
amnesty international

UNITED STATES OF AMERICA

'Where is the justice for me?'

The case of Troy Davis, facing execution in Georgia

February 2007

Summary

AI Index: AMR 51/023/2007

Troy Anthony Davis has been on death row in Georgia for more than 15 years for the murder of a police officer he maintains he did not commit. Given that all but three of the witnesses who testified against Troy Davis at his trial have since recanted or contradicted their testimony amidst allegations that some of it had been made under police duress, there are serious and as yet unanswered questions surrounding the reliability of his conviction and the state's conduct in obtaining it. As the case currently stands, the government's pursuit of the death penalty contravenes international safeguards which prohibit the execution of anyone whose guilt is not based on "clear and convincing evidence leaving no room for an alternative explanation of the facts".

Amnesty International does not know if Troy Davis is guilty or innocent of the crime for which he is facing execution. As an abolitionist organization, it opposes his death sentence either way. It nevertheless believes that this is one in a long line of cases in the USA that should give even ardent supporters of the death penalty pause for thought. For it provides further evidence of the danger, inherent in the death penalty, of irrevocable error. As the Chief Justice of the United States Supreme Court wrote in 1993, "It is an unalterable fact that our judicial system, like the human beings who administer it, is fallible. Or as a US federal judge said in 2006, "The assessment of the death penalty, however well designed the system for doing so, remains a human endeavour with a consequent risk of error that may not be remediable."

The case of Troy Davis is a reminder of the legal hurdles that death row inmates must overcome in the USA in order to obtain remedies in the appeal courts. In this regard, Amnesty International fears that Troy Davis' avenues for judicial relief have been all but closed off. In particular, he is caught in a trap set by US Congress a decade ago when it withdrew funding from post-conviction defender organizations in 1995 and passed the Anti-terrorism and Effective Death Penalty Act in 1996.

This report outlines the case of Troy Davis. Executive clemency will be his last hope if the courts prove unwilling or unable to provide a meaningful remedy. Time is running out.

This summarizes a 35-page document (15,700 words): USA: *'Where is the justice for me?'* The case of Troy Davis, facing execution in Georgia (AI Index: AMR 51/023/2007) issued by Amnesty International in February 2007. Anyone wishing further details or to take action on this issue should consult the full document.

INTERNATIONAL SECRETARIAT, 1 EASTON STREET, LONDON WC1X 0DW, UNITED KINGDOM

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amnesty international

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I think this country would be much better off if we did not have capital punishment... I really think it's a very unfortunate part of our judicial system and I would feel much, much better if more states would really consider whether they think the benefits outweigh the very serious potential injustice, because in these cases the emotions are very, very high on both sides and to have stakes as high as you do in these cases, there is a special potential for error.

US Supreme Court Justice John Paul Stevens¹

Introduction

Troy Anthony Davis has been on death row in Georgia for more than 15 years for the murder of a police officer he maintains he did not commit. Given that all but three of the witnesses who testified against Troy Davis at his trial have since recanted or contradicted their testimony amidst allegations that some of it had been made under police duress, there are serious and as yet unanswered questions surrounding the reliability of his conviction and the state's conduct in obtaining it. As the case currently stands, the government's pursuit of the death penalty contravenes international safeguards which prohibit the execution of anyone whose guilt is not based on "clear and convincing evidence leaving no room for an alternative explanation of the facts".²

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¹ Chicago Sun-Times, 12 May 2004, cited in *The Death Penalty in 2004: Year End Report*, Death Penalty Information Center, <http://www.deathpenaltyinfo.org/DPICyer04.pdf>.

² United Nations Safeguards guaranteeing the rights of those facing the death penalty. 1984.

³ *Herrera v. Collins*, 506 U.S. 390 (1993), opinion written by Chief Justice Rehnquist.

judge said in 2006, "The assessment of the death penalty, however well designed the system for doing so, remains a human endeavour with a consequent risk of error that may not be remediable."⁴

The case of Troy Davis is a reminder of the legal hurdles that death row inmates must overcome in the USA in order to obtain remedies in the appeal courts. In this regard, Amnesty International fears that Troy Davis' avenues for judicial relief have been all but closed off. In particular, he is caught in a trap set by US Congress a decade ago when it withdrew funding from post-conviction defender organizations in 1995 and passed the Anti-terrorism and Effective Death Penalty Act in 1996.

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The inescapable risk of error

*A legal regime relying on the death penalty will inevitably execute innocent people – not too often, one hopes, but undoubtedly sometimes. Mistakes will be made because it is simply not possible to do something this difficult perfectly, all the time. Any honest proponent of capital punishment must face this fact.*⁵

Thirty years after the USA resumed executions, any notion that the US capital justice system is free from error or inequity should by now have been dispelled.⁶ A landmark study published in 2000, for example, concluded that US death sentences are "persistently and systematically fraught with error".⁷ The study revealed that appeal courts had found serious errors – those requiring a judicial remedy – in 68 per cent of cases. The most common errors in US capital cases were "(1) egregiously incompetent defense lawyers who didn't even look for - and demonstrably missed - important evidence that the defendant was innocent or did not deserve to die; and (2) police or prosecutors who *did* discover that kind of evidence but *suppressed* it, again keeping it from the jury." The study expressed "grave doubt" as to whether the courts catch all such errors.

In Troy Davis' case, his appeal lawyers have argued that his trial counsel failed to conduct an adequate investigation of the state's evidence, including allegations that some witnesses had been coerced by the police, or to present full and effective witness testimony of their own (the prosecution presented 30 witnesses in total, the defence presented six).⁸ They

⁴ Judge Carolyn King, US Court of Appeals for the Fifth Circuit, Address to Red Mass, Corpus Christi Cathedral, Texas, 4 October 2006. Speech available from South Texas Catholic News, 20 October 2006, <http://www.goccn.org/stc/articles/article.cfm?article=550>.

⁵ *Life, death and uncertainty*, by US District Judge Michael Ponsor, Boston Globe, 8 July 2001.

⁶ See *USA: The experiment that failed. A reflection on 30 years of executions*, AI Index: AMR 51/011/2007, 16 January 2007, <http://web.amnesty.org/library/Index/ENGAMR510112007>.

⁷ *A Broken System: Error Rates in Capital Cases, 1973-1995*, conducted at New York's Columbia Law School by James S. Liebman, Jeffrey Fagan and Valerie West, published 12 June 2000.

⁸ A recent study of legal representation in death penalty cases in Virginia, Alabama, Mississippi and Georgia concluded that in the first three of these states, "poor representation is a result of official policy.

have also claimed that the state presented perjured testimony as well as evidence tainted by a police investigation which had used coercive tactics, including against children taken into custody for questioning. As shown below, alleged police coercion is a common theme that emerges from the affidavits that various witnesses have provided since the trial when recanting earlier statements.

Perhaps the starkest indicator of the fallibility of the US capital justice system is the fact that since the US Supreme Court approved new death penalty laws in 1976, more than 100 individuals have been released from death rows around the country on grounds of innocence. The cases of people like Anthony Porter – who came 48 hours from execution in 1998 after more than 16 years on death row in Illinois before being proved innocent by a group of journalism students who happened to study his case – stand as an indictment of a flawed system. In April 2002 in Illinois, the 14-member Commission appointed by the governor to examine that state's capital justice system in view of the number of wrongful convictions in capital cases there, reported that it was "unanimous in the belief that no system, given human nature and frailties, could ever be devised or constructed that would work perfectly and guarantee absolutely that no innocent person is ever again sentenced to death".

In similar vein, in January 2007, after a process in which it held five public hearings and took evidence from a wide range of witnesses, a Death Penalty Study Commission established by the New Jersey legislature recommended abolition of the death penalty in that state. The Commission had failed to find any compelling evidence that the death penalty served any legitimate penological purpose, and it concluded that only abolition could eliminate the risk of irreversible arbitrariness and error. New Jersey Death Penalty Study Commission Report, January 2007.⁹

Yet still some maintain that exonerations of condemned inmates are a sign of the system working. Among those who have perpetuated this myth is US Supreme Court Justice Antonin Scalia. Such exonerations, he has contended, demonstrate "not the failure of the system but its success". Justice Scalia added:

*"Like other human institutions, courts and juries are not perfect. One cannot have a system of criminal punishment without accepting the possibility that someone will be punished mistakenly. That is a truism, not a revelation. But with regard to the punishment of death in the current American system, that possibility has been reduced to an insignificant minimum."*¹⁰

The states pay no more than a pittance to help lawyers defend their clients, and none requires that well-trained attorneys handle death cases. Georgia had a similarly inadequate system until 2005, when a publicly funded, statewide capital defenders office began spending whatever is necessary to scour client's backgrounds for mitigating evidence. So far, none of that office's 46 clients has been sentenced to death". *Indefensible? Lawyers in key death penalty cases often fall short*. McClatchy Special Report, 21 January 2007, http://www.realcities.com/mld/kwashington/news/special_packages/death_penalty/

⁹ New Jersey Death Penalty Study Commission Report, January 2007. The report is available at http://www.njleg.state.nj.us/committees/njdeath_penalty.asp.

¹⁰ *Kansas v. Marsh*, 26 June 2006, Justice Scalia concurring.

It is disturbing that anyone, let alone a Justice of the Supreme Court, should consider as “insignificant” the risk of wrongful convictions in capital cases given what is known about the repeated failures of the system. The risk was not insignificant to the more than 100 individuals sentenced to death since 1976 who spent, on average, more than nine years between conviction and exoneration.¹¹ Factors that contributed to these wrongful convictions include prosecutorial or police misconduct and inadequate legal representation.

Of particular relevance in Troy Davis’s case is the question of the reliability of the witness testimony used by the state to send him to death row. The problem of unreliable witness testimony as a source of error in capital cases has long been recognized. For example, a major study published in 1987 found that:

*“By far the most frequent cause of erroneous convictions in our catalogue of 350 cases was error by witnesses; more than half of the cases (193) involved errors of this sort. Sometimes such errors occurred in conjunction with other errors, but often they were the primary or even the sole cause of the wrongful conviction. In one-third of the cases (117), the erroneous witness testimony was in fact perjured.”*¹²

In addition, “clear injustices perpetrated by the police compose nearly a quarter of the errors” identified in this study. The majority of the error attributable to the police came in the form of coerced statements, with the remainder accounted for by negligence and over-zealous police work. Such misconduct was a major contributor to the wrongful conviction of four Illinois death row inmates, who were pardoned by the state governor in 2003 on the basis that their confessions had been tortured out of them by the police.¹³ The final report of the New Jersey Death Penalty Study Commission, released on 2 January 2007, noted the fallibility of eyewitness testimony in reaching the conclusion that “the penological interest in executing a small number of persons guilty of murder is not sufficiently compelling to justify the risk of making an irreversible mistake”. For these and other reasons, the Commission has recommended abolition of the death penalty in New Jersey.¹⁴

The problem of unreliable witness testimony, some of it exacerbated or caused by police misconduct, has been illustrated in a number of the other cases of those released since 1976 from death rows in the USA on the grounds of innocence. For example:

- Thomas Gladish, Richard Greer, Ronald Keine and Clarence Smith were exonerated in 1976 in New Mexico two years after being sentenced to death. A newspaper investigation uncovered perjury by the prosecution’s key witness, perjured identification given under police pressure, and the use of poorly administered lie detector tests.

