdens on the factfinding process” because the prosecution would “be required to repeatedly locate and keep continuously available each declarant.” *Id.* at 742.

### The Reliability Requirement

Decisions after *Roberts* also considered the second (reliability) prong. Under this prong, a hearsay statement satisfies confrontation requirements either because the statement (1) falls within a “firmly rooted” hearsay exception or (2) possesses “particularized guarantees of trustworthiness.”

Like *Inadi*, *Bourjaily v. United States*, 483 U.S. 171 (1987), considered a confrontation challenge to coconspirator statements. This time, however, the reliability requirement was the focus of the litigation. Tracing the judicial history of the coconspirator exception back over a century and a half, the Court found the exception “firmly enough rooted in our jurisprudence.” *Id.* at 183. Accordingly, such statements automatically satisfy confrontation demands for reliability.

The Court adopted the same analysis in *White*, writing that there “can be no doubt” that the excited utterance and medical diagnosis hearsay exceptions are “firmly rooted.” The Court noted that the excited utterance exception had been recognized for “at least two centuries”

and both the Federal Rules of Evidence and nearly “four-fifths” of the states had adopted it. 112 S. Ct. at 742 n. 8.

In sum, the Court in determining reliability in both cases simply looked to see how long a hearsay exception had been recognized and how extensively it had been adopted throughout the country.

### Exceptions Not “Firmly Rooted”

If a hearsay exception is not “firmly rooted,” the Sixth Amendment requires that “particularized guarantees of trustworthiness” accompany the making of the hearsay statement. This was the Court’s holding in *Idaho v. Wright*, 110 S. Ct. 3139 (1990), which involved the admissibility of a child’s statement under a residual hearsay exception. This requirement involves a case-by-case approach that considers the “totality of the circumstances” *at the time the statement was made*.

This approach, according to the Court, precludes consideration of independent corroborating circumstances in determining reliability. “[T]he relevant circumstances include only those that surround the making of the statement and that render the declarant particularly worthy of belief.” *Id.* at 3148. In rejecting reliance on corroborating proof, the Court wrote:

[T]he use of corroborating evidence to support a hearsay statement’s “particularized guarantees of trustworthiness” would permit admission of a presumptively unreliable statement by bootstrapping on the trustworthiness of other evidence at trial, a result we think at odds with the requirement that hearsay evidence admitted under the Confrontation Clause be so trustworthy that cross-examination of the declarant would be of marginal utility. *Id.* at 3150.

### Conclusion

Despite the Court’s statements in earlier cases, the latest decisions suggest that the Confrontation Clause does nothing more than “constitutionalize” the law of hearsay. “Firmly rooted” exceptions are presumptively reliable, and at this point the unavailability requirement has been applied only to former testimony, which, under traditional hearsay law, always required such a showing.

### GRAND JURY PRACTICE

*United States v. Williams*, 112 S.Ct. 1735 (1992), involved the prosecutor’s failure to present exculpatory evidence to a federal grand jury investigating false statements made to a federally insured bank as part of loan applications. Williams alleged that the government had chosen not to present evidence to the grand jury that would have negated an intent to mislead the banks, an essential element of the charged offense. Williams did not argue that the Fifth Amendment right to a grand jury indictment required the prosecution to present exculpatory evidence. Rather, he based his argument on the federal courts supervisory power.

The Supreme Court ruled against Williams. The Court pointed out that the grand jury has historically operated independently of the courts: “[T]he whole theory of its function is that it belongs to no branch of the institutional government, serving as a kind of buffer or referee between the Government and the People.” *Id.* at 1742. Accordingly, the grand jury can investigate upon mere suspicion, need not identify the offender it suspects, nor

is it required to indicate the precise charge it is investigating. The grand jury does not need prior judicial approval to investigate or to indict. Judicial supervision occurs only when the grand jury attempts to compel the appearance of witnesses or the production of evidence. In this context, the courts will refuse to support the grand jury only when a constitutional or common law privilege is asserted by a witness. Given this history, the Court refused to intrude into the process.

