It is clear that the court was concerned that sufficient consideration of James' intellectual deficits was not applied to his waiver of his *Miranda* rights, especially given the requirement in *Fare v. Michael* that juvenile confessions require special consideration. At issue in *Fare* was whether a 16-year-old murder suspect's confession was valid, given that he had requested that his probation officer be present during his interrogation by police. The U.S. Supreme Court found that his request was tantamount to asking for an attorney, and his confession was therefore obtained in violation of *Miranda*. In *Fare*, Justice Blackmun wrote:

> [The] totality of the circumstances [requires] evaluation of the juvenile's age, experience, education, background, and intelligence, and . . . whether he has the capacity to understand the warnings given to him, the nature of his . . . rights, and the consequences of waiving those rights [*Fare*, 442 U.S., p 725].

With this in mind, it is useful to examine James' developmental state in some detail. At the time of the alleged crime, James was chronologically 14 years old. Mensch testified that James' IQ was 67. By mathematical definition, IQ is 100 times mental age divided by chronological age (Tulsky DS, *et al.*: Clinical Interpretation of the WAIS-III and WMS-III. San Diego, CA: Elsevier, 2003). This formula shows James' "mental age" to be approximately 9 years.

According to Piaget's model of cognitive development, James' mental age was in keeping with the concrete-operational stage of cognitive development. This stage typically lasts from ages 7 to 11 years and predates that of the formal-operations stage, when one begins to think abstractly (Kaplan and Sadock: Comprehensive Textbook of Psychiatry (ed 8). Philadelphia: Lippincott, 2005, pp 529–33). Concrete-operational thinkers tend to interpret information on a very literal level. In this case, Atallian's expression "I'm not going anywhere" until "we deal with this" may have meant to James that he simply could not leave until he made a confession. James' concrete thinking, coupled with Atallian's confusing description of James' rights, would have made it extremely difficult for James to appreciate his *Miranda* rights rationally and the potential consequences of waiving them.

This case illustrates the importance that those involved in the juvenile justice system understand the potential impact of a suspect's age, intelligence, education, and background on his or her ability to waive *Miranda* rights knowingly. When there is doubt, a cautious investigator might consult a mental health expert before continuing with such an interrogation.

Mental Retardation and the Death Penalty

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A Defendant May Not Be Sentenced to Death if, at the Penalty Phase, at Least One Juror Finds That the Defendant Has Proven, by a Preponderance of the Evidence, That He Suffers from Mental Retardation

In *State v. Jimenez*, 924 A.2d 513 (N.J. 2007) (*Jimenez III*), the Supreme Court of New Jersey held that the death penalty is precluded when at least one juror finds that the defendant has met his burden of proving that he has mental retardation. The defendant, Porfirio Jimenez, filed a pretrial motion asserting under *Atkins v. Virginia*, 536 U.S. 304 (2002), that his mental retardation precluded the imposition of the death penalty, and he requested that the Supreme Court of New Jersey clarify its opinion in *State v. Jimenez*, 908 A.2d 181 (N.J. 2006) (*Jimenez II*), in which the court provided a framework to adjudicate *Atkins* claims.

Facts of the Case

On May 20, 2001, a 10-year-old boy went to a carnival and did not return home. Two days later, the boy's body was found with evidence that he had been sexually assaulted. On June 7, 2001, Mr. Jimenez was arrested after his DNA matched the DNA of the semen found in the boy's underpants, and he gave the police a detailed confession.

In September 2001, Mr. Jimenez was indicted on multiple charges: murder, felony murder, kidnapping, attempted aggravated sexual assault, and possession of a weapon for an unlawful purpose. In Oc-

tober 2001, the state requested the death penalty for Mr. Jimenez by filing a Notice of Aggravating Factors pursuant to N.J. Stat. Ann. § 2C:11-3c(1) (2000).

