injury can maintain the privilege. This, along with the U.S. Supreme Court's ruling in *Jaffee v. Redmond*, suggests that courts should err on the side of favoring the protection of patients' privacy interests involving communications with their mental health clinicians.

IQ in *Miranda* Waivers and Death Penalty

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Low IQ *per se* Does Not Render a Waiver of *Miranda* Rights Invalid or Preclude the Imposition of the Death Penalty

In *Bevel v. State of Florida*, 983 So.2d 505 (Fla. 2008), the Florida Supreme Court held that low IQ alone is not sufficient to preclude knowing and intelligent wavier of *Miranda* rights. The court also held that mental age under the age of 18, as determined by IQ, does not preclude the imposition of the death penalty.

Facts of the Case

At the age of 22, Thomas Bevel used an AK-47 rifle to kill his roommate, Garrick Stringfield, and to shoot his roommate's girlfriend, Feletta Smith. As Mr. Bevel was leaving Mr. Stringfield's house, he shot and killed Mr. Stringfield's 13-year-old son, Philip Sims. Mr. Bevel remained in hiding for almost a month before his arrest.

Detective Coarsey, an investigating officer, testified that he inquired about Mr. Bevel's educational level and about whether he was under the influence of drugs or alcohol. He asked Mr. Bevel to read the top line of the constitutional rights form aloud and then he read each right to Mr. Bevel and asked him to initial each right indicating his understanding. After giving four different versions of the events at the time of the crime, he confessed to the murders. In his confession, he admitted killing Philip Sims because the child was a witness. He was charged with the first-degree murders of Mr. Stringfield and Philip Sims as well as the attempted first-degree murder of Ms. Smith. About one year before these events, Mr. Bevel had committed a violent felony.

Mr. Bevel was evaluated by two psychologists, Dr. Harry Krop, the defense's psychological expert, and Dr. William Riebsame, a court-appointed psychologist for the state. Based on Dr. Krop's opinion that Mr. Bevel's IQ was 65, Mr. Bevel filed a motion to suppress. An evidentiary hearing was held.

Dr. Krop testified that Mr. Bevel had a full-scale IQ of 65. He opined that Mr. Bevel had the mental age of a 14- or 15-year-old and that, although his low full-scale IQ placed him in the range of mild mental retardation, his diagnosis could not be mental retardation because of his higher level of adaptive functioning. Dr. Riebsame testified that Mr. Bevel had a verbal IQ of 75 and that it was potentially underestimated due to his limited attention span, lack of effort during the examination, and potential need for eyeglasses. Dr. Riebsame opined that Mr. Bevel understood language fairly well and had an adequate vocabulary, and he concluded that no deficiencies in adaptive behavior suggestive of mental retardation could be identified.

The trial court denied the motion to suppress the confession. Mr. Bevel was found guilty on all counts and sentenced to death for the first-degree murders and life imprisonment for the attempted first-degree murder. He appealed, raising nine issues for review, including, in part, whether the trial court erred in denying his motion to suppress his confession because his IQ of 65 was so low that he lacked the mental ability to waive his *Miranda* rights knowingly and voluntarily; in rejecting his mental age of 14 or 15 as a mitigator; in assigning too little weight to the mitigating circumstance of his IQ of 65; and in applying the death penalty, considering that his mental age was less than 18 years.

Ruling

The Supreme Court of Florida affirmed the convictions and death sentences.

Reasoning

Mr. Bevel contended that his IQ of 65 was so low that he lacked the mental ability to waive his *Miranda* rights knowingly and voluntarily. The court found that although IQ is a relevant factor in

waivers, a low IQ *per se* does not preclude a knowing and intelligent waiver. There is no specific IQ threshold for a knowing and intelligent *Miranda* waiver. Instead, the court must look at the totality of circumstances surrounding the interrogation. The investigating officers testified that after each right on the constitutional rights form was read to him, Mr. Bevel acknowledged understanding and initialed the form. The court noted that there was agreement that Mr. Bevel did not exhibit any adaptive behavioral deficiencies indicative of mental retardation.

The court affirmed the trial court's holding that the defendant's age as a statutory mitigator had not been proven. It noted that both psychologists agreed that Mr. Bevel did not meet the criteria for mental retardation. Further, Dr. Riebsame believed Mr. Bevel's IQ was "much higher" and that he may have been exaggerating his deficits. The court also noted that the trial court reviewed Mr. Bevel's letters from jail and his recorded confessions and concluded that he was a "twenty-two-year-old man of average intelligence." Thus, the court found that there was competent, substantial evidence to support the trial court's holding.

In a footnote, the court noted that Mr. Bevel's claim relied heavily on *Atkins v. Virginia*, 536 U.S. 304 (2002), in which the Supreme Court held that it was unconstitutional to execute mentally retarded criminals. The court noted that an *Atkins* claim could not be filed because Mr. Bevel never received a diagnosis of mental retardation and that he could not receive this diagnosis because of his level of functioning. The court noted that the experts opined that Mr. Bevel lacked deficits in adaptive functioning. Mr. Bevel had lived independently since the age of 18, managed his personal affairs, drove to places appropriately, and performed odd jobs including automotive repair and babysitting.

Mr. Bevel contended that the court assigned too little weight to the mitigating circumstance of his IQ of 65. The trial court held that the mitigator had been proven but assigned little weight because the defendant had been living independently since age 18, read and wrote well, and was able to hold a steady job and provide for himself. The court reasoned that Mr. Bevel's low IQ did not have any relationship to the commission of the crime and did not result in any functional deficits.