The Court also rested its decision on the limited function of a grand jury when deciding to indict. Historically, the grand jury does not determine guilt or innocence. It evaluates only whether there is sufficient evidence to proceed to trial, which requires only a consideration of the prosecution's evidence. The defendant does not have a right to testify nor a right to present evidence. Consequently, the prosecutor has no obligation to present such evidence. The Court wrote: "If the grand jury has no obligation to consider all 'substantial exculpatory' evidence, we do not understand how the prosecutor can be said to have a binding obligation to present it." *Id.* at 1745.

### SPEEDY TRIAL

The Court considered a Sixth Amendment speedy trial claim in *Doggett v. United States*, 112 S. Ct. 2686 (1992). In 1980 Doggett was indicted for conspiring to import and distribute cocaine. He left the country before he could be arrested. The DEA agents in charge of the case subsequently learned that Doggett had been arrested on drug charges in Panama. They requested Panamanian officials to "expel" Doggett to the U.S. Doggett, however, was later released and traveled to Colombia, where he stayed for several months. In September 1982 he re-entered the United States and passed unhindered through U.S. Customs in New York. He settled in Virginia, where he married, earned a college degree, held a steady job, lived openly under his own name, and stayed within the law. In September 1988 the Marshall's Service ran a routine credit check on several thousand people subject to outstanding warrants, a procedure that located Doggett. He was subsequently arrested — 6 years after he returned to the U.S. and 8 and 1/2 years after indictment. He moved to dismiss the charges on speedy trial grounds.

The Supreme Court agreed with Doggett's claim and reversed his conviction. An earlier case, *Barker v. Wingo*, 407 U.S. 514 (1972), set forth a four-pronged analysis for determining whether the constitutional right to a speedy trial has been violated:

[1] whether the delay before trial was uncommonly long, [2] whether the government or the criminal defendant is more to blame for that delay, [3] whether, in due course, the defendant asserted his right to a speedy trial, and [4] whether he suffered prejudice as the delay's result. 112 S. Ct. at 2690.

The Court then proceeded to apply these factors. The "extraordinary 8 1/2 years lag" clearly sufficed to trigger a closer inquiry into the other factors. As for the second factor, the record showed that for six years the government made no serious effort to find Doggett. Had they done so, they would have located him "within minutes." Moreover, there was no evidence that Doggett knew of the indictment prior to his departure out of the country. Indeed, his assertions of ignorance were supported by

other evidence in the record. Thus, the critical factor turned on the fourth factor — whether Doggett had suffered any prejudice.

Neither side could establish specific prejudice or lack thereof. The Court, however, held that excessive delay presumptively compromises the reliability of a trial in ways that neither party can prove or, for that matter, identify. While such presumptive prejudice cannot alone carry a Sixth Amendment claim without regard to the other *Barker* criteria, . . . it is part of the mix of relevant facts, and its importance increases with the length of delay. *Id.* at 2693.

Had the prosecution pursued Doggett with due diligence, his speedy trial claim would have failed. Had the prosecution intentionally held back to gain some impermissible advantage, Doggett's claim could easily be accepted; official bad faith counts heavily against the prosecution. Doggett's circumstances, however, fell someplace between these two extremes. The Court believed that the delay was simply too long and the negligence too great. The Court observed: "The Government, indeed, can hardly complain too loudly, for persistent neglect in concluding a criminal prosecution indicates an uncommonly feeble interest in bringing an accused to justice; the more weight the Government attaches to securing a conviction, the harder it will try to get it." *Id.* at 2693-94.

### DOUBLE JEOPARDY

In *United States v. Felix*, 112 S. Ct. 1377 (1992), the defendant was prosecuted for drug transactions that occurred in Oklahoma, including a conspiracy count. At a prior trial for drug transactions in Missouri, the Oklahoma transactions had been admitted as "other acts" evidence under Federal Rule of Evidence 404(b).

