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‘Unconscionable and unconstitutional’

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1. INTRODUCTION

To execute Davis, in the face of a significant amount of proferred evidence that may establish his actual innocence, is unconscionable and unconstitutional
United States federal judge, Rosemary Barkett, April 2009[1]

Troy Anthony Davis has been on death row in Georgia for nearly 18 years for the murder of a police officer he maintains he did not commit. Given that the testimony of only two of the state's numerous witnesses who testified against Troy Davis at his trial remains intact, and given allegations that some witness statements, now recanted, were made under police duress or suggestive techniques, there are serious and still unanswered questions surrounding the reliability of his conviction and the state's conduct in obtaining it. One of the two witnesses who have not altered their trial testimony is himself the subject of new witness statements implicating him as the gunman. Amnesty International does not know if Troy Davis – or this other man – is guilty or innocent of the crime.[2] As an abolitionist organization, it opposes his and any other death sentence unconditionally. As the case stands, however, the government's pursuit of the death penalty continues to contravene 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".[3]

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."[4] Or as the most senior US Supreme Court Justice suggested in 2008, the risk of executing the innocent "can be

[1] *In re: Troy Anthony Davis*, US Court of Appeals for the 11th Circuit, 16 April 2009, Judge Barkett, dissenting.
[2] Troy Davis' petition to the US Supreme Court in 2008 said: "Both the State and Petitioner agree that the murder was committed by one of two men: Mr Davis or State witness Sylvester 'Red' Coles in a dimly-lit parking lot in the dark, early hours of the morning" (see below). In this Amnesty International report, all information relating to Sylvester Coles is taken from public court documents in which he is named, and such references are in no way meant to suggest that the organization considers him guilty of a crime of which he has never been convicted. However, it is not possible to discuss the current state of the evidence against Davis without reference to Coles. At trial, and on appeal, Troy Davis' lawyers have argued that this is a case of mistaken identity and that Coles, not Davis, was the gunman.
[3] United Nations Safeguards guaranteeing the rights of those facing the death penalty. 1984.
[4] *Herrera v. Collins*, 506 U.S. 390 (1993), opinion written by Chief Justice Rehnquist.

entirely eliminated" by abolishing the death penalty.[5] Abolition is indeed the only way to guarantee elimination of this risk. Abolition will not save Troy Davis, however, only judicial relief or executive clemency can at this late point.

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. Despite the continuing doubts about his guilt, 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 passed, and President Bill Clinton signed into law, the Anti-terrorism and Effective Death Penalty Act (AEDPA) of 1996. The AEDPA placed new, unprecedented restrictions on prisoners raising claims in federal court of constitutional violations. The end result is that, to date, no court has held an evidentiary hearing to examine the totality of the post-conviction evidence in this case. The federal judge who dissented last month from her two colleagues' refusal to allow Troy Davis to file a new habeas corpus petition in US District Court wrote:

> "In this case, the circumstances do not fit neatly into the narrow procedural confines delimited by AEDPA. But it is precisely this type of occasion that warrants judicial intervention… The very nature of the writ [of habeas corpus] demands that it be administered with the initiative and flexibility essential to ensure that miscarriages of justice within its reach are surfaced and corrected".[6]

This report is an updated and revised version of one published by Amnesty International in February 2007.[7] Since then, the case of Troy Davis has attracted widespread national and international concern, and the condemned man and his family have been subjected to the rollercoaster of hope and despair that is a hallmark of this cruel punishment.

- 16 July 2007, Troy Davis comes less than 24 hours from execution when the Georgia Board of Pardons and Paroles issues a stay of execution "for the purpose of evaluating and analyzing" the information submitted to it during a clemency hearing earlier that day.
- 3 August 2007, by four votes to three, the Georgia Supreme Court agrees to consider whether a trial-level judge had abused his discretion in dismissing Davis' appeal for a new trial in 2007 without conducting a hearing on the post-conviction evidence.
- 17 March 2008, again by four votes to three, the state Supreme Court rules in the state's favour. Subsequently an execution date of 23 September 2008 is set.
- 12 September 2008, the Board of Pardons and Paroles votes to deny clemency.
- 22 September 2008, the Board declines to reconsider its denial of clemency.
- 23 September 2008, the US Supreme Court issues a stay of execution less than two hours before the killing of Troy Davis by lethal injection is due to be carried out.
- 14 October 2008, the stay of execution is dissolved after the Supreme Court announces that it will not consider the merits of Troy Davis' appeal. An execution date of 27 October 2008 is set.
- 24 October 2008, the US Court of Appeals for the 11th Circuit issues a stay of execution, three days before it is due to be carried out.
- 16 April 2009, a three-judge panel of the 11th Circuit rules, two votes to one, that under the AEDPA Troy Davis cannot file a new habeas corpus petition in District Court. The judge in the

[5] *Baze v. Rees* (2008), Justice Stevens, concurring in judgment.
[6] *In re: Troy Anthony Davis*, US Court of Appeals for the 11th Circuit, 16 April 2009, Judge Barkett, dissenting (in part, quoting Justice Abe Fortas in *Harris v. Nelson* (1969)).
[7] Amnesty International, 'Where is the justice for me?' The case of Troy Davis, facing execution in Georgia, February 2007 (AI Index: AMR 51/023/2007).

minority states that this case "highlights the difficulties in navigating AEDPA's thicket of procedural brambles" and arguing that to execute Troy Davis on the current state of the evidence would be "unconscionable and unconstitutional". The two judges in the majority conclude that Troy Davis can still appeal to the US Supreme Court and extend for 30 days the stay of execution it granted on 24 October 2008.

