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September 16, 2011

Georgia State Board of Pardons & Paroles  
2 Martin Luther King, Jr. Drive, SE  
Suite 458, Balcony Level, East Tower  
Atlanta, GA 30334

Dear Chairman Donald and Members of the Georgia Board of Pardons and Paroles:

On behalf of the Innocence Project, we write to urge you in the strongest possible terms to commute the death sentence of Troy Anthony Davis, given the significant, unresolved doubts that remain about Mr. Davis' guilt. In the alternative, we urge you to grant Mr. Davis a stay of execution so that the Board can consider all of the information now before it, including a landmark national field study of real eyewitnesses in criminal cases that will be released on September 19, 2011, the same day as Mr. Davis' clemency hearing, which will resolve a longstanding debate over which lineup method – sequential or simultaneous – is more accurate. (Mr. Davis' photograph was included in a simultaneous photographic lineup.)

The Innocence Project is an organization dedicated to providing pro bono legal and related investigative services to indigent prisoners whose actual innocence may be established through post-conviction DNA evidence. The Innocence Project also seeks to prevent future wrongful convictions by researching their causes and pursuing legislative and administrative reform initiatives designed to enhance the truth-seeking functions of the criminal justice system – which also enable the more accurate identification of those who actually committed the crimes. Indeed, in 45 percent of the wrongful convictions proven by post-conviction DNA testing, our work also helped identify the real perpetrators of those crimes. Because wrongful convictions destroy lives and allow the actual perpetrators to remain free, the Innocence Project's objectives both serve as an important check on the power of the state over criminal defendants and help ensure a safer and more just society. As perhaps the nation's leading authority on wrongful convictions, the Innocence Project and we as its co-founders are regularly consulted by officials at the state, local and federal levels.

The uncontroverted evidence at Mr. Davis' trial demonstrated that the murder of Officer Mark MacPhail occurred in a poorly lit parking lot late in the night and was witnessed by

people under the extreme stress of being in the line of fire. The police investigation into this crime was riddled with suggestive identification procedures that would have contaminated the already fragile memories of the eyewitnesses to the crime. At trial, the State largely relied on the testimony of nine “eyewitnesses” and a now-discredited ballistics report tying Mr. Davis to an earlier shooting to secure his conviction.

While the District Court found that Mr. Davis did not meet the “extraordinarily high” standard it required to overturn Mr. Davis’ conviction, it did acknowledge that the State’s case was “by no means ironclad.” This Board is not bound by the District Court’s finding or the standard it applied, and can instead consider the unresolved – and unresolvable – residual doubt in this case. We submit that the existence of such doubt would render the imposition of the death penalty unconscionable. As the Supreme Court has made clear, clemency is “deeply rooted in our Anglo-American tradition of law, and is the historic remedy for preventing miscarriages of justice where judicial process has been exhausted.” *Herrera v. Collins*, 506 U.S. 390, 411-12 (1993). Clemency is a necessary “fail safe” mechanism for the review of singular miscarriages of justice. As has long been noted, the judicial process can be thwarted by inflexible rules of procedure and standards in reviewing a petitioner’s claim of innocence that are all but unreachable. Indeed, whether a federal judge may even release a defendant on a claim of factual innocence remains in debate in the nation’s federal courts.<sup>1</sup> Clemency is different, particularly in capital cases, where there is a longstanding American tradition of conferring relief in clemency proceedings when a defendant’s guilt is not “ironclad.” See W. H. Humbert, *THE PARDONING POWER OF THE PRESIDENT* 124, tbl. VI (1941). (Between 1885 and 1931, three of the “[p]rincipal reasons” for granting clemency were “[g]rave doubt as to justice of conviction,” “[d]oubt as to guilt” and “[d]isclosure of new evidence.” *Id.* at 124 tbl. V. Less frequently assigned reasons included “[i]nsufficient evidence,” “[d]ying confession of real murderer” and “[m]istaken identity.”).

A decision by the Board to commute Mr. Davis’ death sentence would satisfy the public’s justified concern that the ultimate sanction be applied as a fitting punishment only in appropriate circumstances, as “[i]t is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion.” *Gardner v. Florida*, 430 U.S. 349, 358 (1977). It would also ensure that the State of Georgia not execute a potentially innocent man, an outcome that would be not only unconstitutional, but also immoral.