Felix argued that the prosecution was foreclosed from presenting evidence of the Oklahoma drug operation because that evidence had been used in the prior Missouri trial. The Supreme Court rejected this argument, holding that the evidentiary use of the Oklahoma transactions at the Missouri trial was not the same as prosecuting the defendant for those offenses, and thus the Double Jeopardy Clause did not bar the later prosecution for the Oklahoma transactions. Citing *Dowling v. United States*, 493 U.S. 342 (1990), the Court recognized a "basic, yet important, principle that the introduction of relevant evidence of particular misconduct in a case is not the same thing as prosecution for that conduct." *Id.* at 1383.

Felix also argued that his conviction of the conspiracy count violated the ban against double jeopardy. Of the nine overt acts offered to support the conspiracy charge, two were based on the conduct for which Felix had been previously prosecuted in Missouri. He based his argument on *Grady v. Corbin*, 495 U.S. 508 (1990), which held that the Double Jeopardy Clause bars prosecution where the Government, "to establish an essential element of an offense charged in that prosecution, will prove conduct that constitutes an offense for which the defendant has already been prosecuted." *Id.* at 521.

The Court bypassed the *Grady* rule by citing earlier precedents, which it said had not been overruled by *Grady*: "But long antedating any of these cases, and not questioned in any of them, is the rule that a substantive crime, and a conspiracy to commit that crime, are not the

'same offense' for double jeopardy purposes." 112 S. Ct. at 1384. For example, in *Pinkerton v. United States*, 328 U.S. 640 (1946), the Court wrote that "the commission of the substantive offense and a conspiracy to commit it are separate and distinct offenses . . . [a]nd the plea of double jeopardy is no defense to a conviction for both offenses." *Id.* at 643. Similarly, in *Garrett v. United States*, 471 U.S. 773 (1985), the Court noted that "it does not violate the Double Jeopardy Clause . . . to prosecute [a continuing criminal enterprise] after a prior conviction for one of the predicate offenses." *Id.* at 793. See also *United States v. Bayer*, 331 U.S. 532 (1947).

The Court went on to hold that these precedents controlled rather than the *Grady* rule.

### HEARSAY RULE

In *United States v. Salerno*, 112 S. Ct. 2503 (1992), the Supreme Court interpreted Fed. R. Evid. 804(b)(1), which is similar to the Ohio rule. Two immunized witnesses testified before a grand jury investigating racketeering. They testified that neither they nor the defendants had participated in the alleged racketeering scheme. When the defense called these witnesses at trial, they asserted their Fifth Amendment privilege to remain silent. The defense then offered their grand jury testimony as former testimony, arguing that the prosecution had had the opportunity to cross-examine the witnesses at the grand jury proceedings. This opportunity, they argued, satisfied the requirement of Rule 804(b)(1) — that the party against whom the testimony is offered had a "similar motive" to examine the hearsay declarant at the prior proceeding.

The district court ruled the evidence inadmissible because the prosecution's motive in questioning a grand jury witness in the investigatory stages of a case is far different from its motive at trial. The Second Circuit reversed, holding that the prosecutor's motive when examining the witness was not critical when the government obtains immunized testimony in a grand jury proceeding from a witness who refuses to testify at trial. According to the court, "adversarial fairness" required this result.

The Supreme Court reversed, holding that the courts had to apply the "similar motive" requirement as enacted by Congress. The courts have no authority to disregard the congressional language in order to achieve "adversarial fairness." The Supreme Court, however, did not decide the "similar motive" issue because the court of appeals had not considered that issue. Accordingly, the Court remanded the case on this point. Justice Stevens, dissenting, stated that the prosecution clearly had an 'opportunity and similar motive' to develop by direct or cross-examination the grand jury testimony.