- 16 May 2009, the stay of execution expires.
- 19 May 2009, Troy Davis' habeas corpus petition is filed in the US Supreme Court.

In May 2009 Troy Davis said: "I have faced execution and the torment of saying goodbye to my family three times in the last two years and I may experience that trauma yet again; I would not wish this on my worst enemy and to know I am innocent only compounds the injustice I am facing." His sister, Martina Correia, told Amnesty International: "With all that my family has faced in the last few years it reminds me of my illness – it is like a growing cancer that keeps coming back... I am beginning to think this is more about racism than the truth, more about the State of Georgia's defiance than justice".

In its March 2008 decision upholding Troy Davis' death sentence, the four Georgia Supreme Court Justices in the majority wrote that, despite all the evidence gathered since trial casting doubt on the conviction, "we simply cannot disregard the jury's verdict in this case". Yet there are doubts in the minds of those very same jurors about the decision they made 18 years ago. As the execution approached in 2007, four of them signed affidavits saying that the post-conviction evidence gave them cause for concern, and they supported judicial relief in the form of a new trial or an evidentiary hearing, or executive commutation of the death sentence.

In the petition to the US Supreme Court filed on 19 May 2009, his lawyers write:

> "Mr Davis' last hope for an evidentiary hearing to prove his innocence lies with this Court. His case presents exceptional circumstances that warrant exercise of this Court's discretionary powers".

If the Court refuses to take the case, executive clemency would be Troy Davis' last hope to have his life spared. If the cruelty of the death penalty – to the condemned prisoner and his family – fails to move the Board of Pardons and Paroles into reconsidering its earlier denial of clemency, then surely the doubts that remain about the prisoner's guilt – as expressed in the past year by three of seven Justices on the Georgia Supreme Court and one of three federal judges on the 11th Circuit panel – demand that the Board now vote for life.

2. THE INESCAPABLE RISK OF ERROR

The death penalty itself, of course, brings with it serious risks, for example, risks of executing the wrong person
US Supreme Court Justice Stephen Breyer, 2008[8]

For many people, the death penalty's most intolerable flaw is the risk of irreversible error that accompanies it. When the New Jersey Death Penalty Study Commission recommended in 2007 that the state legislature get rid of the death penalty, for example, among its stated reasons were that any government interest in executing a small number of those guilty of murder "is not sufficiently compelling to justify the risk of making an irreversible mistake". New Jersey has since abolished the death penalty. So too has New Mexico. Signing an abolitionist bill into law on 18 March 2009, the Governor of New Mexico, Bill Richardson, explained that throughout his adult life he had been a supporter of the death

[8] *Baze v. Rees* (2008), Justice Breyer, concurring in judgement.

penalty, but that in recent years he had come to the conclusion that its irrevocable nature rendered it an untenable punishment in an imperfect justice system:

> "I do not have confidence in the criminal justice system as it currently operates to be the final arbiter when it comes to who lives and who dies for their crime. If the State is going to undertake this awesome responsibility, the system to impose this ultimate penalty must be perfect and can never be wrong. But the reality is the system is not perfect – far from it. The system is inherently defective. DNA testing has proved that. Innocent people have been put on death row all across the country. Even with advances in DNA and other forensic evidence technologies, we can't be 100-per cent sure that only the truly guilty are convicted of capital crimes. Evidence, including DNA evidence, can be manipulated. Prosecutors can still abuse their powers. We cannot ensure competent defense counsel for all defendants."

James Fry, a former Texas prosecutor, also recently revealed that he had changed his mind about the death penalty after it was proved that a man he had prosecuted for rape and who had spent more than 25 years in prison, was innocent. The former Dallas County prosecutor wrote: "As with so many of these cases, [the defendant] was convicted on the testimony of one eyewitness. Witness misidentification is one of the greatest causes of wrongful convictions nationwide". He concluded:

> "For years I supported capital punishment, but I have come to believe that our criminal justice system is incapable of adequately distinguishing between the innocent and guilty. It is reprehensible to gamble with life and death".[9]

The most senior Justice on the US Supreme Court took his seat on the Court just over a year before executions resumed in the USA in January 1977 and some 15 years before Troy Davis was sent to death row. In 2008, Justice John Paul Stevens revealed that his three decades on the Court had led him to believe that the death penalty represents "the pointless and needless extinction of life with only marginal contributions to any discernible social or public purposes". A penalty "with such negligible returns to the State", Justice Stevens continued, is "patently excessive and cruel and unusual punishment". Among other things, Justice Stevens pointed to the "real risk of error" in capital cases, and wrote that "the irrevocable nature of the consequences is of decisive importance to me".[10]

Thirty-two 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.[11] A landmark study published in 2000 concluded that US death sentences are "persistently and systematically fraught with error".[12] 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

[9] James A. Fry, *I put away an innocent man*. Dallas Morning News, 14 May 2009.
[10] *Baze v. Rees* (2008), Justice Stevens, concurring in judgment.
[11] For example, 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.
[12] *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.

witnesses in total, the defence presented six).[13] They 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 executions resumed in 1977, more than 120 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".

