
CONFINED TO A CONCRETE CAVE: THE DEATH ROW
TORTURE OF WARREN LEE HILL

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INTRODUCTION

*Alone I walk,
Alone I sleep,
To myself I talk,
As my eyes begin to dreep

Alone I see,
My own misery
Alone I shall die.*¹

The text of the Constitution expressly identifies a minimum standard for the government’s treatment of its citizens: “Excessive bail shall not be required, nor excessive fines imposed, *nor cruel and unusual punishments inflicted.*”² In *Estelle v. Gamble*, the Supreme Court held that “punishments which are incompatible with the ‘evolving standards of decency that mark the progress of a maturing society’” or “‘involve unnecessary and wanton infliction of pain’” violate the Eighth Amendment.³ In *Atkins v. Virginia*, the Supreme Court held “death is not a suitable punishment for a[n] [intellectually disabled] criminal.”⁴ Quoting the dissent in the Virginia Supreme Court opinion, the United States Supreme Court embraced the idea that “[i]t is indefensible to conclude that individuals who are [intellectually disabled] are not to some degree less culpable for their criminal acts.”⁵ “By defini-

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¹ Nick Fennema, *Death by Loneliness*, available at https://www.facebook.com/permalink.php?id=495122597171128&story_fbid=556787314337989.

² U.S. CONST. amend. VIII (emphasis added).

³ 429 U.S. 97, 102–03 (1976) (quoting *Gregg v. Georgia*, 428 U.S. 153, 173 (1976)).

⁴ 536 U.S. 304, 321 (2002).

⁵ *Id.* at 310 (quoting *Atkins v. Commonwealth*, 534 S.E.2d 312, 325 (Va. 2000)).

tion, such individuals have substantial limitations not shared by the general population.⁶ Intellectually disabled prisoners simply lack the ability to communicate as effectively with their legal teams, and they often appear to lack remorse because of their demeanor.⁷ When viewed together, these decisions present a seemingly obvious conclusion: the execution of the intellectually disabled is both cruel and unusual and offends the evolving standards of decency.

In *Gregg v. Georgia*, the Supreme Court named the two social purposes served by capital punishment: retribution and deterrence.⁸ As acknowledged by the Supreme Court in *Atkins v. Virginia*, the execution of mentally handicapped prisoners serves neither of those purposes.⁹ The state seeks retribution only when dealing with someone who has a higher culpability compared to that of other criminals.¹⁰ It is not a valid form of retribution because the intellectually disabled simply do not possess “a consciousness materially more “depraved” than that of any person guilty of murder,” the standard used to meet the retribution goal of the death penalty.¹¹ Further, execution of the intellectually disabled does not satisfy the deterrence goal, which is “predicated upon the notion that the increased severity of the punishment will inhibit criminal actors from carrying out murderous conduct.”¹² Yet here, due to intellectual disability, the purpose cannot be carried out because the defendants cannot even “process the information of the possibility of execution as a penalty and, as a result, control their conduct based upon that information.”¹³ Therefore, the execution of the intellectually disabled meets no social policy goals upon which the death penalty is based.

Viewed in light of those decisions, how was a man with an intelligence quotient (IQ) of seventy executed in the state of Georgia?¹⁴ In 1990, while already in prison serving a life sentence for the murder of

⁶ *Id.* (quoting *Atkins*, 534 S.E.2d at 325 (Hassell, J., dissenting)).

⁷ *Id.* at 320–21.

⁸ *Gregg v. Georgia*, 428 U.S. 153, 183 (1976).

⁹ *Atkins*, 536 U.S. at 319–20.

¹⁰ *Id.* at 319.

¹¹ *Id.* (quoting *Godfrey v. Georgia*, 446 U.S. 420, 433 (1980)).

¹² *Id.* at 320.

¹³ *Id.*

¹⁴ Alan Blinder, *Georgia Executes Warren Lee Hill for Murder*, N.Y. TIMES (Jan. 27, 2015), http://www.nytimes.com/2015/01/28/us/georgia-executes-warren-lee-hill-for-murder.html?_r=0; Ed Pilkington, *Warren Hill Faces Monday Execution Unless US Supreme Court Steps in*, GUARDIAN (July 11, 2013), www.theguardian.com/world/2013/jul/11/warren-hill-execution-supreme-court.

his girlfriend, Warren Lee Hill murdered a fellow inmate while the inmate was asleep in his bed.¹⁵ Hill was found guilty and sentenced to death.¹⁶