### TRIAL BY JURY: CAPITAL CASES

*Morgan v. Illinois*, 112 S.Ct. 2222 (1992), can be described as a "reverse *Witherspoon*" case. During the voir dire of jurors in a capital case, the defense requested the judge to inquire whether any of the jurors would automatically impose the death penalty if the defendant was convicted. The judge refused to ask the question. The prosecution's questions concerning the *Witherspoon* requirements were permitted. Under *Witherspoon v. Illinois*, 391 U.S. 510 (1968), potential jurors may be disqualified for cause if they would refuse in all instances

to impose the death penalty upon conviction. Thus, all jurors were asked whether they would automatically vote against the death penalty no matter what the facts of the case were. The accused's question was the reverse — whether the jurors would automatically impose the death penalty.

On review, the Supreme Court found that the defendant had a right to have his question put to the jurors. The Sixth Amendment does not require a jury determination concerning the death penalty. However, once a state chooses to use juries in this context, due process requires that the jury be impartial. *Witherspoon* and its progeny recognize this principle. They hold that "a juror who in no case would vote for capital punishment, regardless of his or her instructions, is not an impartial juror and must be removed for cause." 112 S. Ct. at 2229. See *Wainwright v. Witt*, 469 U.S. 412, 424 (1985); *Adams v. Texas*, 448 U.S. 38, 45 (1980).

In *Morgan* the Court ruled that this analysis also applied to jurors who held the opposite predilection: A juror who will automatically vote for the death penalty in every case will fail in good faith to consider the evidence of aggravating and mitigating circumstances as the instructions will require him to do. Indeed, because such a juror has already formed an opinion on the merits, the presence or absence of either aggravating or mitigating circumstances is entirely irrelevant to such a juror. Therefore, based on the requirement of impartiality embodied in the Due Process Clause of the Fourteenth Amendment, a capital defendant may challenge for cause any prospective juror who maintains such views. If even one such juror is empaneled and the death sentence is imposed, the State is disentitled to execute the sentence. *Id.* at 2229-30.

This requirement necessarily means that the defendant must be allowed to inquire about the individual juror's views on this issue.

The Court also commented that *Witherspoon* had not recognized any "right" on the part of the State. Rather, it had limited the prosecution's power to exclude jurors who had scruples concerning the death penalty. Only those who would *automatically* vote against the death penalty could be excluded for cause:

[A] State may not entrust the determination of whether a man should live or die to a tribunal organized to return a verdict of death. Specifically, we hold that a sentence of death cannot be carried out if the jury that imposed or recommended it was chosen by excluding veniremen for cause simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction. *Witherspoon*, 391 U.S. at 520-23.

### COMPETENCY TO STAND TRIAL

*Medina v. California*, 112 S. Ct. 2572 (1992), involved the burden of proof in cases in which a competency to stand trial issue is raised. A California statute allocated the burden to the defendant by a preponderance of evidence.

The Supreme Court's prior cases clearly established that due process precluded the trial of a criminal defendant who was incompetent. *Drope v. Missouri*, 420 U.S. 162 (1975); *Pate v. Robinson*, 383 U.S. 375 (1966). "[T]he

test must be whether he has sufficient present ability to consult with his lawyer with a reasonable degree of rational 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, 402 (1960).

After canvassing both the English and American precedents, the Court could find “no settled tradition” on the “burden of proof” issue. Moreover, contemporary practice is also divided, with some states allocating the burden to the prosecution and some to the defense. Given this background, the Court could not “say that the allocation of the burden of proof to a criminal defendant to prove incompetence ‘offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.’ ” 112 S. Ct. at 2577 (citing *Patterson v. New York*, 432 U.S. 197, 202 (1977)).

Accordingly, the Court ruled against Medina. The Court wrote:

Once a State provides a defendant access to procedures for making a competency evaluation, however, we perceive no basis for holding that due process further requires the State to assume the burden of vindicating the defendant’s constitutional right by persuading the trier of fact that the defendant is competent to stand trial. *Id.* at 2579.