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 asserted in 2006, demonstrate "not the failure of the system but its success". He 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."[14]

It is disturbing that anyone, let alone a judge on a country's highest court, should consider as "insignificant" the risk of wrongful convictions in capital cases given what is known about the justice system's failures. In the USA, the risk was not insignificant to the more than 120 individuals released from death rows since 1977 who spent, on average, more than nine years between conviction and exoneration.[15] In the same 2006 ruling, Justice David Souter, joined by three other Justices, offered a counter-balance to Justice Scalia's assertion by pointing to the growing "evidence of the hazards of capital prosecution", including the fact that since 1989 there had been "repeated exonerations of convicts under death sentences, in numbers never imagined before the development of DNA tests". Among the numbers that Justice Souter said "give a sense of the reality that must be addressed", were the more than 100 death row prisoners released since the USA resumed capital punishment. He continued:

> "Most of these wrongful convictions and sentences resulted from eyewitness misidentification, false confession, and (most frequently) perjury, and the total shows that among all prosecutions homicide cases suffer an unusually high incidence of false conviction, probably owing to the combined difficulty of investigating without help from the victim, intense pressure to get

[13] A report in 2007 examining the issue 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. 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.

[14] *Kansas v. Marsh*, 26 June 2006, Justice Scalia concurring.

[15] Death Penalty Information Center, see http://www.deathpenaltyinfo.org/innocence-list-those-freed-death-row.

convictions in homicide cases, and the corresponding incentive for the guilty to frame the innocent."[16]

As in most cases, there is no DNA available in the Troy Davis case that could help to prove his guilt or innocence. Instead the case centres on 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.*"[17]

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.[18] 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 risk of irreversible error in capital cases demanded abolition.

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.
- 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.[19]
- 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.

[16] *Kansas v. Marsh* (2006), Justice Souter, joined by Justice Stevens, Justice Ginsburg, and Justice Breyer, dissenting.
[17] Page 60, Hugo Bedau and Michael L. Radelet, *Miscarriages of justice in potentially capital cases*, Stanford Law Review, Volume 40, pages 21 to 179.
[18] Aaron Patterson, Madison Hobley, Leroy Orange and Stanley Howard. Each had spent at least 15 years on death row.
[19] See *Capital punishment's deathly injustice*, Los Angeles Times, 28 August 1978, available at http://www.deathpenaltyinfo.org/EarlCharles.pdf.

- 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.
- 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.[20]
- 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.
- Dan Bright was released in 2004 after all charges against him were dismissed. He was sentenced to death in 1996, overturned to life imprisonment in 2000. In 2004 the state Supreme Court granted Bright a new trial, after finding that the state had suppressed evidence undermining the credibility of the prosecution's key witness.
- In 2005 in Ohio, charges were dismissed against Derrick Jamison in relation to the case for which he was sentenced to death in 1985. In 2002 the conviction was overturned on the grounds that prosecutors had withheld exculpatory eyewitness evidence.
- Charges against Jonathon Hoffman were dismissed in 2007, 12 years after he was sentenced to death in North Carolina. He had been granted a retrial in 2004 on the grounds that evidence that could have been used to impeach the credibility of the prosecution's key witness was withheld from the defence. The witness, who had been given immunity from federal charges he was facing in exchange for testifying against Hoffman, later recanted his trial testimony.

[20] *USA: Joseph Amrine: Facing execution on tainted testimony*, AMR 51/085/2002, June 2002, http://www.amnesty.org/en/library/info/AMR51/085/2002.

- Levon Jones was freed in North Carolina in 2008 after spending 13 years on death row. He had been granted a retrial by a federal judge in 2006 on the basis of the inadequate legal representation Jones had received at his trial, which included his lawyers' failure to investigate the prosecution's key witness, who subsequently said that she had lied at the trial and had been coached by a police officer on what to say. Before the retrial, the state dropped all charges.
- Nathson Fields was acquitted in Illinois in 2009 in the crime for which he had originally been sentenced to death in 1986 and spent more than a decade on death row. At the re-trial the judge found "incredible" the testimony of a co-defendant – who had testified at the original trial in exchange for a lesser sentence.