Although Hill did not raise a claim of mental disability until 1995,¹⁷ Hill's IQ level, as tested in 2000, was a mere seventy.¹⁸ Twelve years ago, during Hill's first claim of mental disability, three doctors declared Hill competent for execution, but all have since acknowledged that they made a mistake in measuring his IQ.¹⁹ A total of nine doctors found Hill to be intellectually disabled, including the three psychiatrists who originally ruled him competent.²⁰ Hill's IQ is low enough to put him in the bottom two percent of all American IQs.²¹ Although the Georgia court found that he indeed was intellectually disabled, it still sentenced him to execution because he failed to prove his intellectual disability "beyond a reasonable doubt," a heightened standard used only in the state of Georgia.²²

Hill lived on death row for twenty-three years.²³ After his original death sentence in 1990, Hill was nearly executed by the state of Georgia three times.²⁴ In fact, Warren Hill came within hours of death each time and was even strapped to the gurney and sedated only to have his execution stayed.²⁵ The multiple near-executions left Hill's family emotionally exhausted, anxious, and frightened.²⁶ The State, ignoring the many arguments that presented the execution of Warren Lee Hill

¹⁵ Hill v. Humphrey, 662 F.3d 1335, 1340 (11th Cir. 2011).

¹⁶ Hill v. State, 427 S.E.2d 770 (Ga. 1993).

¹⁷ Hill, 662 F.3d at 1340.

¹⁸ Id. at 1341 n.7.

¹⁹ Ed Pilkington, *Ten Reasons Why Georgia Should Not Execute Warren Hill*, GUARDIAN (Feb. 19, 2013, 1:00 PM), <http://www.theguardian.com/world/2013/feb/19/warren-hill-georgia-execution-10-reasons>.

²⁰ Id.

²¹ Matt Kwong, *Warren Hill, Mentally Disabled Man, Tests America's Harshes Execution Law*, CBC NEWS (Oct. 23, 2013, 6:02 AM), <http://www.cbc.ca/news/world/warren-hill-mentally-disabled-man-tests-america-s-harshes-execution-law-1.2187681>.

²² Editorial, *An Urgent Plea for Mercy*, N.Y. TIMES, July 6, 2012, http://www.nytimes.com/2012/07/07/opinion/a-plea-for-mercy-for-man-on-georgias-death-row.html?_r=0.

²³ Dave Miller, *Lee Murderer's Execution Stay Overturned*, WALB NEWS 10, <http://www.walb.com/story/25551665/lee-murderers-execution-stay-overturned> (last updated June 10, 2014).

²⁴ Rania Khalek, *The Death Row Torture of Warren Hill*, NATION (Aug. 14, 2013), <http://www.thenation.com/article/175737/death-row-torture-warren-hill#>.

²⁵ Id.

²⁶ Id.

as “a moral stain on the people of [Georgia],” executed him on January 27, 2015.²⁷

Hill’s diminished mental capacity “to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand others’ reactions”²⁸ made it impossible for him to understand what exactly was happening to him; he was repeatedly told that he would die, only to have a last-minute stay granted.²⁹ For someone with limited capacity, this amounts to cruel and unusual punishment.³⁰ Further, the isolation and confinement of Hill only exacerbated his confusion³¹ and further contributed to the idea that he was subject to psychological torture that runs in direct contravention of the Eighth Amendment.

Prolonged time awaiting execution, and the uncertainty of an inevitable execution can cause an inmate to experience Death Row Syndrome.³² Symptoms of Death Row Syndrome may include extreme anxiety, dissociation with reality, psychosis, and severe demoralization.³³ Death Row Syndrome claims are brought as “*Lackey* claims,” and although these claims have prevailed in foreign courts³⁴ and have the support of the international community,³⁵ no United States *Lackey* claim has prevailed.³⁶ No court, however, has examined the idea of Death Row Syndrome in conjunction with a mental disability.³⁷ Courts have commuted several sentences to life imprisonment due to severe

²⁷ Blinder, *supra* note 14.

²⁸ *Atkins v. Virginia*, 536 U.S. 304, 318 (2002).

²⁹ Ed Pilkington, *Georgia Inmate Warren Hill Granted Last-Minute Stay of Execution*, *GUARDIAN* (July 15, 2013), <http://www.theguardian.com/world/2013/jul/15/warren-hill-stay-execution-georgia>.

³⁰ *Atkins*, 536 U.S. at 319.

³¹ See Harold I. Schwartz, *Death Row Syndrome and Demoralization: Psychiatric Means to Social Policy Ends*, 33 *J. AM. ACAD. PSYCHIATRY & L.* 153, 154 (2005), available at <http://www.jaapl.org/content/33/2/153.full>.