¹¹ Death Penalty Information Center, see <http://www.deathpenaltyinfo.org/article.php?scid=6&did=110>.

¹² Page 60, Hugo Bedau and Michael L. Radelet, *Miscarriages of justice in potentially capital cases*, Stanford Law Review, Volume 40, pages 21 to 179.

¹³ Aaron Patterson, Madison Hobley, Leroy Orange and Stanley Howard. Each had spent at least 15 years on death row.

¹⁴ See *USA: New Jersey Death Penalty Study Commission recommends abolition*, AI Index: AMR 51/003/2007, 3 January 2007, <http://web.amnesty.org/library/Index/ENGAMR510032007>.

- Earl Charles was sentenced to death in Georgia in 1975 and was on death row for three years before being exonerated. At his trial, two eyewitnesses identified him as the murderer. However, it was later revealed that the police had used suggestive photo line-up techniques and not revealed that the eyewitnesses had pointed to others in the line-up as possible suspects.¹⁵
- Larry Hicks was acquitted at a retrial in 1980, two years after being sentenced to death in Indiana. At the retrial, evidence showed that eyewitness testimony that had been used against him at the original trial had been perjured.
- Anthony Brown was acquitted at a retrial in Florida in 1986. Three years earlier he had been sentenced to death on the basis of evidence from a co-defendant who received a life sentence. At the retrial, the co-defendant admitted that his original testimony had been perjured.
- Neil Ferber was released in 1986, almost four years after he was sentenced to death in Pennsylvania. The state declined to retry him after, among other things, it emerged that a jailhouse informant had given perjured testimony at the first trial.
- Timothy Hennis was acquitted at a retrial in North Carolina in 1989, three years after being sentenced to death for murder. At the retrial, the defence discredited the witnesses who had testified at the original trial and pointed to a neighbour of Hennis who could have been responsible for the crime.
- Charles Smith was acquitted in 1991 in Indiana, eight years after being sentenced to death. At the retrial, the defence presented evidence that witnesses at his original trial had given perjured testimony.
- Federico Macias was sentenced to death in Texas in 1984 on the basis of the testimony of a co-defendant and jailhouse informants. His conviction was overturned, a grand jury refused to indict him again because of lack of evidence. He was released in 1993.
- Walter McMillian was released in Alabama in 1993, six years after being sentenced to death. His conviction was overturned after it was shown that three of the state's witnesses had given perjured testimony.
- Ronald Williamson was released in 1999. He was sentenced to death in Oklahoma in 1987. Among other things, his trial lawyer had failed to question the motive of a jailhouse informant who alleged that Williamson had confessed to the murder.
- Steve Manning had charges against him dropped in 2000. He had been sentenced to death in Illinois in 1993 on the basis of the word of a jailhouse informant who testified that Manning had confessed to him in jail.

¹⁵ See *Capital punishment's deathly injustice*, Los Angeles Times, 28 August 1978, available at <http://www.deathpenaltyinfo.org/EarlCharles.pdf>.

- Charles Fain was released in August 2001 after charges against him were dropped. He had been sentenced to death in Idaho in 1983. The evidence against him included the word of two jailhouse informants, who said that Fain had confessed to the murder.
- Joseph Amrine was released in Missouri in 2003, 17 years after being sentenced to death for murder on the basis of the testimony of fellow inmates, who later recanted their testimony.¹⁶
- Alan Gell was acquitted in North Carolina in 2004, six years after being sentenced to death. At his retrial, the defence presented evidence that the state's two key witnesses had lied at the original trial.

In addition, a number of prisoners have been executed in the USA since 1977 despite serious doubts about their guilt. In some of these cases, the doubts centred on the reliability of witness testimony. For example:

- Ruben Cantu was executed in Texas in 1993. The eyewitness and co-defendant whose testimony was crucial to putting Cantu on death row have since recanted.¹⁷ In a development that is reminiscent of the Troy Davis case (see below), the lone eyewitness has said that he felt pressured by police into identifying Ruben Cantu as the murderer.
- Larry Griffin was executed in Missouri in 1995. An investigation by the NAACP Legal Defense and Educational Fund has cast serious doubt on the credibility of the state's key witness.¹⁸
- Gary Graham was executed in Texas in 2000 primarily on the testimony of a single eyewitness. Other eyewitnesses, not interviewed by the defence lawyer, said that Graham was not the perpetrator.¹⁹
- Angel Nieves Diaz was executed in Florida in 2006 despite the fact that a key prosecution witness – a jailhouse informant – had recanted his trial testimony implicating Diaz. Angel Diaz maintained his innocence in his final statement before being killed in a botched execution.

Amnesty International has little doubt that sooner or later it will be shown that the USA has executed at least one person since 1976 for a crime he or she did not commit. Such cases are, of course, hard to prove, especially before abolition. The state will tend to resist

¹⁶ USA: *Joseph Amrine: Facing execution on tainted testimony*, AMR 51/085/2002, June 2002, <http://web.amnesty.org/library/index/engamr510852002>.

¹⁷ See, for example, *Did Texas execute an innocent man?* Houston Chronicle, 24 July 2006.

¹⁸ NAACP report available at <http://www.truthinjustice.org/griffin-report.htm>.

¹⁹ USA: *An appeal to President Clinton, Vice-President Gore and Governor Bush of Texas to condemn one illegal execution and to stop another*, AI Index: AMR 51/096/2000, 15 June 2000, <http://web.amnesty.org/library/Index/ENGAMR510962000>. See also, Mandy Welch and Richard Burr, *The politics of finality and the execution of the innocent: The case of Gary Graham*. In: *Machinery of Death: The reality of America's death penalty regime*. Edited by David Dow and Mark Dow, Routledge Books, 2002.

attempts to uncover the execution of an innocent person, and in any event, once a person has been put to death, the scarce resources of the legal and abolitionist communities will generally be directed toward trying to stop future executions.²⁰ One such looming execution is that of Troy Davis.

Deadly mix: over-zealous police & death-qualified jury?

You've either got to believe that Troy Davis did all of this stuff or that Sylvester Coles did.

Prosecution at the trial of Troy Davis

On 28 August 1991 Troy Davis was convicted by a jury of the murder of a police officer, 27-year-old Mark Allen McPhail, who had been shot in the car park of a Burger King fast food restaurant in Savannah, a city on the Georgia/South Carolina border, in the early hours of 19 August 1989. According to the autopsy, Officer McPhail had been hit by two bullets, one in the face and one in the body. He had died as a result of blood loss caused by the bullet that had hit him in the side of his chest and pierced his lung.

Troy Davis was also convicted of two counts of aggravated assault for the shooting of Michael Cooper that occurred earlier that night as Cooper was leaving a party in the nearby Cloverdale district of Savannah, and an attack on Larry Young, a homeless man, who was accosted and struck across the face with a pistol immediately before Officer McPhail was shot. A ballistics expert testified at the trial that the .38 calibre bullet that killed Officer McPhail could possibly have been fired from the same gun that wounded Michael Cooper, although he admitted that he had "some doubt" about this. He was "confident" that .38 calibre shell casings found at the Cloverdale party matched one allegedly found by a homeless man near the Burger King restaurant. The homeless man did not testify at the trial.

The Georgia Supreme Court would later summarize the evidence from the trial as follows:

"At midnight, on August 18, 1989, the victim, a police officer, reported for work as a security guard at the Greyhound Bus Station in Savannah, adjacent to a fast food restaurant. As the restaurant was closing, a fight broke out in which Davis struck a man with a pistol. The victim, wearing his police uniform – including badge, shoulder patches, gun belt, .30 revolver, and night stick – ran to the scene of the disturbance. Davis fled. When the victim ordered him to halt, Davis turned around and shot the victim. The victim fell to the ground. Davis, smiling, walked up to the stricken officer and shot him several more times. The officer's gun was still in his holster...

²⁰ Nevertheless, as well as the above cases, a number of investigations have unearthed evidence pointing to the execution of wrongfully convicted individuals in the USA. Journalists at the *Chicago Tribune*, for example, have raised compelling evidence that Carlos DeLuna, executed in Texas in 1989 for a murder committed six years earlier, was innocent of the crime for which he was put to death. See 3-part series by Steve Mills and Maurice Possley, *Chicago Tribune*: 'I didn't do it. But I know who did' (25 June 2006). *A phantom, or the killer?* (26 June). *The secret that wasn't* (27 June). http://www.chicagotribune.com/news/specials/broadband/chi-tx-htmlstory_0,7935000.htmlstory.

The next afternoon, Davis told a friend that he had been involved in an argument at the restaurant the previous evening and struck someone with a gun. He told the friend that when a police officer ran up, Davis shot him and that he went to the officer and 'finished the job' because he knew the officer got a good look at his face when he shot him the first time. After his arrest, Davis told a cellmate a similar story".²¹

At the trial, Troy Davis denied having shot Michael Cooper at the Cloverdale party, claiming that the first time he had ever seen Cooper was in the courtroom. He admitted that he had been at the scene of the shooting outside the Burger King, but claimed that he had neither assaulted Larry Young nor shot Officer McPhail.

Troy Davis further denied having told anyone that he had killed Officer McPhail. In September and October 1989, Kevin McQueen was detained in the same jail as Troy Davis. McQueen told the police that during this time Troy Davis had confessed to shooting Officer McPhail. McQueen testified to this effect at the trial. Another witness, Jeffrey Sapp, also testified that Troy Davis had told him that he had shot the officer, but that it had been in self-defence.

The state presented 15 witnesses to testify as to Troy Davis' guilt. One of them was Sylvester "Red" Coles. At the trial, Sylvester Coles admitted that he had been carrying a .38 calibre silver chrome handgun, the same calibre used in the shooting, half an hour before Officer McPhail was shot. He said that he had discarded the gun before the incident, and that he had not seen the gun again. Coles had gone to the police with a lawyer soon after the shooting and made a statement exonerating himself and implicating Troy Davis as the gunman. At the trial, Troy Davis' defence lawyers argued:

"[F]rom that point on, the entire focus of this investigation was not in deciding and finding the truth of this case as to who actually committed these crimes that the defendant is now on trial for, but it was to find evidence to convict the defendant of these crimes... They bought Mr Coles' story hook, line and sinker. They never considered Mr Coles to be a suspect... And they went out into this community, and they rounded up witnesses everywhere they could find them, and they paraded them in here... But what about the quality, the credibility of those witnesses?"