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.[21] 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.
- David Spence was executed in Texas in 1997 maintaining his innocence. He was executed despite the fact that two of the jailhouse informants who had testified against him at trial later recanted. A former police officer who was involved in the case also later gave a sworn statement stating that he did not believe Spence had committed the murder.
- 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. In his final statement before being put to death, Gary Graham said: "I'm an innocent black man that is being murdered. This is a lynching that is happening in America tonight. There's overwhelming and compelling evidence of my defense that has never been heard in any court of America. What is happening here is an outrage for any civilized country to anybody anywhere to look at what's happening here is wrong.[22]
- 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.

Justice Scalia has taken issue with those who, like Justice Stevens, are concerned about the risk of executing the innocent. It is not a risk, Justice Scalia has written, that Justice Stevens "can quantify, because he lacks a single example of a person executed for a crime he did not commit in the current American system".[23] Of course, neither can Justice Scalia prove that an innocent person has not been executed. Evidence and concern continues to mount that such an execution may have occurred. For example, in April 2009, Texas Senior District Judge C.C. Cooke, a judge with 34 years experience on the bench, revealed that he used to be "very pro capital punishment" but now believes, "generally speaking", that life imprisonment without parole is "more palatable".[24] Among other things he cited his belief that one of the men he sentenced to death – and who was executed in 2000 -- may have been innocent.[25]

[21] See, for example, *Did Texas execute an innocent man?* Houston Chronicle, 24 July 2006.
[22] See M. Welch and R. 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. Eds: D. Dow and M. Dow, Routledge Books, 2002.
[23] *Baze v. Rees* (2008), Justice Scalia, concurring in judgment.
[24] Judge favors sentence other than death. Cleburne Times-Review, 13 April 2009.
[25] See USA: Too much cruelty, too little clemency: Texas nears 200th execution under current governor, April 2009, http://www.amnesty.org/en/library/info/AMR51/057/2009/en.

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 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.[26] One such looming execution is that of Troy Davis.

3. DEADLY MIX: OVER-ZEALOUS POLICE AND 'DEATH-QUALIFIED' JURY?

At trial, the jury had the benefit of hearing from witnesses and investigators close to the time of the murder, including both [Troy] Davis and [Sylvester] Coles. We simply cannot disregard the jury's verdict in this case

Georgia Supreme Court, *Davis v. State*, 17 March 2008

On 28 August 1991 Troy Davis was convicted by a jury of the murder of a police officer, 27-year-old Mark Allen MacPhail, 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.[27] According to the autopsy, Officer MacPhail 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 MacPhail was shot. A ballistics expert testified at the trial that the .38 calibre bullet that killed Officer MacPhail 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…
>
> 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'

[26] 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.

[27] In the February 2007 version of this report, Amnesty International adopted the spelling "McPhail" as was contained in the trial transcripts. The organization has since adopted the spelling that, as the Georgia Supreme Court noted in 2008, is believed to be the correct one.

> 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".[28]

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 MacPhail.

Troy Davis further denied having told anyone that he had killed Officer MacPhail. 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 MacPhail. 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.

One of the state's witnesses was Sylvester "Red" Coles. At the trial, he admitted that he had been carrying a .38 calibre silver chrome handgun, the same calibre used in the shooting, half an hour before Officer MacPhail was shot. He said that he had discarded the gun before the incident, and that he had not seen the gun again. In April 2009, Judge Barkett on the 11th Circuit Court of Appeals emphasized that:

> "the police had no leads until Coles went to the police station the day after the murder, admitted that he was one of the three individuals involved in the altercation with Larry Young, and implicated Davis in the MacPhail shooting. There is no dispute that the police focused exclusively on Davis as a suspect because of Coles's statement".[29]

At the trial, Troy Davis' defence lawyers had 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?"

A number of the state's witnesses have alleged in their post-trial affidavits that they were coerced by police into making false statements. There had been some testimony to this effect even at the trial. For example, Craig Young testified that he had been pressured by police into giving a false statement. Young originally stated that Troy Davis had made some threats at the Cloverdale party, but later said that this was false.[30]

In their November 2008 petition to the US Court of Appeals for the 11th Circuit, Troy Davis' lawyers argued that the police investigation of the crime had been "bungled":

> "After a highly-visible police canvass of Coles' neighbourhood, Red Coles approached the police with his attorney... Within an hour of Coles' visit to the police station, Detective Ramsey obtained an arrest warrant for Mr Davis. Before learning that Coles had a .38 revolver or questioning him about his clothing, Detective Ramsey's superiors held a press conference, released Mr Davis' name and picture to the press and began a highly-publicized, city-wide campaign against Mr Davis.

[28] *Davis v. State* (1993), affirming the conviction and death sentence.
[29] *In re: Troy Anthony Davis*, US Court of Appeals for the 11th Circuit, 16 April 2009, Judge Barkett, dissenting.
[30] *Davis v. Head*, Petition for writ of habeas corpus. In the US District Court for the Southern District of Georgia, 14 December 2001.