³² See *Lackey v. Texas*, 514 U.S. 1045 (1995) (mem.) (Statement of Stevens, J., respecting the denial of certiorari).

³³ Schwartz, *supra* note 31.

³⁴ *Lackey*, 514 U.S. at 1046 (citing *Pratt v. Attorney Gen. of Jam.*, [1994] 2 A.C. 1, 4).

³⁵ See *id.*

³⁶ *Allen v. Ornoski*, 435 F.3d 946, 960 (9th Cir. 2006); *Brown v. State*, 948 So. 2d 405, 414 (Miss. 2006); *State v. Moore*, 591 N.W.2d 86, 95 (Neb. 1999).

³⁷ Richard C. Dieter, *International Perspectives on the Death Penalty: A Costly Isolation for the U.S.*, *DEATH PENALTY INFO. CENTER*, <http://www.deathpenaltyinfo.org/international-perspectives-death-penalty-costly-isolation-us#internationaldevelopments> (last visited Mar. 25, 2015).

mental handicap, including the notorious “Unabomber,” Theodore “Ted” Kaczynski; Calvin Swann; and Roosevelt Pollard.³⁸ Others, despite overwhelming testimony of intellectual disability or severe mental illness, have not been so fortunate.

In Arkansas, Rickey Ray Rector, a man who had been lobotomized and did not even understand the concept of execution was put to death in 1992.³⁹ In Alabama, Varnall Weeks was executed despite testimony from multiple psychologists that he suffered from severe delusions.⁴⁰ In California, Horace Kelly was executed despite the fact that before his execution he had “wallow[ed] in his own waste, not bathing or combing his hair.”⁴¹ America, in its pursuit for justice, overlooks the prisoners who need the most protection: the intellectually disabled and severely mentally ill.

This Note argues that (I) the Supreme Court should recognize Death Row Syndrome as a valid claim for intellectually disabled death row inmates, (II) United States courts should recognize that the solitary confinement of intellectually disabled death row inmates is cruel and unusual punishment because it exacerbates Death Row Syndrome, and (III) Warren Lee Hill should have been ineligible for execution because of his subjection to Death Row Syndrome exacerbated by mental disability.

I. DEATH ROW SYNDROME

*I've only been on death row for about six and a half years and I've seen guys come in here seemingly without a care in the world, only to break several years down the line from the isolation and monotony. Withdrawn and haggard, isolating themselves further from everyone. I've seen guys unable to take the stress and isolation anymore and commit suicide. A lot of people don't reali[z]e how bad life back here is, and how once we're dead our suffering is over. Some might ask, if life is so bad back here, and death would be an end to suffering, why do guys continue to fight, continue with their appeals? Because it's human nature to want to continue living, even if it's only instinctively.*⁴²

Along with other current concerns facing the capital punishment system in the United States,⁴³ the recognition of Death Row Syndrome

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² Perry, *My Concrete Box*, HUM. WRITES, <http://www.humanwrites.org/writings.php?id=42> (last visited Mar. 26, 2015).

⁴³ See John Hall, *Oklahoma Stays Execution of Two Convicted Murderers After They Challenge State's Secretive Law on Lethal Injection Drugs*, THE DAILY MAIL (Apr. 21, 2014), <http://www>

by psychologists has become increasingly more prominent.⁴⁴ Although there is no concurrence among members of the psychiatric community about Death Row Syndrome, there are several components to most definitions of Death Row Syndrome: (1) the death row inmate must have a sufficiently prolonged wait on death row; (2) the death row inmate must be subject to harsh conditions; and (3) the death row inmate must show some “psychological effects of living under the sentence of death.”⁴⁵

A. Temporal Requirement

*I spent [twelve] years in solitary confinement I am a human being and every day I still struggle with the trauma being held in that gray box. I wake screaming at night. I can't get it out of my head some days. Solitary confinement in my opinion is worse than being beaten. That I spent twelve years in such conditions in America is appalling.*⁴⁶

In *Allen v. Ornoski*, the court held that “a *Lackey* claim does not become ripe only after a certain number of years or as the final hour of execution nears.”⁴⁷ The temporal requirement of Death Row Syndrome should, in theory, be easy for all prisoners on death row to meet, but courts have yet to answer an important question: “how much time is enough?” The average United States inmate remains on death row for over a decade; in California, the wait is an average of twenty years.⁴⁸

.dailymail.co.uk/news/article-2609631/Oklahoma-court-puts-2-executions-hold.html (executions stayed because of concern over lethal injection drugs); Michael L. Radelet, *Examples of Post-Furman Botched Executions*, DEATH PENALTY INFO. CENTER (May 2, 2014), <http://www.deathpenaltyinfo.org/some-examples-post-furman-botched-executions> (noting that executions were stayed because of concern over lethal injection drugs).