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<sup>1</sup> Confusion and inconsistency have developed among the circuits as to whether courts can recognize a claim of actual innocence. Three circuits have interpreted *Herrera* to reject completely the cognizability of an actual-innocence claim. See *United States v. Quinones*, 313 F.3d 49, 67 (2d Cir. 2002); *Moore v. Quarterman*, 534 F.3d 454, 465 n.19 (5th Cir. 2008); *Rouse v. Lee*, 339 F.3d 238, 255 (4th Cir. 2003). Conversely, the Ninth Circuit has explicitly assumed that the Constitution recognizes freestanding innocence claims and articulated the applicable standard. See *Carriger v. Stewart*, 132 F.3d 463, 476 (9th Cir. 1997). The remaining circuits recognize the possibility that such a claim may exist in the appropriate circumstances, but are hesitant to state under what standard such a finding would be warranted. See *United States v. Sampson*, 486 F.3d 13, 27-28 (1st Cir. 2007); *Albrecht v. Horn*, 485 F.3d 103, 121-22 (3d Cir. 2007); *House v. Bell*, 311 F.3d 767, 768 (6th Cir. 2002); *Cornell v. Nix*, 119 F.3d 1329, 1334 (8th Cir. 1997); *Felker v. Turpin*, 83 F.3d 1303, 1312-13 (11th Cir. 1996).

***Eyewitness Misidentification Is The Most Common Cause of Wrongful Convictions.***

To date, 273 individuals in the United States have been exonerated by DNA evidence, including 17 who served time on death row. Eight of the non-death row exonerees were convicted in the state of Georgia – *and in each of those eight cases, eyewitness misidentification played a central role in the underlying conviction.* Georgia’s experience reflects what we know from analyzing all of our exonerations: eyewitness misidentification is the most common cause of wrongful convictions, accounting for a full 75 percent of the 273 exonerations secured by the Innocence Project’s work.<sup>2</sup> In 38 percent of eyewitness misidentification cases, multiple eyewitnesses misidentified the same innocent person.<sup>3</sup> The following are examples from our DNA exonerations where multiple eyewitnesses misidentified the same innocent suspect:

- Luis Diaz, a Florida cook who was married with three children at the time of his arrest, was convicted of a string of sexual assaults and served 25 years in Florida prisons. He had been misidentified by eight witnesses.
- Kirk Bloodsworth, a former United States Marine, was convicted of having raped and murdered a little girl in Baltimore County, Maryland, based on the mistaken identification of five eyewitnesses. Prior to his exoneration, Mr. Bloodsworth had been sentenced to death.
- Brandon Moon, an Army veteran and college student who was released in 2005 from the Texas prison system after serving 17 years for a rape that DNA proved he did not commit, was misidentified by two witnesses.
- Dennis Maher, a Massachusetts man, served 19 years for a series of rapes after he was misidentified by three different victims.
- Stephen Phillips, a Texas man, was exonerated of a string of sexual assaults after serving 25 years in prison. In the 11 crimes for which Phillips was wrongfully convicted, there were at least 60 victims. At least six of those victims were shown to have erroneously identified Phillips as the perpetrator.

The Innocence Project’s finding that eyewitness misidentification is the most common cause of wrongful convictions is supported by numerous other studies.<sup>4</sup> One study of all exonerations (both DNA and non-DNA) from 1989 through 2003 found that 64 percent of the wrongful convictions involved at least one mistaken identification.<sup>5</sup> And in its 1996 study of 28 DNA exonerations, the Department of Justice found that, in a majority of the cases, eyewitness misidentifications served as “the most compelling evidence” at trial.<sup>6</sup>

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<sup>2</sup> <http://www.innocenceproject.org/understand/Eyewitness-Misidentification.php> (last visited September 15, 2011).

<sup>3</sup> *Id.*

<sup>4</sup> See, e.g., Brandon L. Garrett, “Convicting the Innocent: Where Criminal Prosecutions Go Wrong” (Harvard U. Press, 2011) (analyzing the first 250 DNA exonerations).

