

U.S. Supreme Court

Chemerinsky: Who is mentally disabled when it comes to the death penalty?

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The Supreme Court held that it is cruel and unusual punishment for the government to execute a mentally retarded individual, but it never has explained how it is to be determined whether a person is mentally retarded. In *Hall v. Florida*, to be argued Monday, March 3, the court will address this issue. Thirty-two states have the death penalty and the court's answer could affect a significant number of people on death row across the country.

Freddie Lee Hall was tried and convicted for a murder that occurred in 1978. At a hearing on whether to impose the death penalty, Hall's lawyers presented evidence that he is mentally retarded. His teachers had identified his mental disabilities and labeled him "mentally retarded." Doctors who examined him concluded that Hall was "extremely impaired psychiatrically, neurologically and intellectually," that he showed signs of "serious brain impairment," and that he "is probably incapable of even the most ... basic living skills which incorporate math and reading." On intelligence tests, his IQ measured at 60, 76, 79, and 80, all in the range of being mentally retarded. Nonetheless, the Florida trial court sentenced him to death.

In 2001, Florida enacted a statute that prohibits the execution of persons with mental retardation. The law defines mental retardation as "significantly sub-average general intellectual functioning" as measured by a "performance that is two or more standard deviations from the mean score on a standardized intelligence test specified in the rules." In 2007, the Florida Supreme Court interpreted this law to mean that only those with an I.Q. score of 70 or below qualify as mentally retarded. *Cherry v. State*.

In 2009, a hearing was held on whether Hall was mentally retarded. An expert testified that he had administered an IQ test to Hall—the Wechsler Adult Intelligence Scale-III—and Hall scored 71. Another expert testified that Hall's IQ was 73. The trial court concluded that Hall could be executed by Florida because his IQ was above 70.

Florida is one of 10 states with laws that define mental retardation solely based on whether a person has an IQ score of 70 or lower. Two other states set a cutoff of an IQ of 75 or lower. The question before the Supreme Court is whether this approach to defining who is mentally retarded is consistent with the Eighth Amendment.

This is an issue that the Supreme Court has avoided since its 2002 decision in *Atkins v. Virginia*, which held that the "mentally retarded should be categorically excluded from execution." In a 6-3 decision, with the majority opinion written by Justice John Paul Stevens, the court concluded that it is cruel and unusual punishment to impose the death penalty on a mentally retarded individual. The court declared: "Because of their disabilities in areas of reasoning, judgment, and control of their impulses, however, they do not act with the level of moral culpability that characterizes the most serious adult criminal conduct. Moreover, their impairments can jeopardize the reliability and fairness of capital proceedings against mentally retarded defendants."

But the court did not try to define "mentally retarded." Instead, it said, "we leave to the [s]tate[s] the task of developing appropriate ways to enforce the constitutional restriction upon [their] execution of sentences." This has led to a number of different approaches across the country in states that impose the death penalty, including a dozen states that use a rigid standard based on an IQ score. The court has not taken a case on this in the years since *Atkins* .

Florida argues that the court should defer to the states in defining who is mentally retarded. It says that *Atkins* was based on a national consensus against imposing the death penalty on the mentally retarded, but that there is no consensus as to how to determine who is mentally retarded. Florida contends that determining mental conditions, such as insanity, always has been left to state law. Florida argues that the judge acted reasonably in concluding that Hall was not mentally retarded based on his IQ being above 70 and his ability to devise and implement a complicated plan for premeditated murder.

But Hall argues to the court that a rigid standard for determining who is mentally retarded is not consistent with the Eighth Amendment. He maintains that a proper definition of mental retardation needs to focus on three factors: (1) "significantly subaverage" intellectual functioning; (2) limitations in adaptive functioning; and (3) onset before age 18. Hall says that he is mentally retarded under this definition.

More specifically, Hall contends that the problem with a rigid line for determining who is mentally retarded is that it fails to account for the standard error of measurement (SEM). In fact, the question presented to the court is whether the Florida approach, which bars those with an IQ test score of above 70 from demonstrating mental retardation "and precludes consideration of the standard error of measurement for IQ tests," violates the Eighth Amendment. Hall's argument is that his IQ test score of 71 "is clinically indistinguishable from a score of 70, in light of the inherent measurement error in the test." But under Florida law an IQ above 70 means that the defendant is barred from presenting any other evidence of mental retardation.

The issue in *Hall v. Florida* is clearly presented: May a state set a rigid cutoff based on IQ score in deciding who is mentally retarded? But the answer to this question will turn on the justices' views about the death penalty, about federalism and deference to the states, and about scientific evidence. Ultimately, despite all of the complex legal arguments, the case likely will turn on a much more basic and more human consideration: How does the court feel about the state executing a person with an IQ of 71 when the state defines mental retardation as an IQ of 70 or lower? Is there really enough precision to an IQ test to allow this distinction to determine who lives and who dies?

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