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Suffocated Habeas Corpus and Merciless Clemency in the Execution of Warren Hill

By Donald E. Wilkes, Jr.

The writ of habeas corpus was once seen as the great protector of the people against the overwhelming power of the State; now its reputation has shrunk to little more than a stall tactic. As Congress and the courts have increasingly disfavored the “Great Writ,” its power to grant relief has nearly evaporated.—Eric O’Brien

A people confident in its laws and institutions should not be ashamed of mercy. —U.S. Supreme Court Justice Anthony Kennedy

Author’s Note: This article is a follow-up to [my previous *Flagpole* article on the Warren Hill case](#), published on Aug. 14, 2013. To avoid confusion, both the previous article and the present one use the terms “mentally retarded” and “mental retardation,” even though the scientific community has abandoned these terms and replaced them with “intellectually disabled” and “intellectual disability.” No disrespect is intended.

Embodying the evolving standards of decency that mark the progress of a maturing society, the clause of the Eighth Amendment prohibiting cruel and unusual punishments, a key provision of our Bill of Rights, mandates that courts administer criminal justice humanely and in conformity with human dignity. Applying this general principle nearly 13 years ago, in 2002, the U.S. Supreme Court held that the cruel and unusual punishments clause bars the states from putting mentally retarded persons to death.

Yet only weeks ago, on Tuesday, Jan. 27, the state of Georgia did exactly that when Warren Lee Hill, Jr. was executed by lethal injection at the state prison in Jackson. This state unconstitutionally wielded its most dangerous and irreversible power, the power to kill. A prisoner with significantly sub-average intellectual functioning, a 54-year old man with the mind of a boy, was strapped down and killed in flagrant violation of a provision of the Bill of Rights intended to maintain human dignity.

How could this have happened?

Erosion of Federal Habeas Corpus

Perhaps the principal reason is that Hill was refused access to the writ of habeas corpus. This writ—the only one mentioned by name in the U.S. Constitution—traditionally has been the accepted judicial remedy for correcting the constitutional error in cases where a citizen has been sentenced to death or imprisoned in violation of a constitutional right.

There are countless judicial decisions in which citizens convicted or sentenced in violation of the Bill of Rights have successfully invoked federal habeas corpus to obtain a new trial, resentencing, or even release from imprisonment.

In 1967, for example, an Illinois prisoner convicted of murder who had come within eight hours of being placed in the electric chair was, via the writ of habeas corpus, set free after spending 12 years on death row. Relief was granted because, in violation of constitutional due process protections, the district attorney had used fabricated evidence (a garment stained with paint which the prosecutor falsely claimed was human blood) to procure the conviction.

And in a famous 1966 case, Sam Sheppard, after 12 years of imprisonment, was granted habeas relief in the form of a new trial (at which he was acquitted) because his original trial, in violation of due process, had been unfair due to massive prejudicial publicity.

Since the 1960s, however, the usefulness of the federal habeas remedy as a method of vindicating individual rights has been steadily spiraling downward. The decline commenced during the Nixon era, when an increasingly conservative U.S. Supreme Court began handing down decision after decision cutting back on the availability of federal habeas.

Between 1970–1996, in an unprecedented display of pro-government slavishness, the Court in scores of cases reversed lower federal court judgments granting federal habeas relief to state prisoners. Many of these Supreme Court decisions were written in a querulous, chastising tone indicative of the Court's distaste for habeas protection of our fundamental rights.

As this right-wing judicial activism gained steam, it became increasingly difficult for prisoners to redress violations of their rights through federal habeas corpus. These decisions judicially manufacturing restrictions on the habeas writ resulted, to quote former Supreme Court justice Harry Blackmun, in "a Byzantine morass of arbitrary, unnecessary, and unjustifiable impediments to the vindication of federal rights."

Then, in 1996, with the federal writ of habeas corpus already enfeebled, Congress dealt a further, staggering blow to the writ by enacting the Orwellianly named Antiterrorism and Effective Death Penalty Act.

The AEDPA, passed shortly after Republicans took control of Congress, would have more aptly been named the Habeas Corpus Suffocation Act. It is the first statute in our history to systematically cut back on the availability of habeas corpus in the federal courts. It hugely restricts the power of the federal judiciary to utilize the writ of habeas corpus to protect rights. The AEDPA does this by, among other things, fettering federal habeas with burdensome procedural rules.