<sup>5</sup> Samuel R. Gross et al., *Exonerations in the United States, 1989 Through 2003*, 95 J. Crim. L. & Criminology 523, 542 (2005) (“The most common cause of wrongful convictions is eyewitness misidentification.”).

<sup>6</sup> U.S. Dep’t of Justice, Nat’l Institute of Justice, *Convicted by Juries, Exonerated by Science: Case Studies in the Use of DNA Evidence to Establish Innocence After Trial*, Pub. No. NCJ 161258, 24 (1996), available at <https://www.ncjrs.gov/pdffiles/dnaevid.pdf>.

Mr. Davis' case will never be resolved by DNA evidence because there is no biological material from the crime scene that could yield a DNA test result that would be probative of anyone's guilt or innocence. However, the experiences of those exonerated by DNA demonstrate that certain features of Mr. Davis' case – including later recantation by eyewitnesses whose testimony was central to the underlying conviction – are by no means uncommon among the wrongly convicted:

- In 1999, Clarence Elkins was sentenced to life in prison for the rape and murder of his 68-year-old mother-in-law and the rape of his six-year-old niece, based on his niece's identification, which was the only direct evidence connecting Elkins to the crime; there was no physical evidence. (There is now no physical evidence connecting Troy Davis to the murder of Officer Mark MacPhail.) Three years after his conviction, Mr. Elkins' niece recanted her testimony. Despite this recantation, Mr. Elkins' request for DNA testing was denied. Mr. Elkins, together with his wife and attorneys from the Ohio Innocence Project, obtained testing of the available DNA evidence and worked to connect it to the person they believed to be the actual perpetrator. Three years later, after he spent six and a half years in prison, Mr. Elkins was exonerated and the real perpetrator – who had been convicted of three unrelated rapes – was identified.
- In 1986, Frank Lee Smith was sentenced to death in Florida after being convicted of rape and murder based on eyewitness testimony. In 1998, Mr. Smith had an evidentiary hearing at which the principal eyewitness recanted her trial identification. The court found that the witness' recantation was insufficient to overturn Mr. Smith's conviction and he remained on death row. Two years later – after fourteen years on death row – Frank Lee Smith died of cancer. Eleven months after his death, and almost fifteen years after his 1986 conviction, Frank Lee Smith was exonerated based on exculpatory DNA testing results. These results not only cleared Smith of the crime, but also identified the true perpetrator, Eddie Lee Mosley, a convicted rapist and murderer.
- In 1978, four Illinois men – Kenneth Adams, Dennis Williams, Willie Raigne and Verneal Jimerson – were convicted of rape and murder and sentenced, variously, to seventy-five years in prison, life without parole, and death, largely as a result of the identification testimony of an eyewitness who claimed she had been at the scene of the crime with the four men. After their convictions, however, the witness recanted her testimony, then reinstated her original testimony during retrials, and finally recanted her testimony again, stating that she lied because she felt pressured and threatened by the police. DNA evidence eventually exonerated all four men, who were released from prison in 1996, and identified three other men as the perpetrators.

Courts have long recognized the significant and unique dangers that the admission of unreliable eyewitness testimony can pose for the criminal justice system. Forty-five years ago, long before the era of exculpatory DNA evidence, the United States Supreme Court described “the annals of criminal law” as “rife with instances of mistaken identification.” *United States v. Wade*, 388 U.S. 218, 228 (1967). While “[t]he vagaries of eyewitness identification” were

already “well known” at the time *Wade* was decided, the scientific research in the area was still in its infancy. *Wade*, 388 U.S. at 228.

***Scientific Research Concerning Eyewitness Perception and Memory Is Robust and Informs Best Practices for Eyewitness Identification Procedures.***

Since *Wade*, dozens of social scientists have conducted thousands of eyewitness identification experiments. These experiments demonstrate how certain factors, both in isolation and in tandem with other factors, can erode the reliability of eyewitness identification evidence. This research has been published in hundreds of articles in a range of peer-reviewed psychological journals. A search of psychological journals using an assortment of keywords such as “eyewitness” and “identification” in psychology journal databases such as PsychINFO reveals that the number of relevant published articles has increased 6,000 percent since the 1970s, and almost 150 percent since the 1990s.