⁴⁴ Karen Harrison & Anouska Tamony, *Death Row Phenomenon, Death Row Syndrome and Their Affect on Capital Cases in the US*, INTERNET J. CRIMINOLOGY, http://www.internetjournalofcriminology.com/Harrison_Tamony_%20Death_Row_Syndrome%20_IJC_Nov_2010.pdf.

⁴⁵ Amy Smith, *Not “Waiving” but Drowning: The Anatomy of Death Row Syndrome and Volunteering for Execution*, 17 B.U. PUB. INT. L.J. 237, 240 (2008).

⁴⁶ Letter from Brian Nelson to the Illinois Senate (June 12, 2012), *available at* <http://solitarywatch.com/wp-content/uploads/2012/06/brian-nelson-peoples-uptown-law-center-survivor-of-solitary-confinement.pdf>.

⁴⁷ *Allen v. Ornoski*, 435 F.3d 946, 958 (9th Cir. 2006).

⁴⁸ Kevin Johnson, *Prisoners’ Time Spent on Death Row Doubles*, USA TODAY (July 23, 2008), http://usatoday30.usatoday.com/news/nation/2008-07-23-Death-row-time_N.htm (noting that in 2006, the average wait time for execution was twelve years); Jared Milrad, *Death Penalty: As Other States Phase It out, Florida Ramps It up*, POL’Y MIC (May 6, 2013), <http://www.policymic.com/articles/39895/death-penalty-as-other-states-phase-it-out-florida-ramps-it-up> (explaining that the average death row wait is thirteen years in

While it may seem obvious to the layperson that the temporal requirement would be met, courts have held differently. In *Brown v. State*, the court found five years insufficient to show an Eighth Amendment violation.⁴⁹ In *State v. Moore*, the Nebraska Supreme Court found that forty years on death row did not rise to the level of an Eighth Amendment violation because the prolonged period of incarceration benefitted the inmate by giving him time to appeal.⁵⁰

Foreign courts are uncomfortable with the prolonged waits and conditions on death row in the United States. In *Soering v. United Kingdom*, the European Court of Human Rights refused to extradite a prisoner to the United States to face death row because “the condemned prisoner [would] ha[ve] to endure for many years the conditions on death row and the anguish and mounting tension of living in the ever-present shadow of death.”⁵¹ In *Pratt v. Attorney General of Jamaica*, a Jamaican court held that a delay between sentencing and execution of fourteen years was inhumane punishment.⁵² In *Catholic Commission for Justice & Peace in Zimbabwe v. Attorney General of Zimbabwe & Others*, the court found that a mere fifty-two to seventy-two months on death row was enough to subject the prisoners to Death Row Syndrome and thus rose to the level of cruel and unusual punishment, a clear violation of the constitution of Zimbabwe.⁵³

Lackey provides a few guidelines for arguing that, under the Eighth Amendment, there is a constitutionally significant time period.⁵⁴ First, the courts must examine whether the prolonged period on death row resulted from a frivolous abuse of the judicial system.⁵⁵ Second, the court must examine whether the petitioner exercised a

Florida); *Death Row Information and Frequently Asked Questions*, ARIZ. DEP’T CORRECTIONS, <https://corrections.az.gov/public-resources/death-row/death-row-information-and-frequently-asked-questions> (last visited Feb. 27, 2015) (explaining that the average death row wait is seventeen years in Arizona).

⁴⁹ *Brown v. State*, 948 So. 2d 405, 414 (Miss. 2006).

⁵⁰ *State v. Moore*, 591 N.W.2d 86, 88–89 (Neb. 1999).

⁵¹ *Soering v. United Kingdom*, App. No. 14038/88, 11 Eur. H.R. Rep. 439 (1989).

⁵² *Pratt v. Attorney Gen. of Jamaica*, [1994] 2 A.C. 1, 2.

⁵³ *Catholic Comm’n for Justice & Peace in Zimb. v. Attorney Gen.*, [1993] 4 S.A. 239 (Zimb.), available at <http://www.eji.org/files/Catholic%20Commission%20for%20Justice%20and%20Peace%20in%20Zimbabwe%20v.%20Attorney-General.pdf>.

⁵⁴ See *Lackey v. Texas*, 514 U.S. 1045 (1995) (mem.) (Statement of Stevens, J., respecting denial of certiorari).