Under the statute, a prisoner who cannot comply with these technical requirements is denied the opportunity to have his constitutional claim heard on the merits and is tossed out of court even though his claim of denial of rights is valid and provable and would lead to the granting of relief if the courts would simply address it. As a direct result of the statute, federal courts now routinely reject the habeas corpus claims of imprisoned Americans whose rights have been violated, without even bothering to consider the merits of the claims.

This is precisely what occurred in Warren Hill's case. After Hill's initial federal habeas corpus proceeding was unsuccessful, he sought, as the AEDPA requires, permission to file a second

federal habeas petition. He had excellent reasons for making this request: After the denial of his initial federal habeas petition, newly discovered evidence, not previously available, had come into existence. The three mental health experts retained by the state who had previously testified that Hill was not mentally retarded reconsidered the issue and changed their minds. All three contacted Hill's attorney and presented him with sworn affidavits explaining why their previous testimony was wrong and certifying that now, in their professional opinion, Hill did suffer from mental retardation.

This new evidence was incredibly important. Since four mental experts retained by Hill had previously testified that Hill was mentally retarded, the new evidence meant that all seven of the psychiatrists or psychologists who had examined Hill and testified about his mental condition now agreed that he was in fact mentally retarded.

This new evidence made it indisputable that Hill suffered from mental retardation. It rendered undeniable Hill's assertion that executing him would constitute a denial of his constitutional rights.

Nevertheless, relying on harsh AEDPA procedural provisions making it a near-impossibility for an inmate to file more than one federal habeas petition, the federal courts refused to allow Hill to file a second habeas petition. Even though Hill was a death row inmate with a valid, provable claim that his sentence was unconstitutional, the AEDPA, for entirely technical reasons, blocked him from presenting his claim, thereby preventing the federal courts from inquiring into the merits of his claim.

The federal writ of habeas corpus had become so hamstrung by the statute that the federal courts were, in the words of astonished federal judge Rosemary Barkett, "not permitted to acknowledge that a mistake ha[d] been made which would bar an execution [which] is quite incredible for a country that not only prides itself on having the quintessential system of justice but attempts to export it to the world as a model of fairness."

Under the AEDPA, therefore, federal habeas corpus is no longer a remedy as broad as the rights it is designed to protect; some violations of individual rights can no longer be remedied by the federal courts, even in death sentence cases. Procedural rules intended to trip up prisoners now trump the protection of individual rights.

Erosion of Georgia Habeas Corpus

The federal courts are not the only courts with power to grant habeas relief. In each of the fifty states there are state courts with habeas corpus jurisdiction. So what about this state's writ of habeas corpus? Why didn't the Georgia courts grant habeas corpus relief to Hill, even if the federal courts wouldn't?

It certainly was not because Hill failed to apply to the Georgia courts for habeas relief. He did file a state habeas petition in which he set forth the newly discovered evidence and asked that his death sentence be set aside.

However, on the procedural ground that Hill had—before the new evidence became available—filed two other Georgia habeas petitions, the courts of this state summarily dismissed the third petition, refusing to even consider whether it had merit. Hill, they said absurdly, had “not cited any new law or evidence sufficient to overcome the procedural bar.”

In other words, the Georgia courts, like the federal courts, denied Hill habeas relief based on a technicality. The Georgia courts did this pursuant to several laws passed by the General Assembly in recent years for the purpose of hobbling Georgia’s writ of habeas corpus. (It might be noted our state’s writ of habeas corpus has been curbed not only by these statutes but also by the judicial activism of the increasingly conservative Georgia Supreme Court, which has issued at least half a dozen decisions creating previously nonexistent obstacles to obtaining habeas relief.)

In the Georgia courts, therefore, as in the federal courts, assuring that basic rights are enforced is now subordinated to making sure that prisoners comply with narrow, rigid procedural rules. Compelling habeas petitioners to satisfy technical rules of procedure, and slamming shut the courthouse door if they can’t, is deemed more important than guaranteeing that Americans are not imprisoned or executed in violation of their fundamental rights.

Erosion of Executive Clemency in Georgia

But what about Hill’s nonjudicial remedies? In particular, what about executive clemency, often described as the “fail safe” in our criminal justice system? Why didn’t Hill receive clemency?

Executive clemency, Cara H. Drinan observes in a recent article in the Georgia State University Law Review, “is designed to serve several laudable goals: it serves as a check on the judiciary; it enables error-correction in a criminal justice system fraught with mistakes; it may afford relief from undue harshness; and it helps ensure that justice is tempered by mercy.”