Taken together, the cases of exonerees whose convictions were obtained through reliance on eyewitness misidentifications and the vast body of scientific research relating to eyewitness memory and identification have led to the emergence of recommended “best practices” governing the collection of eyewitness identifications by law enforcement. These best practices reflect the understanding of memory as fragile and easily contaminable by external factors. Since the late 1990s, law enforcement has recognized the importance of employing these best practices in order to ensure the reliability of eyewitness identifications. Best practices generally include some or all of the following:

- Fair lineup composition: compose lineups in such a manner that the suspect does not unduly stand out (including avoiding any markings on lineup photographs that might provide clues to the witness). This best practice reflects the phenomenon known as “relative judgment” where witnesses choose the individual who looks “most like” his or her memory of the perpetrator, rather than the individual who actually *is* the perpetrator. It also recognizes that suggestive police procedures can contaminate a witness’ memory and undermine the reliability of an identification.
- Blind administration: the administrator and all present during the identification procedure should not know who the suspect is. This best practice reflects the scientific finding that witnesses are sensitive to even inadvertent verbal and nonverbal cues by law enforcement, and that such cues are difficult to avoid unless the administrator actually does not know who the suspect is.
- Witness instructions: provide the eyewitness pre-viewing instructions including that the perpetrator may or may not be in the lineup, that the investigation will continue whether the witness makes a selection or not, that the eyewitness should not assume that the person administering the lineup knows who the suspect is, and that the witness need not make an identification. This practice addresses the scientific research showing that instructions like these reduce the incidence of witness selection of a photograph when s/he is uncertain, and also reduces the number of “filler” (i.e., innocent lineup participant) selections.

- Separation of witnesses: ensure that multiple witnesses view lineups individually, that the lineups viewed by multiple witnesses are not identical, and that witnesses do not confer about their identification or memory of the event. This practice reflects a significant body of research that shows that co-witness statements can contaminate memory and undermine the reliability of eyewitness identifications.
- Document/record the lineup procedure: make a written and photographic/videotaped record of the lineup procedure (including recording non-identifications). This practice recognizes that contemporaneous recording ensures that the recommended best practices were followed and ensures that the lineup procedures were fair.
- Record confidence statements: obtain and record a statement from the witness in his/her own words that describes the level of confidence in the identification at the time of the selection. This practice recognizes the scientific finding that confidence is malleable and that the most accurate reflection of a witness' confidence is at the time of the identification procedure (assuming there has been no suggestive feedback).
- Avoid suggestive feedback: at all times, law enforcement officers should avoid any statement or other nonverbal clue that might influence the witness' choice or perception. This practice recognizes the fragility of memory and that confidence is malleable.

Some or all of these practices have been recommended by the Department of Justice (October 1999)<sup>7</sup>; the American Bar Association (2004)<sup>8</sup>; the International Association of Chiefs of Police (IACP) (2006)<sup>9</sup>; the Commission on Accreditation for Law Enforcement Agencies (CALEA) (2009)<sup>10</sup> addressing eyewitness identification as well as many states and localities.

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<sup>7</sup> U.S. Dep't of Justice, Nat'l Institute of Justice, *Eyewitness Evidence: A Guide for Law Enforcement*, Pub. No. NCJ 178240, 2 (1999), available at <https://www.ncjrs.gov/nij/eyewitness/188678.pdf>. Procedures recommended in the DOJ Guide include: fair lineup composition; witness instructions; avoid suggestive feedback; record confidence statements; record/document the lineup. The DOJ Guide described both simultaneous and sequential photo lineup procedures without recommending either.

<sup>8</sup> American Bar Association *Statement of Best Practices for Promoting the Accuracy of Eyewitness Identification Procedures* (August 2004), available at: [http://www2.americanbar.org/sdl/Documents/2004\\_AM\\_111C.pdf](http://www2.americanbar.org/sdl/Documents/2004_AM_111C.pdf) (last visited Sept. 16, 2011). The following best practices were included: fair lineup composition (including consideration of the appropriateness of simultaneous vs. sequential presentation); blind administration (when "practicable"); witness instructions; record confidence statements; record/document the lineup; avoid suggestive feedback.