As already noted, studies of why wrongful convictions in capital cases occur point to a number of contributory factors, including police error or misconduct. A review of this issue published in 1996 pointed out the following:

"We often talk of a miscarriage of justice as an error at trial, but that's a mistake. The error occurs much earlier, in the investigation of a crime, when the police identify the wrong person as the criminal. If they gather enough evidence against this innocent suspect, the error will ripen into a criminal charge; if that charge survives the formal and informal processes of pre-trial screening, it will go to trial and a jury may confirm the mistake by a wrongful conviction..."

²¹ *Davis v. State* (1993), affirming the conviction and death sentence.

For the most part, the pressure to solve homicides produces the intended results... But that same pressure can also produce mistakes. If the murder cannot be readily solved, the police may be tempted to cut corners, to jump to conclusions, and – if they believe they have the killer – perhaps to manufacture evidence to clinch the case. The danger that the investigators will go too far is magnified to the extent that the killing is brutal and horrifying, and to the extent that it attracts public attention – factors which also increase the likelihood that the murder will be treated as a capital case”.²²

This case involves the murder of a police officer, a crime which undoubtedly heightens emotions – among the authorities seeking to bring the perpetrator to justice, as well as within the community and the media.²³ Seventy-one of the 84 prospective jurors questioned during jury selection for Troy Davis’ trial indicated that they had heard about the murder from pre-trial publicity and/or had discussed the case with other people. Indeed, 32 of these individuals were rejected during jury selection on the grounds of their bias or prejudice. Nevertheless, only one of the jurors from the pool, who had been living outside of Savannah at the time, said that he had not known anything about the case. Troy Davis’ lawyers sought a change of venue for the trial away from Chatham County where the crime occurred. This motion was denied by the trial court.

When denying relief for death row inmates, it is common for an appeal court or an executive clemency authority to point to the deference to be afforded to the jury’s verdict in the original trial. Thus, in addition to the specific concern that the impartiality of Troy Davis’s trial may have been tainted by pre-trial publicity on the case, it is worth pausing to consider the more general question of who sits on the jury in a US capital trial.

In a state (as opposed to federal) capital trial, 12 citizens from the county in which the trial is held (the county where the crime is committed unless a change of venue is granted) are selected to sit as a “death qualified” jury. At jury selection, the defence and prosecution will question the prospective jurors and have the right to exclude certain people, either for a stated reason (for cause) or without giving a reason (a peremptory challenge). Those citizens who would be “irrevocably committed” to vote against the death penalty can be excluded for cause by the prosecution, under the 1968 US Supreme Court ruling in *Witherspoon v. Illinois*.²⁴ In 1985, in *Wainwright v. Witt*, the Supreme Court relaxed the *Witherspoon* standard, thereby expanding the class of potential jurors who could be dismissed for cause during jury selection.²⁵ Under the *Witt* standard, a juror can be dismissed for cause if his or her feelings

²² Samuel R. Gross. *The risks of death: Why erroneous convictions are common in capital cases*. Buffalo Law Review, Volume 44, pages 469-500 (1996).

²³ This can be even more pronounced when the victim was white and the perpetrator black, as in this case.

²⁴ *Witherspoon v. Illinois*, 391 U.S. 510 (1968).

²⁵ *Wainwright v. Witt*, 469 U.S. 412 (1985). In 1992, in *Morgan v. Illinois*, the Court explicitly extended the *Witt* standard to include proponents of the death penalty. In other words, anyone whose support for the death penalty would “prevent or substantially impair” them from performing his or her duties as a juror can be dismissed for cause.

about the death penalty would "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath".

In 1998, the United Nations Special Rapporteur on extrajudicial, summary or arbitrary executions expressed concern that "while the jury system was intended to represent the community as a whole, the community can hardly be represented when those who oppose the death penalty or have reservations about it seem to be systematically excluded from sitting as jurors".²⁶ The problem goes beyond this, however. There is evidence that a "death-qualified" jury is more conviction-prone than its non-death-qualified counterpart. This raises special concerns given the irrevocability of the death penalty.

In 1986, the US Supreme Court acknowledged evidence from research that the "death qualification" of juries "produces juries somewhat more 'conviction-prone' than 'non-death-qualified' juries".²⁷ The Court had been presented with 15 published studies each finding that death-qualified jurors were more conviction-prone than excludable jurors. Three Justices referred to this "overwhelming evidence that death-qualified juries are substantially more likely to convict or to convict on more serious charges than juries on which unalterable opponents of capital punishment are permitted to serve", adding that "death-qualified jurors are, for example, more likely to believe that a defendant's failure to testify is indicative of his guilt, more hostile to the insanity defence, more mistrustful of defence attorneys, and *less concerned about the danger of erroneous convictions*" (emphasis added).²⁸

The three Justices went on to note that "the true impact of death qualification on the fairness of a trial is likely even more devastating than the studies show". They noted that the *Witherspoon* ruling, while limiting the state's "ability to strike scrupled jurors for cause", had said nothing about the prosecution's use of peremptory challenges to eliminate jurors who had less than absolute opposition to imposing the death penalty. There was "no question", the Justices added, "that peremptories have indeed been used to this end".

In 1998, a review of the existing research indicated that a "favourable attitude towards the death penalty translates into a 44 per cent increase in the probability of a juror favouring conviction".²⁹ Another expert review in 1998 concluded that:

"Death-qualification standards theoretically exist to ensure that capital defendants will be tried by impartial jurors. The research, however, demonstrates that there is a deep chasm between the law's intentions and the result of death qualification in practice. Rather than ensuring impartiality, the result can more accurately be envisioned as a stacked deck against the defendant: death-qualified jurors, regardless

²⁶ Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions. Addendum: Mission to the United States of America, UN Doc. E/CN.4/198/68/Add.3, para. 147. 22 January 1998.

²⁷ *Lockhart v. McCree*, 476 U.S. 162 (1986).

²⁸ *Ibid.* Justices Marshall, Brennan and Stevens, dissenting.

²⁹ Mike Allen, Edward Mabry and Drue-Marie McKelton, *Impact of juror attitudes about the death penalty on juror evaluations of guilt and punishment: A meta-analysis*. Law and Human Behaviour, Volume 22, No. 6, 1998, pages 715 to 731.

of the standard, are more conviction-prone, less concerned with due process, and they are more inclined to believe the prosecution than are excludable jurors.³⁰

In Troy Davis' trial in 1991, the jury rejected the defence argument that this was a case of mistaken identity and that it was Sylvester Coles and not Davis who had shot Officer McPhail. Instead, the jury accepted the prosecution's theory and convicted Troy Davis on all counts. The trial moved into the sentencing phase.

At the time of Troy Davis' trial in 1991, support for the death penalty in the USA was far stronger than it is today. Death sentencing rates in the United States were approaching their zenith. Some 268 people were sentenced to death in the country in 1991. Death sentencing would peak in the next few years – reaching its apex of 317 new death sentences in 1996 – before beginning to drop off. In 2004 and 2005, for example, there were 138 and 128 new death sentences respectively – each only about half of the 1991 total. Factors contributing to this reduction in juries passing death sentences are believed to include the number of wrongful convictions in capital cases, a diminished belief in the deterrence value of the death penalty, and the availability of the sentence of life imprisonment without the possibility of parole. In other words, a greater public awareness of the possibility of irrevocable mistakes, coupled with increased confidence that public security can be ensured by locking up defendants for life rather than killing them, has led to a greater reluctance among capital jurors to pass death sentences.³¹

At the time of Troy Davis's trial, jurors in Georgia did not have the option of life imprisonment without parole as an alternative to the death penalty.³² In addition, by that time there had been "only" 150 executions carried out across the USA since executions resumed in 1977. There have been more than 900 executions since his trial. Indeed, in the late 1980s, it was being suggested that the average capital juror in the USA "may well not believe – at the time he or she votes for sentence – that a death sentence is likely to ever be carried out. Indeed, that juror may well believe that a death sentence may result merely in a longer prison term while the protracted appellate process follows its course".³³ In 1986, Georgia Supreme

³⁰ Marla Sandys, *Stacking the deck for guilt and death: The failure of death qualification to ensure impartiality*. In: *America's experiment with capital punishment*. Edited by James R. Acker, Robert M. Bohm and Charles S. Lanier. Carolina Academic Press, 1998.

³¹ A May 2006 Gallup Poll in the USA found that when given a choice between the sentencing options of life without parole and the death penalty, fewer than half – 47 per cent – of respondents chose capital punishment. This was the lowest percentage in two decades. 63 per cent of respondents said that they believed that an innocent person had been executed in the previous five years. 64 per cent disagreed with the notion that the death penalty deters murder. Polls in the 1980s and early 1990s indicated a majority believing that the death penalty deterred murder.

³² In January 2004, the Georgia parole board commuted the death sentence of Willie James Hall on the eve of his execution. During his clemency hearing, six of the jurors from the 1989 trial testified that they would have voted for life without parole if that sentence had been an option at the time.

³³ Paduano, A. and Stafford Smith, C., *Deathly errors: Juror misperceptions concerning parole in the imposition of the death penalty*. *Columbia Human Rights Law Review*, Volume 18:2, pages 211-257 (1987).

Court Justice Charles Weltner said: "Everybody believes that a person sentenced to life for murder will be walking the streets in seven years".³⁴

Sixty-five per cent of all executions carried out in the USA between 1 January 1977 and 1 January 2007 occurred in the decade from 1995 to 2004. This period was accompanied by numerous revelations about the inequities inherent in the use of capital punishment. By the time of Troy Davis's trial in 1991, for example, fewer than 40 people had been released from death rows since 1977 on the grounds of innocence. In the years since, more than 70 such cases have been uncovered, with the attendant publicity increasing as the total reached and surpassed 100.

At the sentencing phase of his trial, Troy Davis maintained his innocence and asked the jury to spare his life. His trial lawyers urged the jurors to consider any "little nagging lingering doubts" that they may have in their minds and not to pass a death sentence. Their appeals fell on deaf ears. On 30 August 1991, the jury backed the prosecution and sentenced Troy Davis to death for the murder of Officer Mark McPhail.

With the current state of public knowledge about the risk of errors in capital cases, about the repeated instances of prosecutorial misconduct and inadequate legal representation, and about the unreliability of certain witness testimony, and given the alternative of life imprisonment without parole, would a jury today – presented with the evidence from the 1991 trial – sentence Troy Davis to death?

The state's evidence is not what it was 15 years ago, however. Therefore another question must also be asked. If the jurors from the original trial were presented with the evidence as it stands today, would they still support a death sentence?

The witnesses – recanted and new testimony

[T]he only remnants of the State's case against Troy Davis is the dubious testimony of Red Coles and Steven Sanders' questionable courtroom identification of Mr Davis.

