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

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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 comforter 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-

tion, Dr. Eisenstein agreed that Mr. Barwick met criteria for antisocial personality disorder. Dr. Eisenstein, unlike the other witnesses, opined that there were two sentencing mitigators: acting under extreme mental or emotional disturbance and having substantially impaired capacity to conform conduct to the requirements of the law. In rejecting the claim that the exclusion of Dr. Eisenstein's testimony was reversible error, the court held that the mere fact that a newly found expert would present different or more favorable testimony does not necessarily imply that trial counsel was deficient or ineffective.

Among Mr. Barwick's other claims in his petition for a writ of *habeas corpus* was that his mental age, regardless of his chronological age, should make him ineligible for the death penalty, pursuant to *Atkins*. The court wholly rejected this argument on both procedural and precedential bases. It directly addressed the case Mr. Barwick cites as supporting this claim, *Roper v. Simmons*, 543 U.S. 551 (2005). In *Roper*, the Supreme Court held that the death penalty could not be imposed on those who commit murder before the age of 18.

The Florida Court quickly dispatched Mr. Barwick's argument, noting that he was older than 19 years at the time of the crime and thus could not rely on *Roper*. Age simply means chronological age. The court also cited other Florida cases where only chronological age, not mental age, controls the application of *Roper*: *Lowe v. State*, 2 So.3d 21 (Fla. 2008); *Melton v. State*, 949 So.2d 994 (Fla. 2006); *Hill v. State*, 921 So.2d 579 (Fla. 2006); and *Schoenwetter v. State*, 46 So.3d 535 (Fla. 2010).

Discussion

Mr. Barwick's appellate claims attempted to leverage a series of Supreme Court decisions that have progressively narrowed the severity of criminal sanctions imposed on minors and persons with distinct mental limitations. In *Thompson v. Oklahoma*, 487 U.S. 815 (1988), the Court barred the imposition of the death penalty on defendants younger than 16 years at the time of the offense, citing a broad array of developmental, biological, and sociocultural characteristics unique to adolescents to justify reduced culpability. In *Atkins v. Virginia*, the Court held that imposing the death penalty on mentally retarded individuals violates the Eighth Amendment's bar against cruel and unusual punishment, citing "evolving standards of decency that mark the progress of a maturing society" and an emerging "national consensus" (*Atkins*, p 312) as rationale for the Court's holding. *Atkins* foreshadowed the challenges such cases present to the Court, as ongoing litigation centered on disagreement among experts as to whether Mr. Atkins was truly mentally retarded and what would be the most reliable method of making that determination. In *Roper v. Simmons*, the Supreme Court held that the execution of individuals who were younger than 18 years at the time of the offense violates the Eighth Amendment, citing a broad range of emerging neuroscience and social science research that details brain differences between adolescents and adults that adversely affect minors' decision-making capacity. Specifically, the *Roper* Court associated juvenile immaturity with impulsivity, vulnerability to adverse environmental factors, and lack of complete character formation. In *Graham v. Florida*, 560 U.S. 48 (2010), using a rationale similar to that in *Roper*, the Court further narrowed the scope of harsh punishments for minors by imposing a ban on mandatory life without parole for nonhomicide offenses. In *J.D.B. v. N.C.*, 131 S.Ct. 2394 (2011), the Court called for individualized assessments of juveniles in regard to triggering the *Miranda* warning. Writing for the dissent, Justice Alito raised concerns that this approach would "lose the clarity and ease of application" of the test, and lead to consideration of "all manner of individualized, personal characteristics" of the suspect, including education, mental health status, intelligence, and age. Finally, in *Miller v. Alabama*, 132 S.Ct. 1733 (2012), the Court held that imposing mandatory life sentences on juveniles convicted of murder is also a violation of the Eighth Amendment's bar on cruel and unusual punishment. Instead, the Court held that each convicted juvenile was entitled to an individualized presentencing hearing, where expert testimony would be offered regarding remorselessness, dangerousness, and prospects for rehabilitation.

Mr. Barwick sought to extend *Roper* by asserting that his "mental age" was younger than 18 due to "brain damage and mental capacity," and that using his prior juvenile violent felony conviction as an aggravating factor was improper. Although the Florida court was dismissive of this claim, the clear trend of the Supreme Court decisions detailed herein, which limit criminal culpability for adolescents and retarded adults, will be marshaled by adult defendants who claim similar psychopathology. However, giv-

ing judicial weight to individualized claims of mental handicaps creates a quandary for the courts, as emerging neuroimaging, neuropsychological, and social science research cited in support of treating adolescents differently from an average mature adult reveals differences not necessarily unique to adolescents. The same abnormal findings on a neuroimaging study or neuropsychological test presented to excuse a defendant for a particular act may well be found in normal, well-behaving citizens. Similarly, many individuals with adverse early-life experiences emerge as responsible and law abiding citizens.

The *J.D.B.* and *Miller* decisions require individual determinations of a juvenile defendant's culpability and cognitive/emotional capacity. Such determinations may someday be extended to the adult defendants, thus carrying the potential of greatly adding to the burden of an already overwhelmed court system. *J.D.B.* and *Roper* illustrate the difficulties that the neurosciences face when trying to distinguish between normal and abnormal brain characteristics and psychological profiles as they relate to judgment, decision-making, and capacity to resist impulses, among other factors.

One could imagine a scenario where one's biology and life history are configured to explain and perhaps excuse all conceivable actions. The worry is that, by relying on what is perhaps premature neurosocial science and by opening the door to individualized mental assessments of defendants, the Supreme Court has taken a step onto a slippery slope. Trial and appellate courts will long grapple with how to translate the emerging brain and neurocognitive sciences into questions of individual responsibility, choice and free will, and personal accountability.

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Evidence Admissibility Standards for Defense Expert Testimony Concerning False Confessions

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Defense Expert Testimony Concerning False Confessions May be Admissible to Assist the Jury, but Only When It Is Shown to be Both Scientifically Reliable and Relevant to the Facts of the Instant Case

The Michigan Supreme Court, in *People v. Kowalski*, 821 N.W.2d 14 (Mich. 2012), held, for the first time, that expert scientific testimony concerning false confessions is admissible. The court held that such testimony concerned matters that are outside the ordinary understanding of laypersons, and thus expert testimony could be of assistance to a jury. However, the testimony could be admitted only if it was first demonstrated to be scientifically reliable and relevant to the particular facts of the case at hand.

Facts of the Case

In May 2008, the brother and sister-in-law of the defendant, Jerome Kowalski, were found shot to death in their residence. Police questioned Mr. Kowalski about the murders four times over the next several days. During the third interview session, Mr. Kowalski allegedly acquiesced to an interviewer's statement that "there was a 50 percent chance" that he had killed his brother. At that time, Mr. Kowalski discussed having a "blackout" and "blurred" memory. During his fourth and final police interview, Mr. Kowalski allegedly confessed to the murders, stating that he killed the victims after a verbal exchange. At a pretrial hearing, the confession elicited during the final interview was identified as the primary evidence that implicated him in the murders.

Before trial in the circuit court, defense counsel filed notice of intent to call expert witnesses, including Dr. Richard Leo, an expert on false confessions and interrogation techniques, and Dr. Jeffrey Wendt, a forensic psychologist who would testify about his psychological testing of the defendant and provide his opinion about Mr. Kowalski's mental state during the police interrogation. At a pretrial *Daubert* hearing, the circuit court noted that Dr. Leo's analysis incorporated facts from case files but also facts from accounts in the popular media. The circuit court also acknowledged that Dr. Leo categorized coerced confessions by comparing them to "other confessions he had already determined to be