

in the United States until many years later (Beyleveld and Brownsword). In 1969, the Kentucky Court of Appeals affirmed a lower court's ruling, ordering the removal of one of Jerry Strunk's kidneys for transplantation into his dying brother (*Strunk v. Strunk*, 445 S.W.2d. 145 (Ky. Ct. App. 1969)). Mr. Strunk, who had an IQ of 35, clearly could not consent to the procedure. The court reasoned that he would suffer more emotional harm from the loss of his brother than he would suffer physical harm from the loss of one kidney. In its opinion, the court gave a detailed history regarding the doctrine of substituted judgment. It traced the origins of the concept of substituted judgment from Lord Eldon's court to its introduction in American courts in 1844 with the New York case *In the Matter of Willoughby, a Lunatic*, 11 Paige Ch. 257 (N.Y. Ch. 1844).

In the case of *Jane Does I through III v. District of Columbia*, three women who had never been competent to make medical decisions were faced with health care concerns. Each of these women was afflicted with unfortunate circumstances in life. However, it was clear to the court of appeals that the D.C. MRDDA utilized a variety of measures to ensure the preservation of liberty interests for those entrusted to its care. Lord Eldon, we believe, would have approved of this decision.

Miranda Waiver in a Juvenile

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A Mentally Retarded Juvenile Suspect Did Not Knowingly Waive Miranda Rights

In *Smith v. State*, 918 A.2d 1144 (Del. 2007), the Supreme Court of Delaware considered whether a mildly mentally retarded juvenile was competent to stand trial and had knowingly waived his *Miranda* rights before making an inculpatory statement to police.

Facts of the Case

The appellant, James Smith, was a 14-year-old juvenile adjudicated in the New Castle County Fam-

ily Court of Delaware to be a delinquent on two counts of second-degree rape and one count of second-degree unlawful sexual contact.

On September 20, 2003, James' mother, Rita Smith, took James and his sister to visit their maternal aunt and three-year-old cousin, Georgia. Georgia reported to her mother that she and James were in the bathroom together when James asked her to "lick his wee-wee." Georgia reported further that, later that day, James demanded she perform oral sex on him while they were behind a shed.

Georgia's mother notified authorities. Georgia was examined by a physician, who found no physical evidence of sexual contact. However, Georgia made spontaneous statements in the waiting and examining rooms regarding the incidents. The examining physician opined that Georgia had been abused based on these spontaneous statements. Georgia was later examined in October of 2003 by Terri Kaiser, BA, a forensic interviewer with the Children's Advocacy Center of Delaware, where she disclosed that James had touched her "wee-wee" and her buttocks.

James and his family were living in a motel room on December 19, 2003, when Detective Jason Atallian of the New Castle County Police Department arrived and asked to interview James. Ms. Smith agreed to bring James to the police station, where Atallian reportedly informed both James and Ms. Smith that James was a suspect in a criminal investigation involving sexual misconduct. Further, Atallian reportedly informed them that Ms. Smith and/or an attorney could be present during the interview.

Atallian's videotaped interview of James lasted approximately 45 minutes. He began by asking James if he could read or write. James stated that he had trouble with reading, and Atallian agreed to read James his rights. Atallian then stated:

Okay number one you have the right to remain silent. And what that means is you can be quiet if you want to. You don't have to answer anything if you don't want to. Anything you say can and will be used against you in a Court of law. It just means whatever we're talking about today you know is legal you know whether it happens from here on out whatever we talk about you know is pertinent to what's going to happen okay. You have the right to talk to a lawyer and have him present with you while you're being questioned. If you can't afford to hire a lawyer one will be appointed to represent you. If you wish one we've already talked to your mom about that and that's fine. At any time during this interview if you wish to discontinue your statement you have the right to do so. All that means is at any time we're talking if you want to talk to me or you don't.

You understand these things I explained to you? [Smith, p 1146].

James replied, "Uh uh." Atallian apparently interpreted this to mean that James understood, and he proceeded with the interview. James then printed his name on the form, as he did not know how to sign it. He frequently gave no response to questions posed during the interview. At one point, Atallian told him, "I'm not going anywhere. The only way we're walking out of here is if you're straight up and honest with me and we deal with this and then I can help you." James later confessed to several of the sexual encounters that Georgia had described.

Before his bench trial, James filed a motion to suppress his statement to Atallian. He argued that his waiver of *Miranda* rights was not knowing and voluntary. This motion was denied and, several months later, James filed a motion to determine his competency to stand trial.

Dr. Abraham Mensch, a psychologist with the Delaware Division of Child Mental Health Services, was the only witness at James' competency hearing. He testified that James had a full scale IQ of 67 and that James had word recognition and arithmetic skills of second-grade equivalency. In his report, Mensch also noted that, despite James' cognitive impairment, he could be taught the roles of the participants in the trial process. James was ultimately found by the trial court to be competent. However, Mensch's findings led the trial court to schedule additional time to allow James to consult regularly with his attorney to review the proceedings.

James did not testify at the trial. The state relied heavily on Georgia's testimony as well as James' videotaped statement. James was found delinquent on two counts of second-degree rape and one count of second-degree unlawful sexual contact. James appealed his conviction and argued that the trial court erred in its finding that he was both competent to stand trial and that he had knowingly waived his *Miranda* rights.

Ruling and Reasoning

The Supreme Court of Delaware upheld the trial court's finding that James was competent to stand trial, noting Mensch's testimony that James appeared to understand the nature of the charges against him and that the trial court had made special accommodations to account for his cognitive limitations.

The Supreme Court of Delaware reversed the trial court's finding that James knowingly waived his *Miranda* rights. The court cited *Fare v. Michael*, 442 U.S. 707 (1979), and Justice Blackmun's opinion that the "totality of the circumstances," including age and intelligence, must be considered when reviewing *Miranda* waivers. In its reversal of the trial court's decision, the Supreme Court of Delaware highlighted the following key issues.

First, the trial court had ruled on the admissibility of James' confession before his competency hearing. Accordingly, the court had not yet heard Mensch's testimony. The trial court recognized this as problematic by noting, after Mensch testified, "probably if I re-heard [the suppression motion] today [I] would have required much more detailed explanation of the *Miranda* rights than I saw today. But that's water over the dam" (Smith, 918 A.3d, p 1150).

Second, portions of Atallian's videotaped explanation of James' *Miranda* rights were nonsensical. The confusing manner in which Atallian structured his sentences during this explanation greatly troubled the court. In the court's opinion, Atallian's "explanation" at times was "almost unintelligible."

Third, the court noted that, despite James' right to remain silent, Atallian insisted he was not "going anywhere" until James had given him an explanation with regard to the alleged sexual abuse. This insistence may have led James to believe that he could not in fact remain silent.

Finally, the court noted that James' intellectual deficits, in and of themselves, gave cause for alarm with regard to his knowing waiver of *Miranda* rights. Concluding, the court wrote, "The totality of these circumstances compels the conclusion that James' waiver of his *Miranda* rights was not knowing." His adjudication as a delinquent was therefore vacated, and the matter was remanded for a new trial.

Discussion

The Delaware Supreme Court's upholding of the trial court's competency ruling is in line with the traditionally minimal standards for defendants' ability to stand trial, especially given the accommodations made in this case. Here, the issue of James' competence is most relevant, in that it introduced into the record Mensch's testimony regarding James' intellect that brought into question the validity of his waiver of his *Miranda* rights.

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, edu-

cation, 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-