> On August 24, 1989 (five days after the shootings) investigators confronted Coles about his .38 revolver. Coles admitted carrying the weapon on the night of the shootings but could not produce it for ballistics testing. Nevertheless, the detectives never searched Coles' house or car for the murder weapon, never included Coles' picture in witness photo spreads and paraded Coles in front of three State witnesses as an innocent bystander to the shooting in a crime scene re-enactment…
>
> Mr Davis' photo – the *same* photo used in the witness photo array – appeared on television and on wanted posters near where the eyewitnesses lived and worked. Several other pictures of Mr Davis appeared on the front page of the Savannah Evening News and in nightly news coverage. On August 21, 1989 Mr Davis' picture appeared in the paper under the headline: 'POLICE PUSH HUNT FOR KILLER'. Video of Mr Davis surrendering to police was widely covered by all outlets of the Savannah media before any eyewitness was shown a photo array."[31]

As noted above, studies of wrongful convictions in capital cases 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…
>
> 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". [32]

The murder of a police officer is undoubtedly a crime which heightens emotions – among the authorities seeking to bring the perpetrator to justice, as well as within the community and the media. All the more so, perhaps, where the suspect's "picture was plastered on wanted posters and in the local Savannah media" prior to his arrest.[33] Research conducted by the Capital Jury Project, including interviews with more than 1,000 capital jurors from various US states, found that nearly half of them believed that the death penalty was the only suitable punishment for someone who killed a police officer or a prison guard.[34]

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.

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[31] *In Re: Troy Anthony Davis*. Brief in support of application for permission to file a second petition for writ of habeas corpus in the District Court. In the US Court of Appeals for the 11th Circuit, 10 November 2008.
[32] Samuel R. Gross. *The risks of death: Why erroneous convictions are common in capital cases*. Buffalo Law Review, Volume 44, pages 469-500 (1996).
[33] *Davis v. Georgia*, Petition for a writ of certiorari, In the US Supreme Court, 14 July 2008.
[34] See Bowers, W.J., Brewer, T.W. and Lanier, C.S. The capital jury experiment of the Supreme Court, Chapter 10, The future of America's death penalty. Eds.: Lanier, C.S.; Bowers, W.J. and Acker, J.R., Carolina Academic Press (2009).

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, as the Georgia Supreme Court did in denying Troy Davis relief on 17 March 2008. Thus, in addition to the specific concern that the impartiality of his jury 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*.[35] 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.[36] Under the *Witt* standard, a juror can be dismissed for cause if his or her feelings 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".

As Justice Stevens has pointed out, "millions of Americans oppose the death penalty".[37] A decade earlier, the United Nations Special Rapporteur on extrajudicial, summary or arbitrary executions had expressed concern that in the USA, "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".[38] Troy Davis' 2001 federal habeas corpus petition argued that he had been denied his right to a fair trial when seven prospective jurors were excused because they indicated their opposition to the death penalty. The petition also claimed that a juror who indicated a predisposition for the death penalty was selected to sit on the jury; that another had been selected despite expressing an opinion as to Davis' guilt; and that another had been selected who had indicated that she knew a number of the prosecution's witnesses. Under the AEDPA, the federal court deferred to the Georgia Supreme Court's ruling against Davis on this issue (see Section 5).

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 capital jurors "produces juries somewhat more 'conviction-prone' than 'non-death-qualified' juries".[39] 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).[40]

[35] *Witherspoon v. Illinois*, 391 U.S. 510 (1968).
[36] *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.
[37] *Uttecht v. Brown* (2007), Justice Stevens, dissenting.
[38] 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.
[39] *Lockhart v. McCree*, 476 U.S. 162 (1986).
[40] *Ibid*. Justices Marshall, Brennan and Stevens, dissenting.

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".[41] 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 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."[42]

Justice John Paul Stevens revisited this question in his 2008 opinion in which he addressed the flaws of the US death penalty system:

> "Of special concern to me are rules that deprive the defendant of a trial by jurors representing a fair cross section of the community. Litigation involving both challenges for cause and peremptory challenges has persuaded me that the process of obtaining a 'death qualified jury' is really a procedure that has the purpose and effect of obtaining a jury that is biased in favour of conviction. The prosecutorial concern that death verdicts would rarely be returned by 12 randomly selected jurors should be viewed as objective evidence supporting the conclusion that the penalty is excessive".[43]

Justice Stevens also wrote that the detail of the crimes placed before capital jurors "provides the most persuasive arguments for prosecutors seeking the death penalty. A natural response to such heinous crimes is a thirst for vengeance". Of concern then – in addition to evidence that "death-qualified" jurors tend to be more conviction prone – is when these same jurors have inflammatory comments directed at them by prosecutors, as has frequently happened.[44] In Troy Davis' case, for example, the prosecutor argued:

> "Office MacPhail got no trial by jury. He got no due process. He didn't get an extended effort such as the defendant in this case has had in which to defend himself, in which to put Davis to the trouble of proving the case against him. Officer MacPhail was murdered without benefit of due process, even the meanest, most cynical process. This defendant Davis acted as judge, jury, and executioner, all by himself. One thing can certainly be said. Troy Anthony Davis believes in the death penalty. And he believes in imposing it at his own whim, to suit his own purposes."

