

even though he was polite and not disruptive during the trial.

The Eighth Circuit concluded that the finding of competency by the district court was essentially a finding of Mr. Turner's competency to proceed *pro se*, because that was the specific area examined by the judge in finding that he had knowingly and voluntarily waived his right to counsel. Moreover, *Edwards* does not require that a trial judge conduct an inquiry into the competency of every defendant who requests to proceed *pro se* or hold a hearing before making a competency determination. Further, it was noted that no parties, including Mr. Turner, raised the question of competency at any time, including those with the opportunity to observe and interact with him over an extended period. Therefore, the trial court had not erred when proceeding to trial without a competency hearing.

In his third point for appeal, Mr. Turner asserted that the district court had erred by not ordering, *sua sponte*, a competency hearing after his bizarre behavior in court. The court acknowledged *Vogt v. United States*, 88 F.3d 587 (8th Cir. 1996), which stated that the court "shall order" a competency hearing upon its own motion if "there is reasonable cause to believe" that a defendant is not competent (*Vogt*, p 590). A court "may order" a psychological evaluation before such a hearing. The court of appeals noted, "Not every manifestation of mental illness demonstrates incompetency to stand trial. Neither low intelligence, mental deficiency, nor bizarre, volatile, and irrational behavior compels a finding of incompetency" (*Turner*, p 725).

The Eighth Circuit concluded that the district court did not abuse its discretion in failing to order a *sua sponte* competency hearing. His unusual behavior was acknowledged. However, "such behavior does not invariably compel a finding of incompetency" (*Turner*, pp 725–6). The Eighth Circuit used such evidence as the fact that Mr. Turner was polite and respectful, that he invoked the rule on witnesses, that he used cross-examination to his benefit, and that he tried to appeal to the jurors' consciences to forgive him.

Mr. Turner further argued that the court should have ordered a competency evaluation before sentencing. The court of appeals noted that he was given the shortest sentence possible and therefore any error committed by the district court would have been harmless.

#### Discussion

*United States v. Turner* highlights some of the most common problems in assessing a mentally ill person's competency to proceed *pro se*. Determining competency to proceed *pro se* may involve a difficult evaluation. Often, defendants requesting to proceed *pro se* do so because of an irrational view of their defense strategy that is unrelated to mental illness. Their viewpoint is further complicated by the lack of an accepted standard for competency to proceed *pro se*, other than that the decision is made knowingly and voluntarily. The forensic clinician evaluating a defendant wishing to represent himself should carefully interview the defendant, assess for symptoms of a present mental condition, evaluate the impact that the symptoms may have on the defendant's decision, and investigate any symptoms that may impair the defendant's knowing and intelligent waiver of counsel. When evaluating an individual for competency to proceed *pro se*, it can be helpful to consult the relevant literature. (Here are some recent resources that can serve as a guide: Knoll JL, Leonard C, Kaufman AR, *et al*: A pilot survey of trial court judges' opinions... *J Am Acad Psychiatry Law* 38:536–9, 2010; Morris DR, Frierson RL: Pro se competence... *J Am Acad Psychiatry Law* 36:551–7, 2008; Mossman D, Noffsinger SG, Ash P *et al*: AAPL practice guideline... *J Am Acad Psychiatry Law* 35:S3–72, 2007.)

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## Burden of Proof for Mental Retardation

**Karl Mobbs, MD**

*Fellow in Forensic Psychiatry*

**Sara West, MD**

*Assistant Professor of Psychiatry*

*Forensic Psychiatry Division*

*Department of Psychiatry*

*Case Western Reserve*

*Cleveland, OH*

### Georgia Supreme Court Rules Burden of Proof for Mental Retardation Is Beyond a Reasonable Doubt in a Death Penalty Case

In *Stripling v. State*, 711 S.E.2d 665 (Ga. 2011), a state law requiring that capital murder defendants

prove mental retardation beyond a reasonable doubt was upheld and deemed constitutional. The court found that proof of mental retardation is analogous to insanity and so should require a similar burden of proof.