In Warren Hill’s case, it was crystal clear that his sentence imposed cruel and unusual punishment and that the courts had failed to correct the constitutional violation solely on account of technicalities. Why then wasn’t Hill’s unconstitutional death sentence commuted to life imprisonment without parole?

One explanation is that Georgia was simply adhering to the current nationwide trend that disfavors and discourages the exercise of clemency, even in death sentence cases. “In the last four decades,” Drinan observes in her article, “state clemency grants have declined significantly; in some states, clemency seems to have disappeared altogether.”

This is especially true in capital sentence cases, where “state clemency grants have all but disappeared from the political landscape... Some capital states have not commuted any death sentences [since 1976].” This astonishing “overall decline in state clemency grants is consistent and pronounced,” Drinan notes.

Here in Georgia, executive clemency is in the hands of the Board of Pardons and Paroles, which without explanation denied Hill’s request for clemency the day before his execution. The Board

simply issued a short press release, couched in boilerplate phraseology, which carefully omitted any mention of Hill's mental retardation.

This was not surprising. In Georgia the clemency power is rarely exercised to any significant degree, particularly in death penalty cases. It is almost unheard of for the Board of Pardons and Paroles to commute a death sentence. Only three years ago the Board obstinately closed its eyes to substantial, persistent questions about Troy Davis' guilt and disgracefully and without adequate explanation refused to commute his sentence, even though it had previously pledged that it would not permit Davis' execution to go forward unless there was no doubt about his guilt.

The Board's reluctance to grant clemency may also be attributable to the regulatory capture which permeates and contributes to the punitiveness of our criminal justice system. A majority of the five-member Board, which is supposed to mitigate excesses committed by either the courts or law enforcement agencies, consists of ex-law enforcement officers (two of the Board's members are former prison system officials, and a third is a former policeman); and the Board often behaves—especially in capital cases—as if it is an arm of the law enforcement establishment rather than a neutral and independent government body.

That huge, powerful and growing establishment—police, prosecutorial, and prison officials and agencies—allies itself with the political right in strongly supporting the death penalty. (Neither of the two other Board members is likely to have much compassion for prison inmates whose rights have trampled on or who are otherwise the victims of governmental overreaching. One is a former Georgia legislator who oversaw bills affecting the Georgia Department of Corrections. The other is a former legislator who was once named Christian Coalition Legislator of the Year and has received awards from Georgia Right to Life organizations.)

Having successfully persuaded a superior court judge to fix Hill's execution for Jan. 27, Georgia prosecutors opposed clemency for Hill, of course. They had, after all, embarrassed themselves by stubbornly insisting throughout Hill's legal odyssey that he was not mentally retarded.

When interviewed the day before the execution the district attorney who requested the execution date preposterously told the press: "According to every indication, [Hill] was a responsible, goal-oriented person... It is very clear that he [is] not mentally retarded." In their zeal to execute somebody, pro-death penalty prosecutors inhabit a cloud-cuckoo land where they blissfully ignore or deny the facts.

Revitalizing Habeas Corpus and Reinvigorating Clemency

How can our precious constitutional rights be preserved if the writ of habeas corpus, the great protector of those rights, is undermined by law and order judges or statutorily attenuated by legislators with a law and order agenda?

How can any criminal justice system avoid unnecessary severity if it is the law enforcement establishment which not only (1) arrests defendants, (2) is in charge of prosecuting arrested defendants, (3) is responsible for carrying out the punishment of convicted defendants, but also (4) decides whether and to what extent imprisoned defendants will receive mercy?

American criminal justice tilts too far in favor of government. It desperately needs reform. The great writ of habeas corpus must be restored to its former glory. It must be loosed from the constricting coils that now suffocate it. The power of the law enforcement establishment must be curbed. Executive clemency, now moribund, must be resuscitated.

Georgia Tarnished

We the people of Georgia live in a state where desensitized prosecutors zealously pursued, and callous courts were willing to permit, based on technicalities, the execution of an inmate who, in the unanimous opinion of the mental health experts that examined him, was mentally retarded and therefore categorically exempt from the death penalty (although certainly not from imprisonment). We live in a state where in a capital case in which the injustice was palpable the only government agency with power to grant clemency conducted itself mercilessly. We live in a state which has been shamed.

Warren Hill's execution truly was, as his attorney says, "an abomination" and "a grotesque miscarriage of justice... The memory of Mr. Hill's illegal execution will live on as a moral stain on the people of this state and on the courts that allowed it to happen."

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