Federal appeal brief for Troy Davis, 2005

There was no physical evidence against Troy Davis and the weapon used in the crime was never found. The case against him consisted entirely of witness testimony which contained inconsistencies even at the time of the trial. In state *habeas corpus* proceedings in 1996, one of his trial lawyers recalled that there had been "a number of witnesses who either saw the actual shooting or saw the incident involving Mr Young, Larry Young. And there were a lot of inconsistencies about the colour of shorts, whether someone had a hat on or didn't have a hat on, about size, about skin colouration."³⁵

Nevertheless, the State of Georgia maintains that the conviction and death sentence against Troy Davis are reliable. For example, a legal brief it filed in federal court in 2005 in

³⁴ See note 4, *ibid*.

³⁵ *Davis v. Turpin*. Transcript of proceedings before Honorable John M. Ott, Judge, Rockdale Judicial Circuit presiding in Butts County, Georgia, 16 December 1996.

the case stated: "Red Coles identified petitioner as the perpetrator of Officer McPhail's murder, as did numerous other eyewitnesses, including Harriet Murray, Dorothy Ferrell, Daryl Collins, Antoine Williams, Steven Sanders and Larry Young."³⁶ However, in affidavits signed over the years since the trial, all but three of the witnesses whose testimony secured the conviction and death sentence against Troy Davis have recanted or contradicted their trial testimony. At oral arguments in September 2005 in the US Court of Appeals for the 11th Circuit (see below) a lawyer from the Georgia Attorney General's office dismissed the recantations, describing them as "rank hearsay."³⁷ Yet the state is relying on the testimony from those same individuals to support its bid to kill Troy Davis.

All but three of the state's non-police witnesses from the trial have recanted their testimony. One of the three who has not recanted his testimony is Sylvester Coles – the principle alternative suspect, according to the defence at the trial, and against whom there is new evidence implicating him as the gunman. Another is Steven Sanders. He was one of a number of members of the US Air Force who were in a van at the drive-in section of the Burger King restaurant at the time of the crime. In a statement given to police shortly after the shooting, Stephen Sanders said that he had seen a "black male wearing a white hat and white shirt, black shorts" shoot the officer and then run off with another person who Sanders thought was wearing a "black outfit". He said that he "wouldn't recognize them again except for their clothes". However, for the first time, two years later, at the trial, Stephen Sanders identified Troy Davis as the gunman. At the time of writing, Troy Davis' lawyers had not been able to contact Steven Sanders. Two of his Air Force colleagues, Daniel Kinsman and Robert Grizzard, who were with Sanders at the time of the crime, have signed affidavits standing by their statements given to the police that they could not identify the gunman (see below). Robert Grizzard has said that, contrary to what he mistakenly testified at the trial, he could not then and still could not recall what the gunman was wearing. For his part, Daniel Kinsman has testified that he remains convinced that the gunman was firing the gun with his left hand. Troy Davis is right-handed.

A third witness who has contradicted her trial testimony is Harriet Murray. Murray, who was also homeless at the time, was with her friend Larry Young on the night of the crime. Her various statements given to the police, at the preliminary hearing, at the trial, and in an affidavit signed on 14 October 2002 are inconsistent. According to Troy Davis's federal appeals, Harriet Murray's police statement and her testimony at the preliminary hearing appear to implicate Sylvester Coles. At the subsequent trial she identified Troy Davis as the gunman, but was not asked and did not say whether the man who followed Larry Young, harassed him and attacked him was the same person who shot the police officer. In her 2002 affidavit, she did not identify Troy Davis as the shooter. This was consistent with a statement she gave to police after the crime, in which she simply stated that she had witnessed "a black man" accost Larry Young and hit him on side of the face with his gun. She said she saw the

³⁶ *Davis v. Head*, Brief on behalf of the appellee, On appeal from the United States District Court, Southern District of Georgia, Savannah Division, In the United States Court of Appeals for the Eleventh Circuit, 14 February 2005.

³⁷ *Convicted killer seeks to avoid verdict*. The Atlanta-Journal Constitution, 8 September 2005.

same man subsequently shoot the police officer. She said that she had also seen "two other black men" nearby but they were "not right up with Larry and the other man".

Troy Davis' lawyers have argued in appeal briefs filed in federal court that the description contained in Harriet Murray's 2002 affidavit, her 1989 police statement and 1989 preliminary hearing testimony identify Sylvester Coles as the person who shot Officer McPhail in four respects. Firstly, Murray describes the gunman as the man who argued with Larry Young and who had tried "to start something with Larry". The lawyers state that at the trial, Sylvester Coles admitted to being the only person who had been "picking a fight" with Young. Secondly, in her affidavit, Harriet Murray recalls that the gunman shouted to Young, "You don't know me. I'll shoot you." The lawyers stated that at the trial, Larry Young testified that the person with whom he argued shouted something like "You don't know me, I've got a gun, I'll shoot you". They state that neither Troy Davis nor Darrell Collins (see below) had said anything to Young. Thirdly, Harriet Murray's affidavit recalls that the man who argued with Young had followed the latter up Oglethorpe Avenue.³⁸ The lawyers state that at the trial, Larry Young and Sylvester Coles had testified that it had been Coles who had followed Young up Oglethorpe Avenue. Finally, the affidavit states that the "two other black men" were walking through the bank drive-in section and were not near Larry Young when he was assaulted. The lawyers state that this was consistent with what Coles, Young and Davis testified at trial.

The witnesses in Troy Davis' case fall into a number of categories. There are "informants", who claimed that Troy Davis told them that he had shot Officer McPhail. There are "eyewitnesses", who were present at or near the scene of the crime. There are "party witnesses" who were present at the Cloverdale party and were used to link Davis to the shooting of Michael Cooper that occurred there prior to the killing of the police officer. Finally, there are a number of people who were not heard at trial, including those whose affidavit statements implicate Sylvester Coles as the gunman.

The witnesses are listed below by category and in the chronological order in which their affidavits were signed.³⁹

1. 'Informant' testimony

The Commission on Capital Punishment, set up by Governor Ryan of Illinois after he imposed a moratorium on executions in 2000, examined the question of testimony provided by in-custody informants. The Commission's April 2002 report concluded that, even with stringent safeguards on the use of such evidence, "the potential for testimony of questionable reliability remains high, and imposing the death penalty in such cases appears ill-advised". The Commission points out that "a number of the Illinois cases in which inmates were ultimately released from death row involved proffers of testimony from in-custody informants, and much of which was of dubious veracity." It recommended that prosecutors and defence

³⁸ The affidavit mistakenly says Oglethorpe Street rather than Avenue.

³⁹ Copies of all affidavits on file with Amnesty International.

lawyers involved in capital cases should receive periodic training on "the risks of false testimony by in-custody informants".

In 1996, a federal judge on the US Court of Appeals for the Ninth Circuit offered the following advice to prosecutors: "The most dangerous informer of all is the jailhouse snitch who claims another prisoner has confessed to him... The precautionary rule of thumb with a jailhouse confession presented by another inmate is that it is false until the contrary is proved beyond a reasonable doubt".⁴⁰

Kevin McQueen

Affidavit, 5 December 1996

In September and October 1989, Kevin McQueen was detained in the same jail as Troy Davis. McQueen told the police that during this time Troy Davis had confessed to shooting Officer Mark McPhail. In his 1996 affidavit, he retracted this statement, saying that he had given it because he wanted to "get even" with Davis following a confrontation he said the two of them had allegedly had.

"The truth is that Troy never confessed to me or talked to me about the shooting of the police officer. I made up the confession from information I had heard on T.V. and from other inmates about the crimes. Troy did not tell me any of this... I have now realized what I did to Troy so I have decided to tell the truth... I need to set the record straight".

Monty Holmes

Affidavit, 17 August 2001

Monty Holmes testified against Troy Davis in a preliminary pre-trial hearing, but did not testify at the trial, as he explains in an affidavit signed in August 2001:

"In August of 1989, the police came to talk to me about the officer who was killed in Savannah. They wanted to know if Troy Davis was involved in the shooting and whether he had said anything to me about being involved with the shooting... By the way the police were talking, I thought I was going to be in trouble. I told them I didn't know anything about who shot the officer, but they kept questioning me. I was real young at that time and here they were questioning me about the murder of a police officer like I was in trouble or something. I was scared... [I]t seemed like they wouldn't stop questioning me until I told them what they wanted to hear. So I did. I signed a statement saying that Troy told me that he shot the cop."

When I had to go to court that first time, I felt like I had to say what was in that statement or I'd be in trouble, so that's what I did. When it came to the trial though, I didn't want to go because I knew that the truth was that Troy never told me anything

⁴⁰ Trott, Stephen S. *Words of warning for prosecutors using criminals as witnesses*. 47 *Hastings Law Journal* (1996), page 1394.

about shooting [the police officer]. I heard the police were coming by to give me a subpoena for trial. I dodged the subpoena but they still left it with my mother. I still didn't feel like I could walk in a court and say those things so I didn't go to the trial".

Monty Holmes' pre-trial testimony was admitted at the trial without cross-examination possible due to his absence. Article 14.3(e) of the International Covenant on Civil and Political Rights provides that any criminal defendant must be allowed, "in full equality", to be able "to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him". While Monty Holmes knowingly avoided testifying at the trial, if his pre-trial testimony and his absence from the trial were influenced by coercive tactics allegedly employed by the police, the state played a role in undermining the right of Troy Davis to a fair trial.

Jeffrey Sapp

Affidavit, 9 February 2003

Jeffrey Sapp testified that Troy Davis had told him that he had shot the officer in self-defence. In his affidavit, he stated:

"I remember when the officer got shot down at Burger King... The police came and talked to me and put a lot of pressure on me to say, 'Troy said this' or 'Troy said that'. They wanted me to tell them that Troy confessed to me about killing that officer. The thing is, Troy never told me anything about it. I got tired of them harassing me, and they made it clear that the only way they would leave me alone is if I told them what they wanted to hear. I told them that Troy told me he did it, but it wasn't true. Troy never said that or anything like it. When it came time for Troy's trial, the police made it clear to me that I needed to stick to my original statement; that is, what they wanted me to say. I didn't want to have any more problems with the cops, so I testified against Troy".

2. 'Eyewitness' testimony

Dorothy Ferrell

Affidavit, 29 November 2000

At the trial, Dorothy Ferrell, who was staying at a hotel near the Burger King at the time of the crime, identified Troy Davis as the person who had shot Officer McPhail, emphasising "I'm real sure, that that is him and, you know, it's not a mistaken identity".

After the guilt/innocence phase of the trial had ended, the wife of Troy Davis' defence lawyer received a telephone call from a woman who identified herself as Dorothy Ferrell, and stated that she had lied on the witness stand. The prosecution then revealed that Dorothy Ferrell had written a letter to District Attorney Spencer Lawton requesting "a favour" and his "help" with her own difficulties with the law. She was on parole at the time. She

wrote in the letter: "Mr Lawton if you would please help me, I promise you, you won't be making a mistake" [emphasis in original].