Three years later, in September 2004, pursuing an *Atkins* claim on behalf of Mr. Jimenez, the defense submitted a report by Frank J. Dyer, PhD. The state had Mr. Jimenez evaluated by Frank Dattillio, PhD. Both psychologists agreed that Mr. Jimenez fell into the mildly mentally retarded range as defined by DSM-IV; however, their opinions differed regarding the total score of the IQ test (Dyer reported an IQ of 68 and Dattillio an IQ of 69) and the level of Mr. Jimenez's adaptive functioning.

Ruling

To follow the complex road that led to the New Jersey Supreme Court's decision in *Jimenez III*, we must trace the antecedent decisions.

In its August 2005 decision, the Superior Court of New Jersey, Appellate Division, in *State v. Jimenez*, 880 A.2d 468 (N.J. Super. Ct. App. Div. 2005) (*Jimenez I*), described the complex scheme that the trial court devised in light of *Atkins*. If at a pretrial hearing, the defendant proved by clear and convincing evidence that he was mentally retarded, the trial would proceed as a noncapital matter. If at a pretrial hearing, the defendant proved by a preponderance of the evidence that he was mentally retarded, at the penalty phase, the state had the burden of proving beyond a reasonable doubt that the defendant was not mentally retarded. Both the prosecution and the defense appealed the trial court's decision to the New Jersey appellate division.

The appellate court reversed the trial judge's pretrial procedures and affirmed the trial judge's penalty phase procedures. The court noted that the defendant's mental status could also be introduced as a mitigating factor during the penalty phase. The state appealed the decision.

In October 2006, the Supreme Court of New Jersey, in *State v. Jimenez*, 908 A.2d 181 (N.J. 2006) (*Jimenez II*), reversed the decision of the appellate division. In *Jimenez II*, the court established the procedures that the trial court must follow when resolving *Atkins* claims. The court held that the issue can be raised before trial (e.g., if "reasonable minds [do not] differ as to the existence" of mental retardation), during the guilt phase (e.g., to negate an element of the crime), and during the penalty phase, to preclude the death penalty and/or as a mitigating factor. The court declared that asserting an *Atkins* claim, similar to an insanity defense, is an affirmative defense, and the defendant has the burden of proving his or her mental retardation by a preponderance of the evidence. The court was not clear regarding how many jurors were necessary to sustain a finding that the defendant had mental retardation.

In December 2006, in *State v. Jimenez*, 924 A.2d 513 (N.J. 2007) (*Jimenez III*), the Supreme Court of New Jersey, in a four-to-two decision, held that, to preclude a death sentence, only a single juror had to find that the defendant had proven his mental retardation by a preponderance of the evidence and remanded the case to the trial court for proceedings consistent with their opinion.

Reasoning

Fourteen states have addressed the matter of how to resolve *Atkins*. In each state and in the federal courts, the defendant has the burden of proof: six states (Arkansas, Maryland, Missouri, Nebraska, New Mexico, and Tennessee) use the preponderance-of-the-evidence standard; four states (Indiana, Arizona, Colorado, and Florida) use the clear-and-convincing-evidence standard; one state (Georgia) uses the beyond-a-reasonable-doubt standard; and three states and the federal government have not set a standard of proof (*Pruitt v. State*, 834 N.E.2d 90 (Ind. 2005)).

In *Jimenez III*, the Supreme Court of New Jersey, relying on *Mills v. Maryland*, 486 U.S. 367 (1988), clarified how many jurors must find that the defendant has met the burden of proof, holding that "mitigating factors need not be found unanimously because it would preclude deadlocked jurors from giving legal effect to mitigating factors in determining whether a defendant was death eligible" (*Jimenez*, 924 A.2d, p 515). The court found mental retardation to be a "conclusive mitigating factor," and therefore a unanimous jury finding is not required. Each juror must determine its presence or absence on an individual basis.

The court concurred with the appellate division that in cases in which "reasonable minds cannot differ as to the existence of retardation" the judge should resolve the *Atkins* claims before trial, avoiding capital prosecution.