*Facts of the Case*

In 1988, while working at Kentucky Fried Chicken, Alfonso Stripling shot four co-workers; two died and two were injured. He then fled with stolen money, taking an automobile at gunpoint. He was convicted on two counts of murder, armed robbery, and aggravated assault. He was sentenced to death for each count of murder, a verdict that was affirmed by the Georgia Supreme Court.

Mr. Stripling filed a writ of *habeas corpus*, which was granted in regard to his death sentence. The decision was appealed. The Georgia Supreme Court ruled that the state had suppressed information pertaining to his alleged mental retardation. It affirmed the *habeas* court's decision to order a retrial.

The Georgia Supreme Court reviewed whether the trial court erred in deciding what burden and standard of proof should apply to Mr. Stripling's claim of mental retardation.

*Ruling and Reasoning*

The Georgia Supreme Court reversed the trial court's ruling that a preponderance of the evidence standard should apply and reaffirmed the court's previous holding that a beyond a reasonable doubt standard is just and constitutional (*Head v. Hill*, 587 S.E.2d 613 (Ga. 2003)).

The Supreme Court of the United States held that mentally retarded defendants have a constitutional right to be exempt from the death penalty (*Atkins v. Virginia*, 536 U.S. 304 (2002)). It did not rule on a burden of proof for claims of mental retardation, leaving this decision to the states. As a result, states vary in the standard that is applied.

A Georgia statute states that defendants found to be mentally retarded beyond a reasonable doubt are exempt from the death penalty (OCGA §17-7-131 (c) (3) and (j) (2006)). Mr. Stripling asked the trial court to find the standard of proof necessary for a diagnosis of mental retardation unconstitutional. He also asked that the burden be shifted to the state to prove he was not mentally retarded. The trial court agreed that the burden of beyond a reasonable doubt was unconstitutional and should be changed to a

preponderance of the evidence. The trial judge ruled that the state should not bear the burden.

The trial court ruling relied on an earlier decision in *Hill v. Schofield*, 608 F.3d 1272 (11th Cir. 2010), a decision that was later vacated for *en banc* reversal.

The Georgia Supreme Court noted that its decision was a reiteration of *Head v. Hill*, an earlier holding that found that Georgia's standard of beyond a reasonable doubt was not unconstitutional. That decision recognized the *Atkins* constitutional right of an exemption of mentally retarded defendants from the death penalty, but set no standard of proof to find that a defendant was mentally retarded.

The Georgia Supreme Court also took guidance from *Leland v. Oregon* (343 U.S. 790 (1952)), an insanity ruling of the U.S. Supreme Court, with regard to the use of the standard of beyond a reasonable doubt. The court noted that both claims of mental retardation and of insanity "relieve a guilty person of at least some of the statutory penalty to which he would otherwise be subject" (*Head*, p 621). It rejected claims that mental retardation is analogous to a determination of incompetence to stand trial, which requires a standard of preponderance of the evidence. The Georgia Supreme Court noted that Georgia was not alone in placing a higher burden than a preponderance of the evidence on defendants seeking to prove mental retardation. In determining that the court had not established a procedural standard for discerning a mentally retarded defendant, that there is a similarity in the exculpatory nature of a finding of insanity and mental retardation, and that other states had required a higher burden than preponderance of the evidence, Georgia's standard of beyond a reasonable doubt was found not procedurally unconstitutional.

The Georgia Supreme Court noted that its ruling was consistent with the national consensus about treatment of mentally retarded persons set forth in *Atkins*, in which the Supreme Court praised Georgia for being the first state to have banned the execution of mentally retarded persons. The court counted Georgia among the states forming the national consensus about the treatment of mentally retarded defendants and "made no negative comment about Georgia's heightened standard of proof" (*Stripling*, p 669). Furthermore, Georgia was not alone in demanding proof of mental retardation according to a higher standard. At the time of *Atkins*, Colorado, Florida, Indiana, and Arizona established that a de-

defendant must prove mental retardation by clear and convincing evidence.