After this revelation, Dorothy Ferrell was recalled to the witness stand, outside of the presence of the jury. She denied having made the telephone call, but admitted to having written the letter. The judge then offered the defence the opportunity to cross-examine Dorothy Ferrell in the presence of the jury, but they did not do so, instead calling for a mistrial on the grounds that the prosecution had withheld information from the defence. The trial judge denied their motion for a new trial.

In her affidavit signed in November 2000, Dorothy Ferrell recalled that she had been staying in a hotel opposite the Burger King restaurant on the night of the shooting. She said that she heard a woman scream and gunshots. In her affidavit, she recalls seeing "more than two guys running away", but states that she did not see who the gunman was. After the crime, she was asked to go down to the police station, where she was made to wait until she gave a statement. The affidavit continues:

"I was real tired because it was the middle of the night and I was pregnant too... I was scared that if I didn't do what the police wanted me to do, then they would try to lock me up again. I was on parole at the time and I had just gotten home from being locked up earlier that year.

When the police were talking to me, it was like they wanted me to say I saw the shooting and to sign a statement. I wanted to be able to leave and so I just said what they wanted me to say. I thought that would be the end of it, but it turned out not to be the end."

Some time later, a police detective visited Dorothy Ferrell and showed her a photograph of Troy Davis, and told her that other witnesses had identified him as the gunman:

"From the way the officer was talking, he gave me the impression that I should say that Troy Davis was the one who shot the officer like the other witness [sic] had... I felt like I was just following the rest of the witnesses. I also felt like I had to cooperate with the officer because of my being on parole...I told the detective that Troy Davis was the shooter, even though the truth was that I didn't see who shot the officer."

In her affidavit, Dorothy Ferrell recalls her fear that if she did not repeat her statement at the trial, she would be charged with perjury and "sent back to jail". She says that she spoke to two lawyers who said that she could be so charged and could be sentenced to up to 10 years in prison.

"I had four children at that time, and I was taking care of them myself. I couldn't go back to jail. I felt like I didn't have any choice but to get up there and testify to what I said in my earlier statements. So that's what I did."

On the question of the telephone call made to Troy Davis' defence counsel at the time of the trial, Dorothy Ferrell's affidavit adds that:

"I didn't make that call to the house of the attorney but my friend made the call after she and I had talked. I told my friend about how I had testified to things that weren't the truth and I was feeling bad about it. That's why she made the call."

Darrell "D.D." Collins

Affidavit, 11 July 2002

Darrell Collins was a friend of Troy Davis who was with him on the night of the crime. At the time, he was 16 years old. In his affidavit he said that the day after the shooting, 15 or 20 police officers came to his house, "a lot of them had their guns drawn". They took him in for questioning, and the affidavit continues:

"When I got to the barracks, the police put me in a small room and some detectives came in and started yelling at me, telling me that I knew that Troy Davis...killed that officer by the Burger King. I told them that... I didn't see Troy do nothing. They got real mad when I said this and started getting in my face. They were telling me that I was an accessory to murder and that I would pay like Troy was gonna pay if I didn't tell them what they wanted to hear. They told me that I would go to jail for a long time and I would be lucky if I ever got out, especially because a police officer got killed... I didn't want to go to jail because I didn't do nothing wrong. I was only sixteen and was so scared of going to jail. They kept saying that...[Troy] had messed with that man up at Burger King and killed that officer. I told them that it was Red and not Troy who was messing with that man, but they didn't want to hear that..."

After a couple of hours of the detectives yelling at me and threatening me, I finally broke down and told them what they wanted to hear. They would tell me things that they said had happened and I would repeat whatever they said."

Darrell Collins said that he signed a typed statement without reading it, and was then allowed to go home. According to his affidavit, he was questioned again about a week later by the police who gave him another typed statement to sign. He said he again signed the statement without reading it. The affidavit continues:

"I testified against Troy at his trial. I remember that I told the jury that Troy hit the man that Red was arguing with. That is not true. I never saw Troy do anything to the man. I said this at the trial because I was still scared that the police would throw me in jail for being an accessory to murder if I told the truth about what happened..."

It is time that I told the truth about what happened that night, and what is written here is the truth. I am not proud for lying at Troy's trial, but the police had me so messed up that I felt that's all I could do or else I would go to jail."

Larry Young

Affidavit, 11 October 2002

Larry Young was the homeless man who was accosted and then struck in the face, and whose shouts drew the attention of Officer McPhail. At the trial, he implicated Troy Davis as the

man who had assaulted him, but only identifying him by his clothing. His affidavit, signed in 2002, offers further evidence of a coercive police investigation into the murder of their fellow officer, and states that he "couldn't honestly remember what anyone looked like or what different people were wearing".

"After I was assaulted that night, I went into the bathroom at the bus station and tried to wash the blood off my face. I had a big gash on my face and there was blood everywhere. I was in a lot of pain. When I left the bathroom, some police officers grabbed me and threw me down on the hood of the police car and handcuffed me. They treated me like a criminal, like I was the one who killed the officer. Even though I was homeless at that time and drinking and drugging, I didn't have nothing to do with killing the officer. I told the officers that, but they just locked me in the back of the police car for the next hour or so. I kept yelling that I needed to be treated but they didn't pay me no mind. They then took me to the police station and interrogated me for three hours. I kept asking them to treat my head, but they wouldn't.

They kept asking me what had happened at the bus station, and I kept telling them that I didn't know. Everything happened so fast down there. I couldn't honestly remember what anyone looked like or what different people were wearing. Plus, I had been drinking that day, so I just couldn't tell who did what. The cops didn't want to hear that and kept pressing me to give them answers. They made it clear that we weren't leaving until I told them what they wanted to hear. They suggested answers and I would give them what they wanted. They put typed papers in my face and told me to sign them. I did sign them without reading them.

I never have been able to make sense of what happened that night. It's as much a blur now as it was then."

Antoine Williams

Affidavit, 12 October 2002

Antoine Williams, an employee of Burger King, had just driven into the restaurant's car park at the time the shooting occurred. At the trial, he identified Troy Davis as the person who had shot Officer McPhail. In 2002 he stated that this was false, and that he had signed a statement for the police which he could not and did not read.

"I couldn't really tell what was going on because I had the darkest shades of tint you could possibly have on my windows of my car. As soon as I heard the shot and saw the officer go down, I ducked down under the dash of my car. I was scared for my life and I didn't want to get shot myself...

Later that night, some cops asked me what had happened. I told them what is written here [in the affidavit]. They asked me to describe the shooter and what he looked like and what he was wearing. I kept telling them that I didn't know. It was dark, my windows were tinted, and I was scared. It all happened so fast. Even today, I know that I could not honestly identify with any certainty who shot the officer that night. I

*couldn't then either. After the officers talked to me, they gave me a statement and told me to sign it. I signed it. I did not read it because I cannot read.*⁴¹

At Troy Davis' trial, I identified him as the person who shot the officer. Even when I said that, I was totally unsure whether he was the person who shot the officer. I felt pressured to point at him because he was the one who was sitting in the courtroom. I have no idea what the person who shot the officer looks like."

Daniel Kinsman

Affidavit, 15 October 2002

Daniel Kinsman was with other Air Force personnel in a van in the Burger King car park at the time of the crime. He was interviewed by police. He describes himself as having been "relatively close to the scene" of the shooting, but remains confident that he would "not have been able to make any identification of the shooter due to the poor lighting and the chaotic nature of the scene". In the affidavit, Daniel Kinsman recalls "two things that stand out to this day about what I witnessed at the Burger King". First, as he told the police, "there was and is no doubt in my mind that the person who shot the officer had the gun in and was shooting with his left hand." Second, the gun had a "shiny finish... not dull in any sense of the term." Troy Davis is right-handed.

Robert Grizzard

Affidavit, 23 March 2003

In 1989, Robert Grizzard was a Sergeant in the US Air Force, and was in Savannah for a training exercise. He was in a van in the Burger King car park at the time of the shooting of Officer McPhail. In his affidavit, Robert Grizzard stated:

"I have reviewed the transcript of my testimony from the trial of Troy Davis... During my testimony I said that the person who shot the officer was wearing a light coloured shirt. The truth is that I don't recall now and I didn't recall then what the shooter was wearing, as I said in my initial statement [to the police]. My testimony to the contrary was an honest mistake on my part... As I said in my statement given on that night, I do not and did not remember what the shooter was wearing."

3. 'Party' testimony

In the hours before the shooting of Officer McPhail there was a party in the nearby neighbourhood of Cloverdale, Savannah. As Michael Cooper and a group of friends were leaving the party in their car, shots were fired, wounding Cooper. Troy Davis was convicted of aggravated assault for the shooting.

At the trial, Darrell Collins repudiated his initial statement to the police that Troy Davis had shot at the car. He testified that he had not seen Troy Davis with a gun on the night

⁴¹ His affidavit was read to him before he signed it and he stated that it was accurate.

of the shooting. Michael Cooper testified that he had not seen who shot him. In a 2002 affidavit (below), he repudiates a statement he allegedly gave to police implicating Troy Davis. Benjamin Gordon testified that he had not seen who shot Cooper, contrary to a statement he gave to police after the crime. In a 2003 affidavit (below) he states that the statement he gave to police (when he was 15) had been coerced. Craig Young testified at trial that a statement he gave to police in which he stated that Troy Davis had threatened some guests at the Cloverdale party and that Davis had told him that he had fought with another guest were false and coerced by the police.

In a 1995 affidavit, April Hester (below) stated that Sylvester Coles was at the Cloverdale party.

Joseph Blige

Affidavit, 1 December 1995

Joseph Blige, who was 15 years old at the time of the crime, went to the Cloverdale party. He was in the car that was shot at, and in which Michael Cooper was wounded. His affidavit stated that neither he nor anyone he was with at the party "had any words or any problem with Troy Davis".

"As we drove off Michael yelled something out the window and shooting started. Our car was hit at least six times. I heard more than six shots. I heard more than one weapon being fired. At least one of the weapons being fired was an automatic. It could not have been a revolver because the shots came too fast.

We drove Michael to the hospital. The police talked to us there in the hospital parking lot. A sergeant picked up a bullet from behind the panelling in the door of the car. There was [sic] different size bullet holes in the car. The sergeant saw all the bullet holes. He saw the blood in the car. I do not know what he did with the bullet he picked up. The police did not want to keep the car for evidence. We left in the car.

The next morning the police got me from Yamacraw and asked me lots of questions about the shooting of the police officer that happened at the bus station. They even tried telling me they knew I shot the officer."