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[41] 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.

[42] 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.

[43] *Baze v. Rees*, 20 October 2008, Justice Stevens, concurring in judgment.

[44] See, for example, USA: Old habits die hard: The death penalty in Oklahoma, April 2001, http://www.amnesty.org/en/library/info/AMR51/055/2001/en.

The prosecutor appealed to the jurors to vote to protect the "civilized" community, adding that "the police represent our first and last defence barbarism".

Concerns raised by the "death-qualification" of US capital jurors have often been compounded by racial questions. In his concurring opinion in *Baze v. Rees*, Justice Stevens addressed racial discrimination in the capital justice system, asserting that the US Supreme Court had allowed discriminatory application of the death penalty "to continue to play an unacceptable role in capital cases". A few months later, he drew attention to what he characterized as the Georgia Supreme Court's "utterly perfunctory review" of a case involving a black defendant and a white victim. He recalled the 1987 Supreme Court decision in the Georgia case of *McCleskey v. Kemp* which had made it "abundantly clear that there is a special risk of arbitrariness in cases that involve black defendants and white victims", and that more than a quarter of a century later "at least the race-of-victim effect persists".[45] The *McCleskey* ruling placed an almost insurmountable obstacle in the way of defendants claiming discrimination on the basis of race, with the Supreme Court ruling that "because discretion is essential to the criminal justice process, *exceptionally clear proof* is required before this Court will infer that the discretion has been abused" (emphasis added).[46]

Of the 45 people executed in Georgia since resumption of executions in the state in 1983, 41 were convicted of killing white people (91 per cent). Eleven of these 45 condemned men were African Americans. Four of the 45 executed were convicted of killing black victims. In the latter cases, all four of the condemned were African American.

Officer MacPhail was white. Troy Davis is black. The state courts rejected the claim raised in Troy Davis' case that the "pattern and practice of Georgia prosecuting authorities, courts and juries is to discriminate on the bases of race, sex and poverty" and that the "decision to seek the death penalty in [Davis'] case and the sentence of death directly resulted from the inherent discrimination in Georgia's death penalty statute", as illustrated by statistical analysis. Citing *McCleskey v. Kemp*, the federal judge who denied Troy Davis' appeal in May 2004, noted that "to succeed in an equal protection challenge, a petitioner must demonstrate that the decision-makers in his case acted with discriminatory purpose and that the purposeful discrimination had a discriminatory effect on him". The federal judge deferred to the Georgia Supreme Court's 1993 ruling in Davis' case that Georgia's capital laws were not unconstitutional and that his death sentence was not imposed "under the influence of passion, prejudice or other arbitrary factor".[47]

At the trial, the prosecutors used nine of the 10 peremptory strikes they were allowed to dismiss African American jurors from the jury pool. Defence counsel objected, and the trial judge ordered the prosecution to explain the dismissals. The court upheld the reasons as race-neutral. While the racial mix of the jury finally selected for the trial was not an issue on appeal – about half of the jury was white and the other half black – the state's disproportionate use of peremptory strikes against African Americans was challenged, but has been unsuccessful. Troy Davis' federal habeas corpus petition in 2001, for example, included the following details in relation to the prosecution's explanations for dismissing black prospective jurors. Whether or not they were race neutral explanations, they illustrate how the jury selection process rejects those prospective jurors who display any hesitancy about the death penalty or signs that the prosecution might interpret as amounting to empathy toward the defendant.

- African American juror 1 was dismissed because she was allegedly opposed to the death penalty and her son was a criminal defendant. However, she had indicated during questioning that her opposition to the death penalty was not such that she could not follow the law.

[45] *Walker v. Georgia* (2008), Statement of Justice Stevens respecting the denial of the petition for writ of certiorari.
[46] See 'The McCleskey obstacle', pages 2 to 4 of USA: Death by discrimination - the continuing role of race in capital cases, Amnesty International, April 2003, http://www.amnesty.org/en/library/info/AMR51/046/2003.
[47] *Davis v. Head*. Order. US District Court, Southern District of Georgia, 13 May 2004.

- African American juror 2 was dismissed because she had some relatives who lived in Troy Davis' neighbourhood and because he referred to the defendant by his first name. However, the juror stated that he did not know Davis, had never seen him, and had no opinion about his guilt.
- African American juror 3 was dismissed because her children had had some problems with the police. However, she also said that she did not have an issue with this and could make an impartial decision if selected as a juror.
- African American juror 4 indicated some hesitation about the death penalty, but had said that she could impose it if the facts required it.

The federal judge deferred to the finding of the state courts that the prosecutor's explanations were adequate to rebut the prima facie case of discrimination.

At the 1991 trial, Troy Davis' 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 MacPhail. Instead, the jury accepted the prosecution's theory and convicted Troy Davis on all counts. The trial moved into the sentencing phase.