### ENTRAPMENT

*Jacobson v. United States*, 112 S. Ct. 1535 (1992), raised an entrapment issue. Jacobson was convicted of receiving child pornography through the mails. In 1984 Jacobson ordered two magazines, entitled *Bare Boys I* and *Bare Boys II*, from a California bookstore. At that time receipt of these magazines was legal under both federal and state law. Postal inspectors later found his name on the mailing list for this bookstore. For the next 2 and ½ years two government agencies (the Postal Service and the Customs Service) made repeated efforts, through five fictitious organizations and a bogus pen pal, to ascertain Jacobson’s willingness to break a new federal law by ordering sexually explicit photographs of children through the mail. These agencies finally piqued Jacobson’s interest, and he ordered a magazine. When he received the magazine, he was arrested and his house searched. The search disclosed only the *Bare Boys* magazines and the material sent by the federal agencies.

At trial Jacobson asserted the entrapment defense, a claim with which the Supreme Court agreed. The federal rule on entrapment (and the majority rule) is known as the origin-of-intent test. A defendant must establish (1) that the criminal design originated with the police and (2) that the defendant was not predisposed to commit the crime. The Court explained:

In their zeal to enforce the law, however, Government agents may not originate a criminal design, implant in an innocent person’s mind the disposition to commit a criminal act, and then induce commission of the crime so that the Government may prosecute. . . . Where the Government has induced an individual to break the law and the defense of entrapment is at issue, as it was in this case, the prosecution must prove beyond reasonable doubt that the defendant was disposed to commit the criminal act prior to first being approached by Government agents. 112 S. Ct. at 1540.

Had Jacobson promptly availed himself of the first offer to order child pornography, “it is unlikely that his entrapment defense would have warranted a jury instruction.” *Id.* at 1541. Such was not the case, however. He was the target of 26 months of repeated mailings and communications from federal agents. He became predisposed because of the Government’s own conduct. Thus, the Court ruled as a matter of law that Jacobson had been entrapped.

### INSANITY ACQUITTEE

*Foucha v. Louisiana*, 112 S. Ct. 1780 (1992), involved a state statute that continued the commitment of insanity acquittees. Under Louisiana law, a defendant found not guilty by reasons of insanity (NGRI) is committed to a psychiatric hospital until he proves that he is not dangerous. Under this scheme, an acquittee can be detained, even if he does not suffer from any mental illness. *Foucha* challenged this procedure as a violation of due process.

The Supreme Court struck down the Louisiana law. The superintendent of the hospital recommended *Foucha*’s release because the hospital doctors had found no evidence of mental illness since *Foucha*’s admission approximately four years earlier. A judge then appointed a two-member sanity commission to examine *Foucha*. These doctors found no present mental illness, but they cautioned that *Foucha* suffered from an antisocial personality, a condition that is not a mental disease. Therefore, they would not certify that *Foucha* was no longer dangerous.

In *Addington v. Texas*, 441 U.S. 418 (1979), the Supreme Court had ruled that a person committed to a mental institution in a civil proceeding must be shown to be dangerous by clear and convincing evidence. The Court, however, did not apply the same rule when a defendant is acquitted in a criminal trial by reason of insanity. *Jones v. United States*, 463 U.S. 354 (1983). Under *Jones*, the State need not satisfy the *Addington* burden in this context. In the Court’s view, the NGRI verdict established that the defendant was mentally ill and still dangerous. In *Jones*, however, the Court also stated that “[t]he committed acquittee is entitled to release when he has recovered his sanity or is no longer dangerous.” 112 S. Ct. at 1784. This aspect of *Jones* was based on *O’Connor v. Donaldson*, 422 U.S. 563 (1975), in which the Court had held as a matter of due process that it was unconstitutional for the State to continue to confine a mentally ill person who is not dangerous.

