

No. 11-10109

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2011

WARREN LEE HILL, JR.,

Petitioner,

-v-

CARL HUMPHREY, Warden
Georgia Diagnostic Prison,

Respondent.

**CAPITAL CASE: EXECUTION SCHEDULED
FOR JULY 18, 2012 @ 7:00 PM**

MOTION FOR STAY OF EXECUTION

Comes now, Petitioner, Warren Lee Hill, Jr., by and through undersigned counsel, and prays that an Order be entered staying the execution of his sentence of death until further Order of this Court, and in support of his application, respectfully states as follows:

1. That on July 3, 2012, the Superior Court of Lee County, State of Georgia, set from noon on Wednesday, July 18, 2012 through noon on Wednesday, July 25, 2012 as the period during which Petitioner's execution would be carried out. *See* Exhibit A (execution warrant), attached. The Georgia Board of Pardons and Paroles has denied clemency today, July 16, 2012, in an order attached as Exhibit B.

2. A stay of execution is justified on the grounds that Petitioner’s counsel has filed in this Court a Petition for Rehearing of his previously filed Petition for Writ of Certiorari presenting a substantial constitutional error. The nature of this error is that he faces (now imminent) execution despite the fact that a state court charged with determining whether Petitioner is mentally retarded *actually found Petitioner to be mentally retarded* by a preponderance of the evidence – a finding uncontested by the government in appeals since.¹ Petitioner’s problem, which is close to becoming a miscarriage of justice, is that Georgia forces people attempting to invoke death ineligibility under *Atkins v. Virginia*, 536 U.S. 304 (2002), to prove mental retardation *beyond a reasonable doubt*, an impossible standard by any meaningful reckoning, especially for psychiatric diagnoses.² The courts below are closely divided over whether this standard “eviscerates the command of the Eighth Amendment that the mentally retarded shall not be executed, and is therefore ‘contrary to ... clearly established Federal law, as determined by [this Court].’”³

3. Moreover, any hope that Georgia’s clemency procedures would act as a “fail safe”⁴ to “correct injustices that the ordinary criminal process seems unable or unwilling to consider,”⁵ has disintegrated this morning with the denial of executive clemency.

¹ See *Hill v. Schofield*, 608 F.3d 1272, 1282 n.10 (11th Cir. 2010).

² See, e.g., *Addington v. Texas*, 441 U.S. 418, 432 (1979) (reasonable doubt standard raises “unreasonable barrier” to proving eligibility for civil commitment because of irreducible uncertainty in psychiatric diagnoses).

³ *Hill v. Schofield*, 608 F.3d at 1283 (quoting 28 U.S.C. § 2254(d)(1)) (rev’d, *Hill v. Humphrey*, 662 F.3d 1335 (11th Cir. 2011)).

⁴ *Herrera v. Collins*, 506 U.S. 390, 414 (1993).

4. As discussed in the Petition for Rehearing, this case ought to be (re)considered along with the petition in *Chester v. Thaler*, No. 11-1391, due to be considered next term, because both petitions present the question of whether a state may eviscerate the *Atkins* protections in the process of “implementing” them. In this case and in *Chester*, the lower courts have erroneously taken this Court’s statement in *Atkins* that “we leave to the State[s] the task of developing appropriate ways to enforce the constitutional restriction upon [their] execution of sentences,” 536 U.S. at 517, as license to adopt a definition of mental retardation (*Chester*), or a process for its determination (*Hill*), which make *Atkins* unenforceable in practice.

5. A Stay of Execution will not prejudice the State of Georgia or interfere with Petitioner's custodial status.

6. A Stay of Execution is necessary to ensure that Petitioner is not executed before this Court is able to hear and determine the matters contained in the Petition for Writ of Certiorari. The execution of Petitioner would obviously inflict irreparable harm. There is no question that without a Stay of Execution, Georgia will execute a man, Warren Hill, who is more than likely mentally retarded.

⁵ *Dretke v. Haley*, 541 U. S. 386, 399 (2004) (Kennedy, J., dissenting).

WHEREFORE, Petitioner respectfully requests an Order staying Petitioner's execution, pending resolution of the proceedings and further Order of this Court.

Respectfully submitted this 16th day of July, 2012.

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Counsel of Record

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By: _____

COUNSEL FOR MR. HILL

Exhibit A

IN THE SUPERIOR COURT OF LEE COUNTY
STATE OF GEORGIA
Southwestern Judicial Circuit

LEE COUNTY GA
FILED IN OFFICE

2012 JUL -3 AM 8:01


SARA BLANK CLERK
SUPERIOR COURT

THE STATE OF GEORGIA,

v.

WARREN LEE HILL, JR.,
Defendant.