<sup>9</sup> IACP, *Eyewitness Identification Model Policy* (2006), available at: <http://www.theiacp.org/tabid/486/Default.aspx>. The following recommendations are included: fair lineup composition (including consideration of the appropriateness of simultaneous vs. sequential presentation); blind administration (when "reasonably possible"); witness instructions; record confidence statements; record/document the lineup; avoid suggestive feedback. In addition, IACP's model policy emphasizes that witnesses must be kept separate: "Ensure that not more than one witness views the lineup at a time and that they are not permitted to speak with one another during lineup proceedings."

<sup>10</sup> CALEA Model Policies 42.2.11 and 42.2.12, available at: <http://www.calea.org>. Best practices referenced include: fair lineup composition; witness instructions; record confidence statements; record/document the lineup; avoid suggestive feedback; separate witnesses.

On April 2, 2008 the Georgia House of Representatives passed a resolution “that urged all law enforcement agencies to review their existing policy and procedures or to develop policy and procedure in eyewitness identification and to consider all the alternatives in deciding which of the methods constitute the ‘best practice’ for their agency.”<sup>11</sup> On December 10, 2008, the Georgia Peace Officers Standards and Training Council (POST) voted to require law enforcement officers seeking management and supervisory certifications, as well as officers receiving criminal investigation training, to get instruction on new eyewitness identification procedures. These procedures include: blind administration “urged”; fair lineup composition (including avoiding any markings on photographs and ensuring that the suspect does not unduly stand out); witness instructions; separate witnesses (“Remind the witness that discussing the results of the procedure could harm the investigation. Such discussion by the witness may influence any other witnesses’ identification decisions or their certainty”); confidence statements obtained and recorded; eyewitness procedure documented and recorded (including an instruction that law enforcement “[e]nsure that the witness does not write on or mark materials that will be used in other identification procedures”).<sup>12</sup>

Had Officer MacPhail been killed after 2008, it is clear that the investigatory tactics used to identify, and later convict, Troy Davis would not have been used. It is fundamentally unjust that something as arbitrary as the date on which a crime was committed could result in the imposition of the death penalty, where significant, unresolvable doubt remains – largely a result of law enforcement practices roundly recognized today to have been unduly suggestive and therefore contaminating of any actual evidence of the true perpetrator.

***In Troy Davis’ Case, Suggestive Investigative Practices Contaminated the Memories of the Eyewitnesses, Making them Unreliable.***

While Savannah law enforcement investigating Officer MacPhail’s murder were under no obligation to follow any best practices in 1989 – as is clear from the chronology above, they were likely not aware of them – we now know that the multiple violations of these practices in the course of the investigation undermined the reliability of all of the eyewitness identifications relied upon at trial. For example, rather than separate witnesses to prevent co-witness contamination, law enforcement created a “reenactment” of the crime (which included Sylvester “Redd” Coles in the role of a bystander before it was ever determined that he was not the shooter). This practice, which involved all of the witnesses and is one of the worst examples of co-witness contamination one can imagine, would have so contaminated the memories of each witness as to render any subsequent identification unreliable. For days after the incident, law enforcement displayed wanted posters featuring Mr. Davis’ photograph (also released to the media), patrolled the vicinity of the crime and displayed a single photograph to witnesses and potential witnesses. This practice is the equivalent of a showup, whose use has been limited by best practices and also by case law in light of its enormous potential for prejudicing a witness to choose the individual whose photo is displayed, whether or not the witness could independently identify that individual as the perpetrator. *Salazar v. State*, 245 Ga.App. 878, 879 (2000) (“[a] one-on-one showup is inherently suggestive.”) Witnesses were shown a photographic lineup from which Troy Davis’ photograph was unduly prominent,

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<sup>11</sup> A Resolution Creating the House Study Committee on Eyewitness Identification Procedures, H.R. 352, Georgia General Assembly. (2007).