At that time, Kansas was considered part of the national consensus of treatment of mentally retarded defendants, despite requiring that a causal nexus be established between a defendant's mental retardation and his culpability. "Mentally retarded' means having significantly subaverage general intellectual functioning . . . to an extent which substantially impairs one's capacity to appreciate the criminality of one's conduct or to conform one's conduct to the requirements of law" (Kan. Stat. Ann. § 21-4623 (e) (2001)).

In light of these varied approaches for setting the standard of proof regarding mental retardation, the Supreme Court noted:

To the extent there is serious disagreement about the execution of mentally retarded offenders, it is in determining which offenders are in fact retarded. . . . Not all people who claim to be mentally retarded will be so impaired as to fall within the range of mentally retarded offenders about whom there is a national consensus [*Atkins*, p 317].

The Georgia Supreme Court defined mentally retarded persons in *Head v. Hill*, as, "those whose mental deficiencies are significant enough to be provable beyond a reasonable doubt" (*Head*, p 622). It noted that it is illogical for the court to form the very consensus on treatment of mentally retarded offenders and be in violation of such a rule. It reaffirmed its statutory definition of mental retardation and ruled its prior decision not unconstitutional under *Atkins*.

#### Dissent

Judge Bentham was the sole dissenter. His concern was that someone found clinically mentally retarded could not overcome the "insurmountable hurdle" (*Stripling*, p 671) of proving mental defect beyond a reasonable doubt and would be executed. He noted that of the 30 states with the death penalty, 22 require a preponderance of the evidence to prove mental retardation. Georgia is the only state requiring evidence beyond a reasonable doubt. This situation he notes does not serve "the greater good" (*Stripling*, p 671), especially given that the state was initially leading the nation in prohibiting execution of the mentally retarded.

#### Discussion

There are two notable cases involving the justification of standard of proof in light of psycholegal concerns. In *Cooper v. Oklahoma*, 517 U.S. 348

(1996), the Supreme Court ruled that a lower standard, preponderance of the evidence, was appropriate for proving a defendant's incompetence to stand trial. This burden, the Supreme Court stated, served to protect a mentally ill individual from going to trial in the midst of an acute mental health episode.

In *Addington v. Texas* (441 U.S. 418 (1979)), the converse argument was made for a higher standard, clear and convincing evidence, with the burden on the state, to protect the liberty interests of those civilly committed. Both cases serve a protective role for the individuals.

However, in *Stripling* the burden is heightened, potentially establishing a barrier between the defendant and protection from an unjust death penalty and thus lessening the protection of the individual that was afforded by the legal system in the other two cases.

The very imprecision of psychiatry as identified in *Washington v. United States*, 390 F.2d 444 (D.C. Cir. 1967)), also makes the use of the highest burden of proof hard to justify. However, there is a notable difference in this case. One of the core components of diagnosing mental retardation is IQ testing, which provides a numeric value that is uncommon in other psychiatric diagnoses. This feature renders such a finding arguably more precise than a competency or civil commitment evaluation, which relies heavily on a clinical interview. A concern raised in *Atkins* is the possibility of malingering mental retardation to avoid a death sentence. It is notable that one can fake bad, but not good, on an intelligence test. In this regard, the testing increases the likelihood of an over-inclusion of those faking bad, but testing is less likely to exclude those who are truly mentally retarded. Malingering is a legitimate concern, but not a reason to exclude protection for those whom society has decided need such protection.

In *Atkins*, the Supreme Court ruled that, under the Eighth Amendment, executing a mentally retarded defendant is unconstitutional. In not setting a constitutional burden of proof, it respects the states' right to do so. However, just one expected execution of someone who does not reach Georgia's heightened burden but is believed to be mentally retarded may force the Supreme Court to rule on the burden of proof. The current consensus among the states favors a lower standard, since 26 of 30 states that impose the death penalty require a lower standard for proving mental retardation in death penalty cases than Geor-

gia does. The other states have not specified a standard, which renders Georgia a sole outlier with regard to its high standard of proof.