⁵⁵ *Id.*

legitimate right to review.⁵⁶ Third, the court must examine whether there was some negligence or deliberate action by the State.⁵⁷

In a historic first, a district court judge in California recognized the cruelty of the delay on death row.⁵⁸ In his opinion, Judge Carney stated that the delay between sentencing and execution “violates the Eighth Amendment’s prohibition against cruel and unusual punishment.”⁵⁹ Judge Carney described death sentences as empty promises because of the extreme delay and arbitrary nature of enforcement.⁶⁰ Whether this case will survive appeal remains to be seen, but it is a victory for those who support *Lackey* claims.

B. Death Row Conditions

*We were like animals in one of the old-style zoos, before society realized it was inhumane to confine a large beast in a cramped cage. And like the tiger that obsessively bobs from one side to the other of his barred cage, we would pace back and forth over the small patch of floor beside our bunks. Four steps, turn; four steps, turn; four steps, turn, for hours on end, stopping at the bars of the cell to stare out at nothing.*⁶¹

While on death row, prisoners are locked in small cells in complete isolation for twenty-two to twenty-four hours per day.⁶² For the most part, they are segregated from the general population based solely on their status as death row prisoners.⁶³ Researchers have found that the extreme isolation experienced by death row prisoners affects both their mental and physical health and is akin to torture.⁶⁴ In fact, solitary confinement has been used “as a method of torture or brain washing” by countries such as China and North Korea.⁶⁵ At least forty-

⁵⁶ *Id.* at 1047.

⁵⁷ *Id.*

⁵⁸ Erik Eckholm & John Schwartz, *California Death Penalty System Is Unconstitutional, Federal Judge Rules*, N.Y. TIMES, July 16, 2014, <http://www.nytimes.com/2014/07/17/us/california-death-penalty-unconstitutional-federal-judge-says.html>.

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ Wilbert Rideau, *My Life on Death Row*, PROGRESSIVE (Apr. 7, 2011), <http://progressive.org/rideau0411.html>.

⁶² AM. CIVIL LIBERTIES UNION, A DEATH BEFORE DYING: SOLITARY CONFINEMENT ON DEATH ROW 2 (2013) [hereinafter A DEATH BEFORE DYING], available at <https://www.aclu.org/files/assets/deathbeforedying-report.pdf>.

⁶³ *Id.* at 4.

⁶⁴ *Id.* at 2.

⁶⁵ Harrison & Tamony, *supra* note 44, at 4.

five percent of solitarily confined inmates suffer from “psychosocial impairments.”⁶⁶

Prisoners spend an average of over a decade waiting to die, all the while kept in utter isolation.⁶⁷ They have no hope of moving to a different type of cell; once prisoners are placed in solitary confinement due to death row status, they remain there until the date of their execution or a successful appeal.⁶⁸ Cell sizes are approximately the size of an average bathroom, ranging from thirty-six to one-hundred square feet.⁶⁹ The prisoners receive all food and most medicine through a narrow slot in the door, resulting in little human contact or face-to-face interaction.⁷⁰ Contact with family and loved ones is limited, and the majority of death row prisoners are not even allowed to touch any of their loved ones.⁷¹ One wrongfully convicted prisoner said of his time on death row:

When I was sentenced to death, I did not know that this sentence would also mean that I would have [twelve] years without any human contact, i.e. my mother, my son, my friends. All those people were stripped from my life because of this injustice. I did not know it would mean [twelve] years of having my meals slid through a small slot in a steel door like an animal. I did not know it would mean [twelve] years alone in a cage the size of a parking spot, sleeping on concrete [sic] steel bunk and alone for [twenty-two] to [twenty-four] hours a day.⁷²

The European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment and the United Nations Special Rapporteur on Torture have spoken out against extended solitary confinement, calling it “inhuman and degrading,” and calling for the abolishment of all solitary confinement beyond fifteen days.⁷³

⁶⁶ *Id.*

⁶⁷ Johnson, *supra* note 48.

⁶⁸ Prieto v. Clarke, No. 1:12CV1199, 2013 U.S. Dist. LEXIS 161783, at *2 (E.D. Va. Nov. 12, 2013), *rev'd* Nos. 13-8021, 14-6226, 2015 U.S. App. LEXIS 3716 (4th Cir. Mar. 10, 2015).

⁶⁹ A DEATH BEFORE DYING, *supra* note 62, at 4.

⁷⁰ *Id.*

⁷¹ *Id.* at 5.