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 2006 and 2007, for example, there were 121 and 115 new death sentences respectively – each fewer than half of the 1991 total. Factors contributing to this reduction in juries passing death sentences are believed to include public knowledge of 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, it would seem that 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.[48]

At the time of Troy Davis' trial, jurors in Georgia did not have the option of life imprisonment without parole as an alternative to the death penalty.[49] The state passed a life-without-parole statute in 1993. In the 11 years before the passage of that law, Georgia sentenced to death an average of more than nine people per year. In the 11 years after the law was passed, this figure dropped to under six.[50]

By 1991 there had been "only" 150 executions carried out across the USA since executions resumed in 1977. There have been more than 1,000 executions since Troy Davis' 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".[51] In 1986, Georgia Supreme Court Justice Charles Weltner said: "Everybody

[48] 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.

[49] 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.

[50] A matter of life and death: The effect of life-without-parole statutes on capital punishment. Harvard Law Review, Vol. 119, pages 1838-1854 (2006).

[51] 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).

believes that a person sentenced to life for murder will be walking the streets in seven years".[52] A 1999 Georgia study found that more than two-thirds of potential capital jurors surveyed said that they would be more likely to vote for a life sentence rather than a death sentence if they knew that the defendant would serve at least 25 years in prison before becoming eligible for parole.[53]

Sixty per cent of the 1,163 executions carried out in the USA between 1 January 1977 and 18 May 2009 occurred in the decade from 1997 to 2006. This period was accompanied by numerous revelations about the inequities inherent in the use of capital punishment. In the 10 years before the year of Troy Davis' trial in 1991, for example, fewer than 30 people had been released from death rows on the grounds of innocence. In the 10 years following 1991, more than 50 such cases were uncovered, with the attendant publicity increasing as the total reached and surpassed 100 early in the 21st century.

In his 2008 opinion revealing his concerns about the US capital justice system, Justice Stevens wrote that "the risk of error in capital cases may be greater than in other cases because the facts are often so disturbing that the interest in making sure the crime does not go unpunished may overcome residual doubt concerning the identity of the offender".[54]

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 MacPhail. The judge formally imposed the death sentence on 3 September 1991.

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 18 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? At least some of them indicate that they would not. As Troy Davis' execution approached in July 2007, four of the original trial jurors – who had reviewed the state of the witness testimony as described in the next section – signed sworn statements expressing their doubts:

- Juror A (female): "In light of the new statements presented, I have concerns. I believe that based on the content of the affidavits, a new hearing should be granted."
- Juror B (female): "I have now reviewed several affidavits given by witnesses previously involved in this case and by witnesses who did not previously testify. Based upon the information contained in these affidavits I have some serious doubts about the justness of Mr Davis's death sentence. I find it very troubling that the jury's sentence was based upon incomplete and unreliable evidence. If had been aware of this newly gathered evidence and had the benefit of it at trial, I would not have sentenced Mr Davis to death… Based on this new information, I believe that Mr Davis should not be executed until the evidence has been examined by a judge or a new jury. If that does not happen, my doubts about the fairness of his death sentence are serious enough that I would recommend that his sentence be commuted to life without parole".
- Juror C (male): "In light of this new evidence, I have genuine concerns about the fairness of Mr Davis' death sentence… I believe that Mr Davis should not be executed and that instead, another jury should hear all of the new evidence."

[52] *Ibid.*, see note 4.
[53] See A matter of life and death, Harvard Law Review (2006), *op. cit.*
[54] *Baze v. Rees*, 20 October 2008, Justice Stevens, concurring in judgment.

- Juror D (male): "I have now reviewed several affidavits… Having reviewed these, and other affidavits, I am now troubled. This new evidence would have caused me some lingering doubt about Mr Davis' guilt. In light of this doubt, I would not have sentenced him to death… I recommend that his death sentence be commuted to life."

4. THE WITNESSES – RECANTED AND NEW TESTIMONY

All that remains of the State's case is the self-interested testimony of Red Coles and Steve Sanders' dubious and self-contradictory in-court identification of Mr Davis
Federal appeal brief for Troy Davis, November 2008[55]

There was no physical evidence identifying Troy Davis as the murderer and the weapon used in the crime was never found.[56] The case against him consisted 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."[57]

The State of Georgia maintains that the case against Troy Davis is based on firm enough ground to support the irreversible act of killing him. For example, a legal brief it filed in federal court in 2005 in the case stated: "Red Coles identified petitioner as the perpetrator of Officer MacPhail's murder, as did numerous other eyewitnesses, including Harriet Murray, Dorothy Ferrell, Daryl Collins, Antoine Williams, Steven Sanders and Larry Young."[58] However, the only testimony from these witnesses that remains intact is that of Sylvester Coles and Steven Sanders. In affidavits signed over the years since the trial, the other witnesses whose testimony helped to secure 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."[59] Yet the state is relying on the testimony from those same individuals to support its bid to kill Troy Davis. As three Justices on Georgia's Supreme Court, and a federal judge on the US Court of Appeals for the 11th Circuit, have suggested in the past year (see below), the state's case is far from watertight.