Justice Albin's dissenting opinion, in which Justice Long joined, stated that the burden of proof should require the state to prove beyond a reasonable doubt that the defendant is not mentally retarded, because shifting the burden to the defendant "increases the likelihood of wrongly executing a mentally retarded person" (*Jimenez*, 908 A.2d, p 182).

Discussion

In 1989, in *Penry v. Lynaugh*, 492 U.S. 302 (1989), the U.S. Supreme Court ruled that, due to lack of national consensus, applying the death sentence to the mentally retarded was not categorically prohibited by the Eighth Amendment; however, the defendant could use mental retardation as a mitigating factor. The Court explained that, although the Eighth Amendment categorically prohibits punishments considered cruel and unusual under evolving societal standards of decency, there was insufficient evidence of a national consensus against the execution of mentally retarded people convicted of capital offenses.

In 2002, the question of whether it is constitutional for the state to execute a mentally retarded defendant who had been found guilty of a capital offense was again before the Court. In *Atkins*, the Court reversed *Penry* and ruled that executing a mentally retarded individual is cruel and unusual punishment. The majority, Justices Stevens, O'Connor, Kennedy, Souter, Ginsburg, and Breyer, based their opinion on the "evolving standards of decency" as reflected by the actions of the lower courts and state legislatures.

Justice Rehnquist filed a dissenting opinion in which Justices Scalia and Thomas joined. He stated that: (1) the execution of offenders who were mildly mentally retarded would not have been considered cruel and unusual punishment when the Eighth Amendment was adopted; and (2) the fact that 18 states, which was less than half the number that permitted capital punishment, had enacted legislation barring the execution of criminals who were mentally retarded was not sufficient to establish a national consensus, especially since only 7 of those states had barred all such executions.

The Court left it to state legislatures and the lower courts to describe the procedures to be followed when resolving an *Atkins* claim, which was what the Supreme Court of New Jersey did when it ruled in *Jimenez III*.

In 2006, the New Jersey Legislature created the New Jersey Death Penalty Study Commission, which was in charge of studying all aspects of the death penalty as it is administered in New Jersey. In January 2007, the commission released its report to the legislature and recommended that:

> [T]he death penalty in New Jersey be abolished and replaced with life imprisonment without parole, to be served in a maximum security facility. The Commission also recommends that any cost savings resulting from the abolition of the death penalty be used for benefits and services for survivors of victims of homicide [New Jersey Death Penalty Study Commission Report, January 2007, page 67].

As a result, the Senate and the General Assembly of New Jersey passed Bill 5171 repealing the death penalty, "An Act to allow for life imprisonment without eligibility for parole when certain aggravators exist and to repeal the death penalty, amending N.J. Stat. Ann. 2C: 11-3 and N.J. Stat. Ann. 2B:23-10, repealing P.L. 1983, c.245, and supplementing Title 2C of the New Jersey Statutes" (2007 N.J. ALS 204; 2007 N.J. Ch.204; 2006 N.J. S.N. 171). On December 17, 2007, Governor Corzine signed the bill, making New Jersey the first state to abolish the death penalty by passing a law (Peters JW: Corzine Signs Bill Ending Executions, Then Commutes Sentences of 8. The New York Times. December 18, 2007, B3).

The issues raised in *Jimenez III* are now moot in New Jersey. However, states that are in the process of determining how to resolve *Atkins* claims may profit from reviewing the reasoning in *Jimenez II* and *Jimenez III*.

Right to Refuse Treatment

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Dangerousness Within the Institution Must Be Proven to Treat an Involuntarily Committed Individual Over His Objection

In *Dep't of Health & Mental Hygiene v. Kelly*, 918 A.2d 470 (Md. 2007), the Court of Appeals of Maryland unanimously upheld the Circuit Court for Baltimore City's ruling that Section 10-708 (g), of the