

URGENT ACTION

EXECUTION SCHEDULED DESPITE MENTAL DISABILITY

Warren Hill, a 52-year-old African American man, is due to be executed in the US state of Georgia on 18 July for the 1990 murder of a fellow prisoner. He has a mental disability the seriousness of which leaves the constitutionality of his execution in real doubt.

Warren Hill was sentenced to death in 1991 for the 1990 murder of a fellow prisoner. In 1996 Warren Hill's lawyers submitted an appeal against his death sentence, claiming he had "mental retardation". Georgia's legislature had passed a law in 1988 prohibiting the imposition of the death penalty against anyone found "beyond a reasonable doubt" to have "mental retardation". The law defined this disability as the offender having "significantly sub-average general intellectual functioning," resulting in "impairments in adaptive behavior," which "manifested during the developmental period". In 2002 a state trial-level judge found that Warren Hill indeed had "significantly sub-average general intellectual functioning", but that he had not, beyond a reasonable doubt, proved his adaptive deficits.

The US Supreme Court then ruled, in *Atkins v. Virginia*, that the execution of people with mental retardation violates the US Constitution. Warren Hill's lawyers moved for reconsideration of his claim in light of the *Atkins* ruling. This time the trial-level court decided that the standard of proof for determining if he had mental retardation should be "a preponderance of the evidence" – not the higher "beyond a reasonable doubt" standard – and that under this lower standard, Warren Hill's impairment did indeed amount to mental retardation. However, the state authorities appealed to the Georgia Supreme Court which in 2003 ruled by four votes to three that the "beyond a reasonable doubt" standard was acceptable in this context. The majority reasoned that the US Supreme Court had left it up to individual states to decide how to comply with *Atkins*, and had not specified what the burden of proof for determining mental retardation should be. Warren Hill's case was sent back to the lower court which reinstated its original 2002 ruling that under the "beyond a reasonable doubt" standard, he did not have mental retardation.

In 2010, a three-judge panel of the federal Court of Appeals for the 11th Circuit ruled 2-1 that "because Georgia's requirement of proof beyond a reasonable doubt necessarily will result in the execution of the mentally retarded, the Georgia Supreme Court's decision is contrary to the clearly established rule of *Atkins*". However, the state appealed for a rehearing in front of the full 11th Circuit, and in 2011 the full court ruled, seven to four, that, even if Georgia had "somehow inappropriately struck the balance" in its statute, US law prevented a federal court from acting even if it considered the state Supreme Court's decision upholding that law to be "incorrect or unwise".

No other US state requires proof of mental retardation beyond a reasonable doubt in the death penalty context. Indeed, 22 of the USA's 33 current death penalty states, and the federal government, utilize the "preponderance of the evidence" standard, under which the Georgia judge found Warren Hill to have mental retardation.

Please write immediately, in English or your own language:

- Explain that you are not seeking to downplay the seriousness of the crime or the suffering caused;
- Express concern that Georgia plans to execute a person whom a state judge has found has mental retardation;
- Noting that no other US death penalty state requires proof of mental retardation beyond a reasonable doubt;
- Calling for this execution to be halted and Warren Hill's death sentence commuted.

PLEASE SEND APPEALS BEFORE 18 JULY 2012 TO:

Please address your appeals to the **Board of Pardons and Paroles**, but send to Warren Hill's lawyer, who will collect and forward to the Board. Please send to clemency@garesource.org, putting "**Warren Hill clemency**" in the subject line of your email.

Salutation for your appeals to the Board is: Dear Members of the Board

Please check with the AIUSA Urgent Action Office if sending appeals after the above date.

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ADDITIONAL INFORMATION

Warren Hill was sentenced to death in August 1991 for the murder of a fellow prisoner, Joseph Handspike, in August 1990 in the Georgia prison where both men were incarcerated for murder. Joseph Handspike was bludgeoned to death in the cell that the two men shared. At the time, Warren Hill was serving a life sentence for the murder of his girlfriend in 1986.

The jurors at Warren Hill's trial for the 1990 murder were not presented with the full picture of who they were being asked to sentence, after convicting him of the Joseph Handspike murder. Warren Hill grew up in poverty, in a household in which he and his siblings were exposed to severe domestic violence under which their mother was subjected to assaults by their father. There is a history of intellectual disabilities in the family. Since the trial a number of jurors have said they would have sentenced Warren Hill to life imprisonment without the possibility of parole if that had been an option at the time, which it was not in 1991, and have indicated their support for commutation to this sentence having learned of the evidence of his intellectual disability.

When the Georgia Supreme Court ruled in 2003, by four votes to three, that the state's "beyond a reasonable doubt" standard was acceptable for determining mental retardation – an assessment in any individual case that can be imprecise and subject to differing expert opinions – one of the dissenting judges wrote: "Despite the federal ban on executing the mentally retarded, Georgia's statute, and the majority decision upholding it, do not prohibit the state from executing mentally retarded people. To the contrary, the State may still execute people who are in all probability mentally retarded. The State may execute people who are more than likely mentally retarded. The State may even execute people who are almost certainly mentally retarded. Only if a mentally retarded person succeeds in proving their retardation beyond a reasonable doubt will his or her execution be halted... I am convinced this situation violates the tenets of due process as that concept is embodied in our Federal Constitution."

The four dissenting judges on the 11th Circuit in Warren Hill's case in 2011 were similarly adamant that the outcome was wrong. According to the dissent, "Although Georgia was the first state to declare that the mentally retarded should not be executed, it is the only one to guarantee precisely the opposite result by requiring offenders to prove beyond a reasonable doubt that they are mentally retarded. Requiring proof beyond a reasonable doubt, when applied to the highly subjective determination of mental retardation, eviscerates the Eighth Amendment constitutional right of all mentally retarded offenders not to be executed, contrary to *Atkins v. Virginia*". Another of the dissenting opinions said: "Georgia's beyond a reasonable doubt standard of proof is contrary to the Supreme Court's longstanding recognition that death is different, and for that reason requires heightened reliability in the determinations underlying capital punishment", and "While federal habeas courts must accord state court decision substantial deference under [federal law], we must be vigilant to guard against extreme malfunctions in the state criminal justice systems. In my judgment, execution of a person who has already proven he is more likely than not mentally retarded, but who is unable to prove his mental retardation beyond a reasonable doubt, is an 'extreme malfunction'...".

On 2 July 2012, a Georgia county court set a seven-day window in which the execution of Warren Hill can be carried out. The execution warrant is valid noon on 18 July and expires at noon on 25 July. The Commissioner of the Georgia Department of Corrections has scheduled the execution for 7.00 pm on 18 July at the Georgia Diagnostic and Classification Prison in Jackson.

There have been 23 executions in the USA this year, and 1300 executions since 1977, 52 of them in Georgia. Amnesty International opposes the death penalty in all cases (see also, USA: Deadly formula: an international perspective on the 40th anniversary of *Furman v. Georgia*, <http://www.amnesty.org/en/library/info/AMR51/050/2012/en>)

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Issues: Death penalty

UA: 197/12

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