⁷² Anthony Graves, *When I Was on Death Row, I Saw a Bunch of Dead Men Walking. Solitary Confinement Killed Everything Inside Them*, ACLU (July 23, 2013, 11:03 AM), <https://www.aclu.org/blog/prisoners-rights-capital-punishment/when-i-was-death-row-i-saw-bunch-dead-men-walking-solitary>.

⁷³ A DEATH BEFORE DYING, *supra* note 62, at 2.

C. Psychological Effects of Living on Death Row

I saw guys who dropped their appeals because of the intolerable conditions. Before his execution, one inmate told me he would rather die than continue existing under these inhumane conditions. I saw guys come to prison sane, and leave this world insane, talking nonsense on the execution gurney. One guy suffered some of his last days smearing feces, lying naked in the recreation yard, and urinating on himself.⁷⁴

For those living in isolation, the psychological and physical effects take a toll. As reported by one inmate about solitary confinement, “the brutality of isolation . . . breaks down the human spirit, it breaks down the human psyche, [and] it breaks your mind.” Some research has indicated that persons in solitary confinement experience an array of negative effects that are manifested psychologically and physically, including:

[H]ypersensitivity to external stimuli; perceptual distortions and hallucinations; increased anxiety and nervousness; fears of persecution; lack of impulse control; severe and chronic depression; appetite loss and weight loss; heart palpitations; withdrawal; blunting of affect and apathy; talking to oneself; headaches; problems sleeping; confused thought processes; nightmares; dizziness; self-mutilation; and lower levels of brain function, including a decline in EEG activity after only seven days in solitary confinement.⁷⁵

The American Psychiatric Association “issued a formal position statement that prisoners with serious mental illness should almost never be subjected to such treatment and in the rare event that isolation is necessary, they must be given extra clinical supports.”⁷⁶ Suicides and suicide attempts also increase while on death row.⁷⁷ One mentally ill inmate described his experience living on death row:

Both [psychologists from a psychiatric evaluation] confirmed that I was severely depressed and the conditions at [the prison] exacerbated the depression. Both found that I was actively suicidal. Even though Drs. Burns and Kupers are experts on the conditions of supermax prisons, the [prison] psychologist refused to initiate any of the therapy they proposed. I got worse. Another serious suicide attempt followed⁷⁸

In *Furman v. Georgia*, the 1972 Supreme Court case that temporarily abolished capital punishment, Justice Brennan, writing for the

⁷⁴ *Id.*

⁷⁵ *Id.* at 6–7.

⁷⁶ *Id.* at 8.

⁷⁷ *Id.* at 7.

⁷⁸ *Voices from Solitary: I Lost the Will to Live*, SOLITARY WATCH (June 24, 2012), <http://solitarywatch.com/2012/06/24/voices-from-solitary-i-lost-the-will-to-live/>.

Court, declared capital punishment to be per se unconstitutional because the “mental pain is an inseparable part of our practice of punishing criminals by death, for the prospect of pending execution exacts a frightful toll during the inevitable long wait between the imposition of sentence and the actual infliction of death.”⁷⁹ The Supreme Court has acknowledged the danger of prolonged solitary confinement in non-capital punishment cases, acknowledging that an extended period of sensory deprivation, when coupled with other factors, such as indefinite holding periods in solitary confinement, can give rise to an Eighth Amendment claim.⁸⁰ The Eastern District of Virginia has interpreted this as an “atypical and significant hardship” test and applied it to find that death row prisoners’ indefinite stays in solitary confinement can constitute cruel and unusual punishment under the Eighth Amendment.⁸¹

The Istanbul Statement of the Use and Effects of Solitary Confinement, issued by some of the world’s leading psychological experts, concluded that, under no circumstances, should solitary confinement be used on the mentally ill.⁸² Although not explicitly stated to also apply to the intellectually disabled, the statement, at another point, refers to the “mentally disordered” instead of specifically addressing the mentally ill, which could at least support the inference that the intellectually disabled should also, under no circumstance, be subject to solitary confinement.⁸³

II. DEATH ROW SYNDROME CLAIM FOR WARREN LEE HILL

[Another death row prisoner] was scheduled for execution at 6:00 p.m. [that] evening [H]e was strapped to the gurney and the needles were inserted into each arm Just before 6:00, however, he received a [forty-five]-minute stay which morphed into an almost [three]-hour endurance test as he remained on the gurney . . . waiting for someone to tell him if hope was at hand, if he would live or die. Just before 9:00 he received his answer, the plungers were depressed, the syringes emptied and he was summarily killed.

Anyway, pause for a moment to imagine being on that gurney for over three hours, the needles in your arms. You’ve already come to terms with your imminent death,

⁷⁹ *Furman v. Georgia*, 408 U.S. 238, 288 (1972).