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## Defendant's Mental Age and the Imposition of the Death Sentence

**Lubna Grewal, MD**  
Resident in Psychiatry

**Thomas Fluent, MD**  
Medical Director of Ambulatory Services

Department of Psychiatry  
University of Michigan Health System  
Ann Arbor, MI

### The Eighth Amendment's Bar to Imposing the Death Penalty for Homicides Committed by Defendants When They Were Under the Chronological Age of Eighteen Does Not Apply to Defendants Who, Though Over Eighteen, Were Immature or Had a Mental Age Less than Eighteen at the Time of the Homicide

Darryl Barwick committed a murder at the age of 19. He was convicted and received the death sentence. On appeal, he argued that his younger mental age should bring him under the *Roper v. Simmons*, 543 U.S. 551 (2005), bar against imposing the death sentence for homicides committed by defendants younger than the chronological age of 18 years. Mr. Barwick raised many claims in appealing his conviction and the death sentence. Three of his appellate claims are especially of interest to forensic psychiatry: that his mental age was less than 18 at the time of the murder; that he had mental retardation; and that the crimes that he committed as a juvenile should not be used as aggravating factors in his sentencing. His appeal was heard by the Florida Supreme Court which considered his multiple claims for postconviction relief and his petition for a writ of *habeas corpus* (*Barwick v. State*, 88 So.3d 85 (Fla. 2011)).

#### Facts of the Case

On March 31, 1986, Michael Ann Wendt returned from work to the apartment she shared with her sister, Rebecca, to find that Rebecca had been stabbed to death and her body wrapped in a com-

forter and left in their bathtub. Within one month, Mr. Barwick, who had been seen by a witness lurking around the apartment complex the day of the murder, confessed to committing the murder, but he denied premeditation and sexual assault. He was indicted on charges of first-degree murder, armed burglary, attempted sexual battery, and armed robbery. After a mistrial and a retrial, he was found guilty of all four charges. In the sentencing phase, the jury unanimously recommended the death penalty on the basis of six aggravating factors and no mitigating factors. Mr. Barwick pursued multiple appeals, finally having his claims heard by the Florida Supreme Court, whose opinion is discussed here.

One of Mr. Barwick's claims was that the trial court erred in not recognizing his history of abuse as a mitigating circumstance. He also claimed that his trial counsel was ineffective in the proper use of mental health experts. His trial counsel presented the testimony of multiple mental health experts and several lay witnesses who corroborated Mr. Barwick's abusive childhood environment. However, the supreme court concluded that the testimony of these witnesses did not provide a sufficient basis for mitigating circumstances. Mr. Barwick, argued entitlement to a trial by jury to determine his ineligibility for the death penalty on his claim of mental retardation, citing *Ring v. Arizona*, 536 U.S. 584 (2002), and the ruling in *Atkins v. Virginia*, 536 U.S. 304 (2002). Finally, Mr. Barwick argued that, although his chronological age was above 18 at the time of the crime, his emotional age was well below that level; thus, the death penalty should be barred by *Atkins*. He linked this age-based claim to another one—namely, that it was improper to include his juvenile crime record as an aggravating factor supporting the jury's death penalty recommendation. In 2006, Mr. Barwick was granted an evidentiary hearing on several of these claims, and at that time, he proffered new mitigating evidence from a psychiatrist, Dr. Hyman Eisenstein.

#### Ruling and Reasoning

The state supreme court affirmed the lower court's rejection of all of Mr. Barwick's claims of ineffective assistance of counsel. The court further held that the new mental health expert's proffered testimony was cumulative with the testimony provided by the multiple mental health professionals (and lay witnesses) who testified during the penalty phase of Mr. Barwick's trial. The court noted that in cross examina-