<sup>12</sup> Georgia POST *Eyewitness Identification Training*. available at: [http://web.archive.org/web/20090505213818/http://www.gapost.org/eyewit\\_id.htm](http://web.archive.org/web/20090505213818/http://www.gapost.org/eyewit_id.htm) (last visited Sept. 16, 2011).

bearing a unique background. This lineup was not administered in a blind fashion but rather was administered by an investigating officer. Finally, witnesses were asked to initial the back of Mr. Davis' photograph after selecting it, thereby offering cumulative confirming feedback to each witness who also chose his photograph.

These practices ensured the selection of Troy Davis' photograph by witnesses, but does not ensure that these selections bear any relationship to witness' actual memory of events. To the contrary, the use of these suggestive procedures undermines the reliability of the identifications that resulted from these procedures. We submit that the death penalty should not be imposed in a case where the eyewitness testimony so critical to the State's case is so inherently unreliable. The Board should conclude that the doubts raised by the unreliable nature of the eyewitness testimony, together with the later recantations by many of the same witnesses and a lack of physical evidence, so undermine confidence in the jury's guilty verdict that the death penalty must be commuted.

While recantation evidence is generally looked upon with suspicion, evidence of multiple recantations coupled with a pattern of suggestive eyewitness identification procedures is especially powerful and deserves careful consideration. In isolation, a single accusation of suggestion and/or police pressure is wholly different from allegations of a pattern of those practices. The pattern identified by *seven* of the witnesses adds credibility to each accusation and to the recantations that the district court did not afford credit at the evidentiary hearing, but that the Board can now credit.

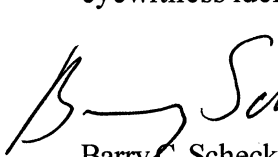
Cases of exonerated individuals involving recantations by multiple eyewitnesses, whose trial testimony was the basis of a conviction are illustrative:

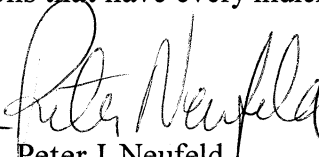
- In 1992, Fernando Bermudez was convicted of murder on the evidence of five eyewitnesses who jointly viewed Mr. Bermudez's mug shot with one identifying him and the others then agreeing the photo resembled the killer. No forensic evidence, blood, fingerprints, or DNA evidence connected Mr. Bermudez to the crime. A year after Mr. Bermudez's conviction, five witnesses who had identified him as the killer at trial recanted, saying in sworn affidavits that they were coerced or manipulated by the police and prosecutors to identify Mr. Bermudez as the killer. Several of those witnesses reiterated their recantations at an evidentiary hearing in 2009, which led to a court's declaration that Mr. Bermudez was innocent.
- In 2004, John Stoll's conviction was overturned by a California court after he spent almost 20 years in prison after being convicted in 1985 of 17 counts of child molestation. Four of Mr. Stoll's accusers, now adults, recanted their prior testimony and testified at an evidentiary hearing that they were manipulated by overzealous investigators until they fabricated accusations against Mr. Stoll. A fifth witness testified he has no memories from that part of his childhood while the sixth alleged victim, Mr. Stoll's son, still insists his father molested him.

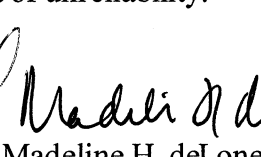
These exonerations prove not only that multiple eyewitnesses can be wrong, but also that their recantations – while confusing and perhaps seemingly disingenuous to finders of fact – may well contain the truth.

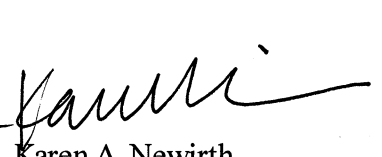
***The Board Should Exercise Clemency In This Unique Case.***

Troy Davis cannot count on DNA evidence to exonerate him, nor can he count on the courts to grant reprieve. Given the significant doubts that remain about Troy Davis' guilt in the murder of Officer MacPhail, we strongly urge the Board of Pardons and Paroles to exercise its ultimate power as a "fail safe" to commute Troy Davis' death penalty and prevent the imposition of the death penalty in a case that lacks any physical evidence and rests on eyewitness identifications that have every indicia of unreliability.

  
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