Michael Cooper

Affidavit, 10 February 2002

Michael Cooper was shot and wounded on leaving the Cloverdale party. Troy Davis was convicted of the shooting at his trial for the murder of Officer McPhail which happened later the same night. In his affidavit, Michael Cooper states that:

"I have had a chance to review a statement which I supposedly gave to police officers on June 25, 1991. I remember that they asked a lot of questions and typed up a statement which they told me to sign. I did not read the statement before I signed. In fact, I have not seen it before today. In that statement, the police said that I told them that Mark [Wilds] told me that Troy shot me. I never told the police that. Mark never

said that to me. What is written in that statement is a lie. I do not know who shot me that night. I do not know it now, and I did not know it then."

Benjamin Gordon

Affidavit, 10 February 2003

Benjamin Gordon, who was 15 years old at the time of the crime, had been at the party in Cloverdale and was leaving in the car with Michael Cooper when the latter was shot and wounded. In his affidavit, he states that "the shooting came from the shadows next to the street", and that "I never saw who did the shooting". The affidavit continues:

"Later that night, police officers came and dragged me from my house in Yamacraw. There were police officers everywhere after the police officer was killed and it seemed like they were taking everyone in Yamacraw to the police barracks for questioning. I was handcuffed and they put a nightstick under my neck. I had just turned sixteen and was scared as hell. The police officers took me to the barracks and put me in a small room. Over the next couple of hours, three or so officers questioned me – at first, they called me a motherfucker and told me that I had shot the officer. They told me that I was going to the electric chair. They got in my face and yelled at me a lot. The cops then told me that I did the shooting over in Cloverdale. I just kept telling them that I didn't do anything, but they weren't hearing that. After four or five hours, they told me to sign some papers. I just wanted to get the hell out of there. I didn't read what they told me to sign and they didn't ask me to.

When it came time for trial, I was in jail, and the sheriff's office transported me to the courthouse. A person in a suit told me to say to the court what I had told the police. I believe that person was with the District Attorney's office.

No one working on Troy's case even came to speak to me before trial. If they would have, I would have talked to them and told them what is contained in this affidavit."

4. Testimony implicating Sylvester Coles

Affidavits have been signed by a number of people who knew Sylvester Coles or saw him at or after the shooting.

Joseph Washington

Affidavit, 6 December 1996

Joseph Washington, who was 16 years old at the time of the crime, was at the party in Cloverdale. In his affidavit, he has stated that:

"Very soon after the shooting at the Cloverdale party I went to Fahm street right near the Burger King. This is where I saw Sylvester Coles – I know him by the name Red – shoot the police officer. I am positive that it was Red who shot the police officer... Red was wearing a white shirt with a Batman print on the front of it.

This is the first time I have been asked about the shirt Red was wearing. I would have testified to this but I was not asked by the state or by Troy's lawyers. At the time of the shooting and the trial I was very young. I did not want to testify because I knew my testimony was going to be on television. I had no idea that the shirt Red was wearing at that time was important because no one ever asked me.

I was very nervous when I testified... I got confused by [the] questions."

Tonya Johnson

Affidavit, 6 December 1996

Tonya Johnson was living not far from the Burger King where Officer McPhail was shot. In her affidavit, she stated that she heard the shots and saw:

"Sylvester Coles – we all called him Red – and a guy named Terry coming down the street from the Burger King. When I saw Red and Terry they were both in a panic and very nervous. Red and Terry each had a gun with them at that time. Red asked me to hold the guns for him, which I refused to do. Red then took both guns next door to an empty house and put them inside the screen door and shut the door... I have known Red all of my life. He used to live next door to me... For most of my life I have been scared to death of him. In fact, he threatened me after this happened. He told me that he wanted to make sure that I did not tell the police about the guns he hid in the screen door that morning. This is why I did not testify about the guns at Troy's trial because I was afraid of what Red would do to me if I did. I have not told anyone about this until now because I was still scared... But I have decided that I must tell the truth."

Anthony Hargrove

Affidavit, 8 August 2001

"I know a guy named Red, from Savannah. His real name is Sylvester Coles. I've known Red for years and we used to hang out together. Red once told me that he shot a police officer and that a guy named Davis took the fall for it. He told me this about a year or so after the officer was killed... We were smoking weed and talking. Red told me that he'd had a close one once. I asked him what he meant. Red told me he'd killed someone and another guy took the fall for it. I asked Red who he killed. Red said he killed a policeman and a guy named Troy took the fall for it...I wasn't real surprised to hear that Red killed an officer... Red was known to always carry a gun and he would use it."

Gary Hargrove

Affidavit, 17 August 2001

Gary Hargrove did not testify at the trial. His affidavit stated that he was at the Burger King at the time of the crime. In the affidavit, he recalled:

"The guy who was running away looked like Troy Davis but I can't say for sure that it was him because he had his back to me as he was running away. They guy who was still standing there after the first shot was fired and when I heard the second shot was a guy whose nickname is Red... I am sure that Red was facing in the officer's direction when I heard the shooting. The guy who was running away had his back to where the officer was as the shots were going off.

I was never talked to by the police or any attorneys or investigators representing Troy Davis before his trial. I didn't go up to talk to the police that night because I was on parole at the time and was out past my curfew so I didn't want my parole officer to find out about that."

Shirley Riley

Affidavit, 18 August 2001

Shirley Riley was a friend of Sylvester Coles.

"People on the streets were talking about Sylvester Coles being involved with killing the police officer so one day I asked him if he was involved... Sylvester told me he did shoot the officer..."

Darold Taylor

Affidavit, 20 August 2001

"In the mid-90s, I met a guy named Red in Yamacraw Village...Red and I ended up becoming drinking kind of friends over the years...I had heard from a lot of people in Yamacraw Village about an officer getting shot and killed at a Burger King back in 1989. Everybody who talked about that shooting in the Yamacraw area said that Red did the shooting and Red killed the officer. I remember reading in the paper once about how a guy named Troy Davis got sentenced to the electric chair... One day when I was in the parking lot of Yamacraw drinking beers with Red. I told him about how I'd heard that he was the one who killed the officer. Red told me to stay out of his business. I asked him again if he killed the officer and Red admitted to me that he was the one who killed the officer, but then Red told me again to stay out of his business."

April Hester Hutchinson

Affidavit, 9 July 2002

April Hester Hutchinson (formerly April Hester), who was 18 years old at the time, and her cousins had given the party in Cloverdale which preceded the shooting of Officer McPhail and at which Michael Cooper had been shot. She had previously signed an affidavit on 30 November 1995. In this earlier affidavit, she recalled that Sylvester "Red" Coles had been at the party. After the shooting at the party the police had arrived. While they were there, the news came through on their radios that an officer had been shot. The police left. April and

her cousins drove to Yamacraw "to find out what happened": "I saw Red walking fast up the street at Yamacraw. He acted very nervous and upset."

In her subsequent July 2002 affidavit, she stated that her earlier affidavit had been correct but had not contained everything.

"As I walked back to my house, I saw my cousin Tonya [Johnson] talking to Red. I walked up to them. It was clear to me that Red was real nervous and was sweating profusely. He was fidgeting with his hands and could not keep still... Red turned to me and asked me if I would walk with him up to the Burger King so 'they won't think that I had nothing to do with it'. That's exactly what he said..."

I told [the police] that I saw Red talking to my cousin Tonya and that Red was real nervous. I did not tell them about what Red had said to me because I was scared he would hurt me. I was thinking that if he did that to a police officer, what would he do to me? I didn't want to die like that officer, so I kept my mouth shut."

Anita Saddler

Affidavit, 10 July 2002

Anita Saddler was with Tonya Johnson (see above) on the night of the shooting.

"When I saw Red and Terry, they were jumpy and couldn't stand still. Their eyes were shifting around and they were looking everywhere. They walked up to us and Red asked us to go up to Burger King and see what happened. Like I said, they were real nervous and fidgety. Red had a gun which was stuck into his shorts. I saw the outline of his gun through his white shirt. I had seen him with a gun many times before."....

Peggie Grant

Affidavit, 11 July 2002

Peggie Grant is the mother of April Hester Hutchinson. She says that on the night of the shooting, she saw her daughter April with Red Coles, who was wearing a white T-shirt. She had shouted across to her daughter because "I knew Red from the neighbourhood and knew him to act crazy and violent, especially when he was drinking. I didn't want April hanging out with him". The affidavit recalls:

"A few hours later, April called me on the phone. She said she was back in Cloverdale. April didn't sound right – she was nervous and scared. I could tell that by the sound of her voice. April told me she had been down at the old police barracks and that the police had questioned her about a shooting in Cloverdale and the police officer's shooting. She told me that she had had a conversation with Red where he asked her to walk up with him to where the officer was shot so that the police would think that he was with her and not think he did anything. April also told me that after I had yelled at her, Red had given her a mean look and told her not to say anything to

anyone about what he had said. She said she didn't know what to do and was scared about what Red might do to her if she told anybody."

Caught in a trap: Federal appeals denied

The enactment of the 1996 Anti-terrorism and Effective Death Penalty Act and the lack of funding of PCDOs have further jeopardized the implementation of the right to a fair trial as provided for in the ICCPR and other international instruments.

UN Special Rapporteur, 1998⁴²

Once a person is convicted, he or she bears the burden of showing that the conviction or sentence was tainted by error that requires a judicial remedy. It is an uphill task, and one that faces many legal and technical hurdles.

In 1993, the Georgia Supreme Court affirmed Troy Davis' conviction and death sentence. In 1994, Troy Davis filed a *habeas corpus* petition in state court, claiming that he was the victim of miscarriage of justice and that the wrong man had been convicted of the murder. The appeal claimed that witnesses had been placed under improper pressure by police and law enforcement personnel. After an evidentiary hearing, the state *habeas* court denied the petition in September 1997. The court stated that the claim of coercive or suggestive law enforcement techniques had been procedurally defaulted, that is, that it could and should have been raised earlier. The court acknowledged that the failure of the defence "to discover, admit or effectively argue" evidence undermining the credibility of witness testimony at the trial "would appear to place this case in the category of a case of 'mistaken identity'". However it ruled that the jury decision should stand as such evidence had been presented at the trial:

"[M]any pieces of evidence supporting a finding that Coles was the shooter or highlighting inconsistencies in the testimony of witnesses who identified Davis as the shooter were indeed presented to the jury during Davis' trial. The jury, in its rightful role as finder of fact during the trial, was responsible for evaluating the credibility of the witnesses and determining whether the state proved beyond a reasonable doubt that Davis shot and killed Officer McPhail. This court...cannot supplant the role of the jury and find based on its own review of the record that the jury should have concluded that the state did not carry its burden at Davis' trial. The core purpose of the writ of habeas corpus would not be served by such a presumptuous usurpation of the jury's deliberative process. This court is limited to evaluating whether Davis' rights were properly protected in the context of his jury trial."