⁸⁰ *Wilkinson v. Austin*, 545 U.S. 209, 223–24 (2005).

⁸¹ *See Prieto v. Clarke*, No. 1:12CV1199, 2013 U.S. Dist. LEXIS 161783, at *11 (E.D. Va. Nov. 12, 2013), *rev’d* Nos. 13-8021, 14-6226, 2015 U.S. App. LEXIS 3716 (4th Cir. Mar. 10, 2015).

⁸² *The Istanbul Statement on the Use and Effects of Solitary Confinement* (Dec. 9, 2007), available at http://solitaryconfinement.org/uploads/Istanbul_expert_statement_on_sc.pdf.

⁸³ *See id.* at 1.

*you are reconciled with the reality that this is it, this is how you will die, that there will be no reprieve. Then, at the last moment, a cruel trick, you're given that slim hope, which you instinctively grasp After [three] hours you are drained, exhausted, terrorized, and then the phone on the wall rings and you're told it's time to die*⁸⁴

Hill met all the factors necessary to show that he suffered from Death Row Syndrome. Hill's solitary confinement for twenty-three years on death row should have been enough to prove to any court that a violation of the Eighth Amendment had occurred.⁸⁵ An intellectually disabled man who spends hours alone in a state of confusion, shaken by his situation and uncertain as to the time of his death, should have been able to prove in court that his treatment went far beyond the normal boundaries of deterrence and retribution.

The multiple attempts to execute Hill should also be taken into consideration when considering a Death Row Syndrome claim. Prior to execution, prisoners across the United States follow a series of rituals. First, the prisoner is transported to a cell in the "death house," where the execution will take place; this occurs approximately twenty-four hours prior to execution.⁸⁶ The prisoner remains in the death house cell alone throughout the day but is allowed to meet with a reverend or other spiritual leader and his or her attorney.⁸⁷ Next, the prisoner receives his or her final meal, which, while often selectable at the prisoner's option, is nevertheless subject to varying levels of

⁸⁴ *Voices from Solitary: Death Row Diary of Florida Man Scheduled to Die Tonight*, SOLITARY WATCH (June 12, 2013), <http://solitarywatch.com/2013/06/12/voices-from-solitary-death-row-diary-of-florida-man-scheduled-to-die-tonight/>.

⁸⁵ See Michael McLaughlin, *Warren Lee Hill, Mentally Disabled Death Row Inmate, Appeals to Georgia Parole Board*, HUFFINGTON POST (July 11, 2012, 7:36 AM), http://www.huffingtonpost.com/2012/07/10/warren-lee-hill-mentally-disabled-death-row-georgia-board-pardons-roles_n_1661945.html (noting that Hill was convicted in September of 1990 and served over twenty-three years on death row); see also James Ridgeway & Jean Casella, *Georgia's Response to Death Row Suicides: Restrict Family Visits*, SOLITARY WATCH (Feb. 13, 2010), <http://solitarywatch.com/2010/02/13/georgias-response-to-death-row-suicides-ban-family-visits/> (describing the conditions for prisoners on Georgia's death row, including twenty-three hour isolation); *Hardwick v. Ault*, 447 F. Supp. 116, 119–20, 124–25 (M.D. Ga. 1978) (stating that death row inmates are housed in the H-1 unit of H-House, a disciplinary cell block, and H-House prisoners are subjected to isolation roughly equivalent to solitary confinement), *Daniel v. Zant*, 494 F. Supp. 720, 721 (M.D. Ga. 1980) (describing a death row inmate being placed in H-House under inhumane conditions).

⁸⁶ Ashley Blackstone, *Arkansas Death Penalty: Execution Day*, THV 11 (Nov. 3, 2011, 10:38 PM), <http://www.thv11.com/news/crime/179279/370/Arkansas-Death-Penalty-Execution-Day->

⁸⁷ *Id.*

carceral control.⁸⁸ Then, the prisoner is taken to the execution chamber, given the opportunity to say any last words, strapped down, and executed.⁸⁹

Three times, Warren Hill went through this ritual but was not executed.⁹⁰ Four times, Warren Hill prepared himself to die, ate what he believed would be his last meal, and prepared himself to say farewell to life.⁹¹ In July 2012, Hill's execution was halted ninety minutes prior to his execution.⁹² Seven months later, Hill's execution was halted within thirty minutes of his execution, while he was already strapped to the gurney and sedated.⁹³ On July 15, 2013, Hill was granted a stay a mere four hours prior to his execution.⁹⁴ On July 18, 2013, three days later, Hill was nearly executed again but was granted a temporary reprieve less than a day before his execution.⁹⁵ Under international law, these are considered mock executions and are considered to be a form of torture.⁹⁶ On May 19, 2014, the Supreme Court of Georgia reversed Hill's stay of execution, and on January 27, 2015, Hill's suffering ended when he was executed by the state of Georgia.⁹⁷