Louisiana did not contend that *Foucha* was mentally ill at the time of the hearing, only that he was dangerous. Thus, according to the Court, “the basis for holding *Foucha* in a psychiatric facility as an insanity acquittee has disappeared, and the State is no longer entitled to hold him on that basis.” 112 S. Ct. at 1784. Moreover, the Court ruled that confinement based on his antisocial personality violated due process.

### ANTIPSYCHOTIC MEDICATION AT TRIAL

David Riggins was charged with murder and robbery. *Riggins v. Nevada*, 112 S. Ct. 1810 (1992). After his arrest, a psychiatrist began treatment with thioridazine, an antipsychotic drug. The dosage was raised when Riggins continued to “hear voices” and experience sleep problems. Because the defense intended to rely on an insanity

defense, it moved to suspend the medication until after trial, contending that Riggins had a right to show the jury his true mental state. The trial court refused, and Riggins was forced to receive the medication during trial.

The Supreme Court ruled in Riggins favor. In *Washington v. Harper*, 494 U.S. 210 (1990), the Court had ruled that due process permits a mentally ill prison inmate to be treated involuntarily with antipsychotic drugs where there is a determination that "the inmate is dangerous to himself or others and the treatment is in the inmate's medical interest." *Id.* at 227. The Court, however, recognized that an inmate's interest in avoiding involuntary administration of antipsychotic drugs raised due process issues. Thus, once Riggins moved to terminate treatment, the State became obligated to establish the need for the drug's continued use.

The prosecution might have prevailed had it shown that the medication was required to protect Riggins or others, or to ensure that he was competent to stand trial. The trial court, however, had made no findings about the need for the drug or the availability of reasonable alternatives. Moreover, the record did show that the medication may have hampered Riggins' defense. The side effects could make him "uptight," drowsy, or confused. "It is clearly possible that such side effects impacted not just Riggins' outward appearance, but also the content of his testimony on direct or cross-examination, his ability to follow the proceedings, or the substance of his communication with counsel." *Id.* at 1816. Thus, there existed a strong possibility that Riggins' defense was impaired due to the administration of the drug. The Court noted:

Because the record contains no finding that might support a conclusion that administration of antipsychotic medication was necessary to accomplish an essential state policy, . . . we have no basis for saying that the substantial probability of trial prejudice in this case was justified. *Id.* at 1817.

Significantly, the Court also noted what was not decided. Riggins never argued that he had a right to be tried without

the medication if its discontinuation would render him incompetent to stand trial. The Court observed: "The question whether a competent criminal defendant may refuse antipsychotic medication if cessation of medication would render him incompetent at trial is not before us." *Id.* at 1815.

### EXTRADITION

*United States v. Alvarez-Machain*, 112 S. Ct. 2188 (1992), concerned the abduction of a Mexican national in Mexico and his repatriation to the United States for trial. He was indicted for participating in the murder of a DEA agent in Mexico. DEA officials were responsible for his abduction, although they were not personally involved in it. The defendant moved to dismiss the prosecution, arguing that his abduction violated an extradition treaty between Mexico and the United States.

Several early precedents touched upon this issue. In *Ker v. Illinois*, 119 U.S. 436 (1886), the Court had ruled that the abduction of Ker from Peru did not preclude his trial in the United States. The *Ker* rule later was applied in *Frisbie v. Collins*, 342 U.S. 519 (1952), in which a defendant was kidnaped in Chicago by Michigan officers and brought to trial in Michigan. The Court wrote: "There is nothing in the Constitution that requires a court to permit a guilty person rightfully convicted to escape justice because he was brought to trial against his will." *Id.* at 522.

In the Court's view the *Ker-Frisbie* line of cases controlled unless the extradition treaty between the United States and Mexico prohibited abductions. Nothing in the Treaty required either nation to refrain from forcible abduction, nor is extradition specified as the only method of proceeding. The Court refused to infer a prohibition against abduction. Even if the abduction is "shocking" and a violation of international law, it is not prohibited by the Treaty and thus is a matter for the Executive Branch.

Justice Stevens, in dissent, referred to the majority position as "monstrous."