Relying on *Roper v. Simmons*, 543 U.S. 551 (2005), Mr. Bevel argued that the death penalty is inappropriate for him because his mental age is that of a 14- or 15-year-old. The court held that *Roper* prohibits only the execution of defendants whose chronological age, not mental age, is younger than 18 at the time of the crime. In addition, the court rejected a finding that Mr. Bevel's mental age was that of a *de facto* child, because of his higher level of adaptive functioning.

Discussion

The *Bevel* court rejected the argument that low IQ *per se* indicates incapacity to waive *Miranda* rights. A knowing and intelligent *Miranda* waiver requires the ability to know and understand the *Miranda* rights, weigh options, appreciate likely consequences, and communicate a rational choice. The court's ruling suggests that the capacity to waive *Miranda* rights, similar to other legal competencies, is a functional test. The mere presence of a low IQ, without evidence that Mr. Bevel did not knowingly, intelligently, and voluntarily waive his *Miranda* rights, was not sufficient to prove that he was incompetent to do so.

In *Atkins* and *Roper*, the U.S. Supreme Court interpreted the Eighth Amendment using an "evolving standards of decency" test to determine whether the penalty is "cruel and unusual" punishment for mentally retarded and juvenile offenders. In *Atkins*, the Court reasoned that the diminished intellectual functioning and significant adaptive skills deficits characteristic of mental retardation result in lesser ability to learn from experience, reason logically, control impulses, and understand others' reactions. The Court found that these deficiencies lessen the culpability of mentally retarded offenders. Three years later, in *Roper*, the Court found the death penalty unconstitutional when applied to offenders who are younger than 18 at the time of the offense. The Court assigned diminished culpability to juveniles and cited research that juveniles are vulnerable to influence, are susceptible to immature and irresponsible behavior, have a less defined identity, and are less able to control or escape criminogenic settings.

The *Bevel* court rejected the argument that it is unconstitutional to execute defendants whose mental age is less than 18 at the time of the crime. It did not find *Roper* claims applicable when mental age, but not chronological age, is younger than 18.

Bevel is significant, as it establishes that low IQ alone is not sufficient evidence to prove that a defen-

dant is incompetent to waive his *Miranda* rights. The court also held that a mental age younger than 18, as determined by IQ, does not preclude the imposition of the death penalty.

Absolute Right to Privacy for Prison Inmates

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Washington State's Right to Privacy Does Not Permit a Fasting Inmate to Refuse Nutrition and Hydration

In *McNabb v. Department of Corrections*, 180 P.3d 1257 (Wash. 2008), Charles McNabb was forcibly fed after he refused nutrition and hydration while fasting in prison. McNabb sued, claiming that the force-feeding violated his privacy rights guaranteed by the Constitution of the State of Washington. The Supreme Court of Washington found for the Department of Corrections (DOC), noting that the right to privacy described in the Constitution is no greater than that provided by the U.S. Constitution; McNabb had no absolute right to privacy; and state interests outweighed McNabb's privacy rights. This case calls to mind several landmark cases that balanced individual privacy rights against state interests.

Facts of the Case

Mr. McNabb was incarcerated at Airway Heights Correctional Center (AHCC) in July 2004. He had arrived from the Spokane County Jail, where he had not voluntarily eaten for over five months. After two days of refusing to eat or drink at AHCC, Mr. McNabb was force-fed through a nasogastric (NG) tube for two days, after which he agreed to eat and drink on his own. He reported that previous force-feedings had resulted in his being "strapped into a chair for 28 hours straight, during which time it was impossible . . . to sleep." Mr. McNabb "suffered bleeding from the nose for a day, pain and nausea" due to the NG tube. In explaining his refusal of nutrition and hydration, he stated: "My only wish is for my personal decision not to eat to be respected and to be left in peace for my fast to take its course." Mr. McNabb filed suit shortly after his fast ended, stating that the DOC violated his right to privacy as guaranteed by the Washington State Constitution and his common law right to be free from bodily invasion. The superior court entered a summary judgment on behalf of the DOC, which the court of appeals upheld. Mr. McNabb appealed to the Supreme Court of Washington.

Ruling

The court ruled in favor of the DOC and upheld the decisions of the lower courts. Force-feeding a prison inmate does not violate the right to privacy as guaranteed by the Washington State Constitution.

Reasoning

The Supreme Court of Washington addressed three questions. The first was whether the court should consider the right to refuse nutrition and hydration in relation to the right to privacy guaranteed in the Washington State Constitution or that granted in the U.S. Constitution. Mr. McNabb argued that the state constitution's explicitly stated right to privacy is "far stronger than any federal law." In their analysis, the court determined that the privacy protections afforded by the Washington State Constitution "have an independent meaning from that provided by the federal Constitution." However, they concluded that the right to privacy in this case "is coextensive with, but not greater than, the protection granted under the federal constitution" (*McNabb*, p 1262).

The second question asked if the privacy rights guaranteed by the state of Washington allows an inmate who is fasting with an intent to die the absolute right to refuse nutrition and hydration, as asserted by Mr. McNabb. The DOC, in their argument, recognized the existence of these rights for those with a terminal or severely debilitating condition. The DOC argued that since Mr. McNabb had neither, he was attempting to assert a right to commit suicide. The Supreme Court of Washington concluded that the right to refuse nutrition and hydration is not absolute and that "compelling state interests may outweigh that right." The court added that "inmates' rights are more limited than those of nonincarcerated individuals because courts must consider the state's