The state court's denial of *habeas corpus* relief for Troy Davis was affirmed in November 2000 by the Georgia Supreme Court. The case then moved into the federal courts. Placed before them would be evidence that much of the witness testimony from the trial had been recanted, as well as additional testimony tending to support Troy Davis' claim that he

⁴² Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions. Addendum: Mission to the United States of America, UN Doc. E/CN.4/198/68/Add.3, para. 147. 22 January 1998.

did not shoot Officer Mark McPhail. His federal *habeas corpus* petition was brought under a law passed in 1996, the Anti-Terrorism and Effective Death Penalty Act (AEDPA).

President Bill Clinton signed the AEDPA into law on 24 April 1996. "I have long sought to streamline federal appeals for convicted criminals sentenced to the death penalty", he said at the signing; "For too long, and in too many cases, endless death row appeals have stood in the way of justice being served."⁴³ He added that "from now on, criminals sentenced to death for their vicious crimes will no longer be able to use endless appeals to delay their sentences."⁴⁴

The Act placed new, unprecedented restrictions on prisoners raising claims of constitutional violations. It imposed severe time limits on the raising of constitutional claims, restricted the federal courts' ability to review state court decisions, placed limits on federal courts granting and conducting evidentiary hearings, and prohibited "successive" appeals except in very narrow circumstances. As one leading US lawyer has said:

"The provisions of the Anti-terrorism and Effective Death Penalty Act of 1996 restricting the power of federal courts to correct constitutional error in criminal cases represent a decision that results are more important than process, that finality is more important than fairness, and that proceeding with executions is more important than determining whether convictions and sentences were obtained fairly and reliably."⁴⁵

Under the AEDPA, once Troy Davis' conviction and death sentence had been upheld by the Georgia courts, the possibility of relief in the federal courts was curtailed. Federal relief was only permissible if the decision of a state court had "resulted in a decision that was contrary to, or involved in an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States". This deferential "reasonableness" standard represented "a remarkable departure from the traditional role of federal courts...to declare what the law is".⁴⁶

Even without the AEDPA, the Supreme Court had already curtailed the ability of death row inmates to obtain *habeas corpus* relief in the federal courts. Fairness was being jeopardized in the name of finality. On the question of innocence, the US Supreme Court set a high hurdle for a condemned inmate seeking to have his or her conviction and death sentence overturned on such grounds. In *Herrera v. Collins* in 1993, the Court said that even if, for the sake of argument, "a truly persuasive post-trial demonstration of 'actual innocence' would render a defendant's execution unconstitutional and warrant federal habeas relief", the

⁴³ President William J. Clinton, Statement on signing the Anti-terrorism and Effective Death Penalty Act of 1996. 24 April 1996.

⁴⁴ President William J. Clinton, Remarks on signing the Anti-terrorism and Effective Death Penalty Act of 1996, 24 April 1996.

⁴⁵ *Is fairness irrelevant? The evisceration of federal habeas corpus review and limits on the ability of state courts to protect fundamental rights.* By Stephen B. Bright, John Randolph Tucker Lecture, Published in Volume 54 of the Washington and Lee Law Review, page 1 (Winter 1997).

⁴⁶ Steiker, C. and Steiker, J. *The effect of capital punishment on American criminal law and policy.* Judicature, Volume 89, Number 5, page 251, March-April 2006.

threshold to trigger such relief “would necessarily be extraordinarily high because of the very disruptive effect that entertaining such claims would have on the need for finality in capital cases and the enormous burden that having to retry cases based on often stale evidence would place on the States”.⁴⁷

Under the 1995 Supreme Court ruling *Schlup v. Delo*, a condemned prisoner can obtain judicial review of otherwise barred claims if he or she produces reliable new evidence of actual innocence not available at trial, which demonstrates that it is more likely than not that with this new evidence no reasonable juror would have voted to convict.⁴⁸ This opens the *Schlup* “gateway”. The Supreme Court emphasised that the *Schlup* rule would apply only to the “extremely rare” cases in which there is a “substantial claim that constitutional error has caused the conviction of an innocent person”, adding that the “quintessential miscarriage of justice is the execution of an innocent person.”

In support of the claim that the police had improperly pressured witnesses into implicating Troy Davis as the gunman, the affidavits of Antoine Williams, Larry Young, Darrell Collins and Monty Holmes (see above) were introduced for the first time before federal District Court Judge John F. Nangle. The State of Georgia argued that this claim had been procedurally defaulted and could therefore not be considered by the federal judge. Judge Nangle agreed, and continued that because he was satisfied that no constitutional error had occurred, “the ‘actual innocence’ gateway [under *Schlup*] need not be accessed” to overcome the procedural default:

“The Court finds that because the submitted affidavits are insufficient to raise doubts as to the constitutionality of the result at trial, there is no danger of a miscarriage of justice in declining to consider the claim.”⁴⁹

In his ruling in May 2004, Judge Nangle rejected other claims concerning such issues as ineffective assistance of counsel, unfair jury selection, prosecutorial misconduct, and the use of inflammatory evidence at the trial. His ruling meant that Troy Davis would not receive a hearing on the new evidence contained in the affidavits. Under the AEDPA, a federal evidentiary hearing cannot be held on claims that the prisoner could have developed in state court.⁵⁰

⁴⁷ *Herrera v. Collins*, 506 U.S. 390 (1993).

⁴⁸ *Schlup v Delo*, 513 US 298, 23 January 1995.

⁴⁹ *Davis v. Head*, Order. US District Court, Southern District of Georgia, Savannah Division, 13 May 2004.

⁵⁰ 28 U.S.C. § 2254 (e)(2): “If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that - (A) the claim relies on - (i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or (ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and (B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense”.”

In 1995, during the time Troy Davis was in state *habeas corpus* proceedings, the US Congress voted to eliminate federal funding for the post-conviction defender organizations (PCDOs) which it had established in 1988 to provide legal assistance to indigent death row prisoners. One such PCDO, the Georgia Resource Center, which was representing Troy Davis, had its budget cut by some two thirds and the number of lawyers on its staff cut from eight to two. Their case load was some 80 death row cases.⁵¹ A lawyer working on Troy Davis' case stated in an affidavit that "I desperately tried to represent Mr Davis during this period, but the lack of adequate resources and the numerous intervening crises made that impossible... We were simply trying to avert total disaster rather than provide any kind of active or effective representation".⁵² In his report on the USA in 1998, the UN Special Rapporteur on extrajudicial, summary or arbitrary executions expressed concern that "the absence of PCDOs creates a grave difficulty for defendants at the post-conviction level".⁵³

After Judge Nangle denied Troy Davis' appeal, the case moved to the next level of federal review, the US Court of Appeals for the 11th Circuit. At oral arguments in front of a three-judge panel of the 11th Circuit on 7 September 2005, Judge Rosemary Barkett expressed concern that Troy Davis had not been granted a federal hearing to present the new evidence. She asked, "If these people say, 'I was coerced by the police,' how could [Judge Nangle] reject that without a hearing?"⁵⁴ Judge Barkett reportedly suggested that without the testimony of the various trial witnesses who had now recanted, the state appeared to have no case.

However, on 26 September 2006, the 11th Circuit panel upheld Judge Nangle's ruling, finding that "we cannot say that the district court erred in concluding that Davis has not borne his burden to establish a viable claim that his trial was constitutionally unfair". The *Schlup* gateway remained firmly closed to Troy Davis, and AEDPA-backed finality was a step closer. In December 2006, Troy Davis' appeal for a rehearing in front of the full 11th Circuit court was rejected. His last hope for judicial intervention in the regular appeals process at that point was the US Supreme Court, which takes only a tiny percentage of the cases brought before it.

Clemency: recognizing the possibility of human error

History shows that executive clemency is the traditional 'fail-safe' remedy for claims of innocence based on new evidence, discovered too late in the day to file a new trial motion
US Supreme Court, 1993⁵⁵

On 15 April 2006, President Arroyo of the Philippines ordered the commutation of all death sentences in her country – more than 1,000 – in what is believed to be the largest such act of clemency in modern times. Announcing her move, she said: "I wish to announce that we are

⁵¹ *Witnesses recant; law stymies death row appeal*. The Atlanta-Journal Constitution, 21 September 2003.

⁵² *Ibid.*

⁵³ UN Doc. E/CN.4/198/68/Add.3, para. 99.

⁵⁴ *Convicted killer seeks to avoid verdict*. The Atlanta-Journal Constitution, 8 September 2005.

⁵⁵ *Herrera v. Collins*, 506 U.S. 390 (1993).

changing our policy on those who have been imposed the death penalty. We are reducing their penalty to life imprisonment. Anyone who falls and makes mistakes has a chance to stand up and correct the wrong he has committed.”

President Arroyo’s statement can be read two ways. Firstly, removing the death penalty reinstates the possibility of rehabilitation and reform on the part of an offender.⁵⁶ But removing the threat of execution also opens up the possibility that any mistakes committed by the state in its prosecution of the individual can be remedied while the prisoner is still alive. Thus clemency is justified whether Troy Davis is guilty or innocent of the murder of Officer Mark Allen McPhail.

The power of executive clemency exists as a failsafe against error and to allow consideration of evidence that the courts were unable or unwilling to reach. Clemency has been granted in a number of death penalty cases over the years in the USA, and has become more frequent as evidence of problems with the capital justice system has increased. In several cases, clemency was granted on the grounds of possible innocence.⁵⁷ In some cases, executive clemency has proven to be “the decisive step that averts a terrible miscarriage of justice”.⁵⁸ In 1994, for example, the governor of Virginia commuted Earl Washington’s death sentence to life imprisonment. Six years later, DNA evidence proved his innocence and Washington was pardoned.

Support for clemency can come from many quarters, and can involve late changes in mind on the parts of officials previously involved in the case. One such case recently emerged in California. Appointed as a county-level judge by the then Governor of California

⁵⁶ “The death sentence must, in some measure, manifest a philosophy of indefensible despair in its execution, accepting as it must do, that the offender it seeks to punish is so beyond the pale of humanity as to permit of no rehabilitation, no reform, no repentance, no inherent spectre of hope or spirituality; nor the slightest possibility that he might one day, successfully and deservedly be able to pursue and to enjoy the great rights of dignity and security and the fundamental freedoms protected in... the Constitution, the exercise of which is possible only if the ‘right to life’ is not destroyed. The finality of the death penalty allows for none of these redeeming possibilities. It annihilates the potential for their emergence.” *The State v. T. Makwanyane and M. Mchunu*, Constitutional Court of the Republic of South Africa, 6 June 1995, Mahomed, J., concurring. In any event, an execution is incompatible with the requirement to respect human dignity that lies at the heart of international human rights law and which the US Supreme Court says underlies the US constitutional ban on “cruel and unusual” punishments. “The basic concept underlying the Eighth Amendment is nothing less than the dignity of man.” *Trop v. Dulles* (1958).