* CRIMINAL ACTION NO.
* 91-R-14
*
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*
*
*
*

ORDER

The Court having sentenced Defendant, **WARREN LEE HILL, JR.**, on the 17th day of September, 1991, to be executed by the Department of Corrections at such penal institution as may be designated by said Department, in accordance with the laws of the State of Georgia, and;

The date for the execution of said **WARREN LEE HILL, JR.**, having passed by reason of supersedeas incident to appellate review;

IT IS CONSIDERED, ORDERED, AND ADJUDGED by this Court, pursuant to *O.C.G.A. § 17-10-40*, that within a time period commencing at noon on the 18th day of July, 2012 and ending seven days later at noon on the 25th day of July, 2012, the Defendant, **WARREN LEE HILL, JR.**, shall be executed by the Department of Corrections at such penal institution and on such a date and time within the aforementioned time period as may be designated by said Department in accordance with the laws of the State of Georgia.

It is **FURTHER ORDERED** that the Clerk of the Superior Court of Lee County, Georgia shall record this order on the minutes of the court and shall cause a certified copy of this Order for execution of the original sentence to be served immediately to the Attorney General of Georgia, the Southwestern Judicial Circuit District Attorney, the Commissioner of the Georgia Department of

Corrections, the Warden of the Georgia Diagnostic and Classification Prison, and Defendant's last known attorney of record.

SO ORDERED, this 2nd day of July, 2012.



GEORGE M. PEAGLER, JR.
 Judge
 Lee County Superior Court
 Southwestern Judicial Circuit

07/03/

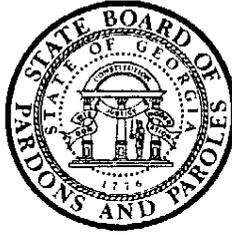
Prepared by:



PLEZ H. HARDIN
 District Attorney
 Southwestern Judicial Circuit
 P.O. Box 1328
 Americus, Georgia 31709
 (229) 924-5411
 Georgia Bar No.: 324856

Exhibit B

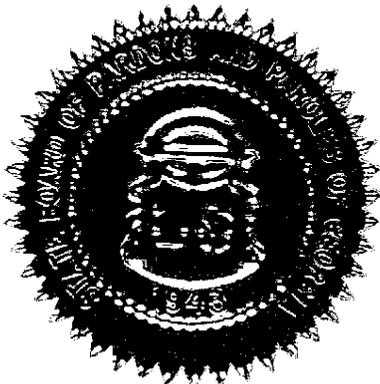
STATE BOARD OF PARDONS AND PAROLES

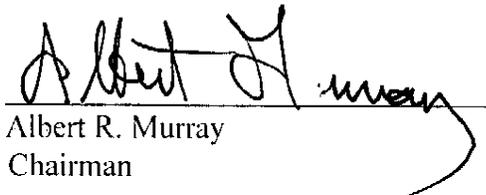


DENIAL OF COMMUTATION OF SENTENCE OF DEATH

- WHEREAS: Upon the 17th day of September, 1991, a sentence of death was imposed on the defendant in the case of The State of Georgia v. Warren Lee Hill, Jr., EF 190963, Indictment Number 91-R-14, before the Superior Court of Lee County; and,
- WHEREAS: An order of the Superior Court of Lee County, dated the 2nd day of July, 2012, directs that Warren Lee Hill, Jr., shall be executed by the Department of Corrections during a certain period of time commencing at noon on the 18th day of July, 2012, and ending at noon on the 25th day of July, 2012; and,
- WHEREAS: The State Board of Pardons and Paroles having received, on behalf of Warren Lee Hill, Jr., an application for clemency requesting that the Board exercise its authority to enter orders staying the execution of Warren Lee Hill, Jr., as well as to commute said sentence of death to a sentence of life without parole; and,
- WHEREAS: The State Board of Pardons and Paroles has reviewed and considered all of the facts and circumstances of the offender and his offense, the clemency application, argument, testimony, and opinion in support of clemency;
- THEREFORE: Pursuant to the provisions of Article IV, Section II, Paragraph II (a) and (d) of the Constitution of the State of Georgia, by the Members of the State Board of Pardons and Paroles, **IT IS HEREBY ORDERED** that the clemency application on behalf of Warren Lee Hill, Jr., requesting his execution be stayed and that his sentence of death be commuted to a sentence of life without parole is **DENIED**.

For the State Board of Pardons and Paroles on this 16th day of July, 2012.




Albert R. Murray
Chairman

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-v-

CARL HUMPHREY, Warden
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CERTIFICATE OF SERVICE

This is to certify that I have served a copy of the foregoing document this day by electronic mail/hand delivery on counsel for Respondent at the following address:

Beth Burton, Esq.
Senior Assistant Attorney General
132 State Judicial Building
40 Capitol Square, S.W.
Atlanta, Georgia 30334-1300

This the 16th day of July, 2012.



Attorney