The psychological torture to Warren Hill should be obvious; he lived every day waiting for his death. With his limited intellectual capacity, it is unlikely that he grasped exactly what was happening to him; he only knew that he must prepare himself for a death that never came. For a man already suffering from a mental handicap, the psychological torture of his captivity was extreme, cruel, and inhuman.

Warren Lee Hill, Jr. had a Death Row Syndrome claim, and the courts should finally acknowledge for other intellectually disabled death row inmates what foreign courts have already accepted: Death

⁸⁸ *Id.*; Avi Brisman, *Fair Fare?: Food as Contested Terrain in U.S. Prisons and Jails*, 15 GEO. J. ON POVERTY L. & POL'Y 49, 62 (2008).

⁸⁹ Blackstone, *supra* note 86.

⁹⁰ Khalek, *supra* note 24.

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ Rania Khalek, *Being Strapped to a Gurney and Almost Being Executed Twice Is Torture*, DISPATCHES FROM UNDERCLASS (Feb. 19, 2013), <http://raniakhalek.com/2013/02/19/being-strapped-to-a-gurney-and-almost-executed-several-times-amounts-to-torture/>.

⁹⁷ Adam Ragusea, *Georgia Supreme Court: State Can Keep Source of Execution Drugs Secret*, GPB NEWS (May 19, 2014, 11:16 AM), <http://www.gpb.org/news/2014/05/19/georgia-supreme-court-state-can-keep-source-of-execution-drugs-secret>; Blinder, *supra* note 14.

Row Syndrome is real, and the unfortunate reality is that subjects intellectually disabled prisoners to it.

CONCLUSION

*This execution is an abomination. 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 this to happen.*⁹⁸

Warren Lee Hill, Jr. should not have been executed due to the extreme amount of psychological and physical hardship he had experienced during his time on death row. After nearly twenty-three years in solitary confinement, a man with already limited mental capacity was subjected to far more anguish than one with full capacity should ever have to face. The constant fear of death coupled with his limited comprehension made his case even more compelling. The Judiciary should recognize claims similar to Hill's Death Row Syndrome claim and diagnosis. After all, protecting those who cannot protect themselves should be one of the Judiciary's main concerns. Unfortunately, however, a man who had been subjected to cruel and unusual punishment under the Eighth Amendment lost his life due to inaction by the court system.

Many have taken up for Hill's cause. Former President Jimmy Carter called for the halt of Hill's execution, declaring that "Georgia should not violate its own prohibition against executing individuals with seriously diminished capacity."⁹⁹ The European Union also formally protested, expressing extreme concern over Hill's execution.¹⁰⁰ Jurors from the case have claimed they would have sentenced Hill to life imprisonment if given the choice.¹⁰¹ Even Hill's victim's family had called for a commutation of Hill's sentence.¹⁰² Why then did the courts not listen?

⁹⁸ Tracy Connor, *Georgia Executes Warren Lee Hill Despite Low IQ Claim*, NBC NEWS (Jan. 27, 2015), <http://www.nbcnews.com/storyline/lethal-injection/georgia-executes-warren-lee-hill-despite-low-iq-claim-n294206>.

⁹⁹ Ed Pilkington, *Georgia Inmate Warren Hill Granted Stay of Execution 30 Minutes Before Lethal Injection*, GUARDIAN (Feb. 20, 2013, 3:07 AM), <http://www.theguardian.com/world/2013/feb/20/warren-hill-stay-of-execution>.

¹⁰⁰ *Id.*

¹⁰¹ David A. Love, *Georgia Wants to Execute Warren Hill and Violate the Constitution*, FIREDOGLAKE (July 23, 2012, 5:36 AM), <http://my.firedoglake.com/davidalove/2012/07/23/georgia-wants-to-execute-warren-hill-and-violate-the-constitution/#more-68>.

¹⁰² *Id.*

Until the American Psychological Association provides definitive criteria to establish Death Row Syndrome, mentally disabled inmates like Warren Hill will likely fight an uphill battle. If anyone had the grounds to prove a valid *Lackey* claim, it was Warren Hill, the intellectually disabled prisoner whom the courts should have protected from the cruel system of capital punishment but did not.