⁵⁷ E.g. Learie Leo Alford (sentence commuted 1979, Florida); Jesse Rutledge (1983, Florida); Doris Ann Foster (1987, Maryland); Ronald Monroe (1989, Louisiana); Joseph Giarratano (1991, Virginia); Herbert Bassette (1992, Virginia); Anson Avery Maynard (1992, North Carolina); Earl Washington (1994, Virginia); Joseph Payne (1996, Virginia); Donald Paradis (1996, Indiana); David Chandler (2001, Federal); Phillip Dewitt Smith (2001, Oklahoma); Aaron Patterson, Madison Hobley, Leroy Orange and Stanley Howard (2003, Illinois – all four pardoned by the governor). For further information, see <http://www.deathpenaltyinfo.org/article.php?did=126&scid=13>.

⁵⁸ Radelet, M.L. and Zsembik, B.A., *Executive clemency in post-Furman capital cases*. University of Richmond Law Review, Volume 27, pages 289 to 314 (1993).

Ronald Reagan in 1974, Judge Charles McGrath presided over the 1983 trial of Michael Morales at which the defendant was sentenced to death. Twenty-three years later, in January 2006, Judge McGrath wrote to state Governor Arnold Schwarzenegger to appeal for clemency for Morales. A key witness at the trial – a jailhouse informant – had testified that Morales had confessed the crime to him in jail. At the time of the trial, Judge McGrath had found the informant's testimony to be credible, but in his letter in 2006 to the Governor, the judge wrote that "new information has emerged to show the evidence upon which I relied in sentencing Mr Morales to death – [the jailhouse informant's] testimony – is false". Judge McGrath expressed his concern that Michael Morales had not received an evidentiary hearing in federal court.⁵⁹

Numerous witnesses, including a jailhouse informant, whose testimony was used against Troy Davis at his trial, have since recanted or contradicted their trial testimony. Troy Davis has never had an evidentiary hearing in federal court on the issue. Justice surely demands that clemency be granted.

Indeed, the risk of error surely demands a rethink on the death penalty. In January 2007, Andrew Gossett, who was serving a 50-year prison sentence in Texas for sexual assault, was freed after DNA evidence confirmed his innocence. The case prompted the *Dallas Morning News* to speak out against executions:

"That juries and judges are fallible is not a revelation. Human error is an inherent part of the system. Thank goodness that in the case of Mr. Gossett a terrible wrong has been corrected... For the condemned, evidence of an error could come too late. Lethal injections don't allow those second chances...Even the remote possibility of a mistake is unacceptable in death penalty cases.

Lawmakers have dismissed our calls for a death penalty moratorium. But the frailties in the justice system that have been exposed suggest that it's time to revisit this issue. When Mr. Gossett was set free last week, newly elected District Attorney Craig Watkins was in the courtroom. He thought it was important to tell Mr. Gossett, 'We're sorry.'

*State officials won't have that opportunity if capital punishment is meted out incorrectly."*⁶⁰

⁵⁹ Letter from Charles R. McGrath, Judge, Chambers of the Superior Court, Ventura, California, dated 25 January 2006, available at <http://media.newsreview.com/media/sacto/2006-04-06/Judge%20McGrath%20Letter1.pdf>. In the event, Michael Morales execution was stayed, and in December 2006, his case led to a suspension of executions in California due to a District Court's finding of serious problems with the state's lethal injection protocols. See, *USA: New Year's resolution: End a cruel and outdated punishment*, AI Index: AMR 51/205/2006, 21 December 2006, <http://web.amnesty.org/library/Index/ENGAMR512052006>.

⁶⁰ *Reasonable Doubt: Is death row immune to DNA exonerations?* Dallas Morning News, 10 January 2007.

Where is the Justice for me? A plea from Troy Davis

Where is the Justice for me? In 1989 I surrendered myself to the police for crimes I knew I was innocent of in an effort to seek justice through the court system in Savannah, Georgia USA. But like so many death penalty cases, that was not my fate and I have been denied justice. During my imprisonment I have lost more than my freedom, I lost my father and my family has suffered terribly, many times being treated as less than human and even as criminals. In the past I have had lawyers who refused my input, and would not represent me in the manner that I wanted to be represented. I have had witnesses against me threatened into making false statements to seal my death sentence and witnesses who wanted to tell the truth were vilified in court.



Troy Davis and his mother, Virginia Davis
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For the entire two years I was in jail awaiting trial I wore a handmade cross around my neck, it gave me peace and when a news reporter made a statement in the local news, "Cop-killer wears cross to court," the cross was immediately taken as if I was unworthy to believe in God or him in me. The only time my family was allowed to enter the courtroom on my behalf was during the sentencing phase where my mother and sister had to beg for my life and the prosecutor simply said, "I was only fit for killing." Where is the Justice for me, when the courts have refused to allow me relief when multiple witnesses have recanted their testimonies that they lied against me?

Because of the Anti-Terrorism Bill, the blatant racism and bias in the U.S. Court System, I remain

on death row in spite of a compelling case of my innocence. Finally I have a private law firm trying to help save my life in the court system, but it is like no one wants to admit the system made another grave mistake. Am I to be made an example of to save face? Does anyone care about my family who has been victimized by this death sentence for over 16 years? Does anyone care that my family has the fate of knowing the time and manner by which I may be killed by the state of Georgia?

I truly understand a life has been lost and I have prayed for that family just as I pray for mine, but I am Innocent and all I ask for is a True Day in a Just Court. If I am so guilty why do the courts deny me that? The truth is that they have no real case; the truth is I am Innocent. Where is the Justice for me?

Troy Anthony Davis, January 2007

The Invisible Victims, by Martina Correia

My name is Martina Correia and I am on Death Row in Georgia. No I have not murdered anybody, never even been on trial; I am on death row because that is where my brother lives. Death Row has been for me and my family a living nightmare. As the eldest of five children I have always been responsible for protecting my siblings, and I keep wondering what I could have done to go back in time or change past history.

My father died of pure depression and grief, my mother prays and prays and prays and cries and cries and cries. Late night phone calls terrify us, prison visits elate us, and death is always upon us. They say we are on the side of the murderer; we have been treated at times like criminals.

We temporarily lost our place of worship, we lost friends, we lost jobs but we never lost faith or the unconditional love of Troy, my brother. We became the invisible victims, the tormented, the shamed; we became the enemy of the state. I once believed in Justice, I don't anymore. My life is a constant battle, I fight to save my brother, I fight to save myself from cancer, I fight to



Troy Davis (bottom left) and members of his family. Back row, left to right: Virginia Davis (mother), Ebony Davis (sister), Martina Correia (sister), Kimberly Davis (sister). Bottom right: Antone' De'Jaun Correia (nephew).
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protect and educate my son and I fight to see my mother smile. It is a terrible thing to know someone you love will be killed, the day, the hour, with years of constant torment and fear. On death row you see the other families awaiting execution and you don't know what to say: you wonder if their pain and suffering will be over or just added to.

My greatest fear is that in the judicial system no one really cares and my brother will be killed by the State of Georgia. I look at my son who is old enough to ask the question, "Why do they want to kill my Uncle Troy?" I don't have a good answer. I feel at times, it would be better to die of cancer than to live and see my brother executed for a crime he did not commit. I live day to day thinking of death and dying, I think to myself, "What can I

do to save Troy?" or even, "Will I be alive to see him walk free?"

My name is Martina and I am on Death Row.

Martina Correia, January 2007

Please appeal for clemency for Troy Davis

In Georgia, the clemency authority is the State Board of Pardons and Paroles. In its annual report of 2005, the Board describes its task thus:

“The Parole Board has the sole constitutional authority to reduce capital punishment cases to a sentence of life or life without parole. Once a death row inmate exhausts his judicial appeals an execution date is set. At that time, the condemned inmate can request an appointment before the Board to ask for executive clemency. Prior to the appointment, the Board staff compiles an exhaustive set of reports about the circumstances of the offense, criminal history and life of the condemned inmate. Each Board member reviews the file and the appointment is scheduled to allow those in favour of clemency to appear before the entire Board. Usually the appointment is attended by the inmate’s attorneys, family or friends. The condemned inmate does not attend the appointment. At the conclusion of the appointment, Board members each cast a confidential vote on the request to commute the death sentence. A majority of three affirmative votes is required to commute a death sentence.”⁶¹

Since executions resumed in the USA in January 1977, 39 prisoners have been put to death in Georgia (by 1 February 2007). In the same period, six prisoners have been granted clemency.⁶²

Recommendations for appeals

Using the information in this report, please write to the Georgia parole board, in your own words, to seek clemency for Troy Davis. If possible, write a separate appeal to each of the individual Board members. If you can only write one appeal, please send it to the Chairperson. Please write in English. We recommend that your appeals be no more than two pages in length. The following is a guide only:

- explaining that you are not seeking to condone the murder of Officer Mark Allen McPhail, or to downplay the seriousness of the crime or the suffering caused;
- explaining that you are writing to seek clemency for Troy Anthony Davis, whose judicial appeals are almost exhausted;

⁶¹ Page 19, report available at <http://www.pap.state.ga.us/05AnnualReport.PDF>.

⁶² Charles Hill (1977), Freddie Davis (1988), Harold Williams (1991), on the grounds that the death sentence was disproportional to the sentence given to his equally or more culpable co-defendant; William Moore (1990), reportedly on the grounds of his good conduct in prison, his remorse, his religious conversion, and the pleas for clemency from the victim’s family; Alexander Williams (2002), on the grounds of his mental illness; Willie James Hall (2004) – six jurors had testified that they would have chosen life without parole had it been an option at the trial. Hall’s good conduct in prison and no criminal record prior to the murder was also reported to be a factor in the board’s decision.

- noting that almost all of the witnesses whose testimony was used against Troy Davis at his trial have since recanted or contradicted their trial testimony;
- noting the large number of wrongful convictions in capital cases that have been uncovered in the USA since 1976;
- noting that unreliability of witness testimony has been one of the contributing factors in numerous of these cases;
- expressing concern that Troy Davis has not had a hearing in federal court on the reliability of the witness testimony used against him at trial;
- noting that the power of clemency in capital cases exists as a failsafe against irreversible error that the courts have been unable or unwilling to remedy;
- noting that numerous death row inmates whose judicial appeals have been exhausted have received clemency since 1977 in the USA on the grounds of doubts about their guilt (see footnote 57);
- calling on the Board to commute the death sentence of Troy Davis.

Board members

- Garland R. Hunt, Esq. (Chairperson)
- L. Gale Buckner (Vice Chair)
- Garfield Hammonds, Jr.
- Robert E. Keller
- Milton E. Nix, Jr.

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Email: Webmaster@pap.state.ga.us

Salutation, as appropriate: Dear Chairperson Hunt / Vice Chair Buckner / Board Member Hammonds, Keller, Nix

Please organize as many appeals as you can. If you can organize a petition, collecting signatures supporting clemency for Troy Davis to send to the Board, please do so. Please check with the AI Section in your country or the International Secretariat, if sending appeals after 30 June 2007.