As noted above, the testimony of only two of the prosecution's witnesses who testified against Troy Davis remains intact. One of these witnesses 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. The other 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, Steven 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".

[55] *In Re: Troy Anthony Davis*. Brief in support of application for permission to file a second petition for writ of habeas corpus in the District Court. In the US Court of Appeals for the 11th Circuit, 10 November 2008.
[56] After it denied clemency to Troy Davis in September 2008, the Georgia Board of Pardons and Paroles took, for it, the unusual step of issuing a public statement because the case had received "such extensive publicity". It said that the Board had "had certain physical evidence retested". Amnesty International understands that this refers to the ballistics evidence purporting to link the shooting of Cloverdale party and the subsequent shooting of Officer MacPhail.
[57] *Davis v. Turpin*. Transcript of proceedings before Honorable John M. Ott, Judge, Rockdale Judicial Circuit presiding in Butts County, Georgia, 16 December 1996.
[58] *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.
[59] *Convicted killer seeks to avoid verdict*. The Atlanta-Journal Constitution, 8 September 2005.

However, for the first time, two years later, at the trial, Steven Sanders identified Troy Davis as the gunman. Troy Davis' appeal lawyers have not been able to interview 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.

Another prosecution witness at the trial was 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' 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 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 MacPhail 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.[60] 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 MacPhail. 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.

Troy Davis' petition to the US Supreme Court filed on 19 May 2009 notes that the Georgia Supreme Court had denied him relief in March 2008 based on the "oft-cited rule that recantations are 'inherently suspect'". The petition argues that the post-conviction testimony in this case is exceptional:

> "Few – if any recantation cases involve consistent multiple recantations from State witnesses who were innocent bystanders to the crime. Moreover, recantations from innocent bystanders are

[60] The affidavit mistakenly says Oglethorpe Street rather than Avenue.

even more rare in States such as Georgia where the penalty for perjury in a capital case is a mandatory life sentence".

The witnesses are listed below by category and in the chronological order in which their affidavits were signed.[61]

4.1. '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 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".[62]

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 MacPhail. 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*

[61] Copies of all affidavits on file with Amnesty International.
[62] Trott, Stephen S. *Words of warning for prosecutors using criminals as witnesses*. 47 Hastings Law Journal (1996), page 1394.

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 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*".

4.2. '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 MacPhail, 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 MacPhail. 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 MacPhail. 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.*[63]
>
> *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 MacPhail. 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*

[63] His affidavit was read to him before he signed it and he stated that it was accurate.

part... As I said in my statement given on that night, I do not and did not remember what the shooter was wearing."

4.3. 'Party' testimony

In the hours before the shooting of Officer MacPhail 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 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 16) 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 head 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 MacPhail 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 16 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."

Benjamin Gordon signed another affidavit in September 2008 (see below).

4.4. Testimony implicating Sylvester Coles

The federal judge who argued that Troy Davis should be allowed to file a second federal habeas corpus petition in light of the post-conviction recantations of numerous trial witnesses, said:

> "The majority of the affidavits support the defense's theory that, after Coles raced to the police station to implicate Davis, the police directed all of their energy towards building a case against Davis, failing to investigate the possibility that Coles himself was the actual murderer. For example, none of the photo-spreads shown to eyewitnesses even included a picture of Coles."[64]

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

Joseph Washington

Affidavit, 6 December 1996

[64] *In re: Troy Anthony Davis*, US Court of Appeals for the 11th Circuit, 16 April 2009, Judge Barkett, dissenting.

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 MacPhail 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 MacPhail 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*."

Benjamin Gordon

Affidavit, 8 September 2008

Having signed an affidavit in 2003 (see above), Benjamin Gordon signed another in September 2008. In this second affidavit, he reaffirmed the contents of the 2003 statement, but said that he had had further information at that time which he had not shared because it involved a family member, Sylvester Coles, and "I was concerned about problems I might have with the cops if I told everything I knew". Benjamin Gordon said that "this has been a weight on me for many years and I want to put this matter behind me". The affidavit states:

"*Sylvester Coles, who I know as 'Red' is the brother of my uncle's wife, [V]. I have known Red all my life and I consider him to part of the family....*

On the night the officer was shot, I was in a parking lot right near the bus station. I went there after a bunch of us dropped Michael Cooper at the hospital. There was a bunch of people on the parking lot. A few minutes after I got there, I heard a shot coming from the direction of the bus station. I froze and then looked over that way. I saw a person then point a gun towards the

ground and fire a shot. After hearing the second shot, I ran towards Yamacraw where I lived at the time, and jumped on a porch right by V's house... As I stood on the porch, I saw Red run up to V's house. I ran back to my place and did not see Red again that night.

I don't remember the exact date, it was in 1995 or 1996, when Red and I talked about the shooting of the officer...Out of nowhere, Red said, 'I shouldn't have did that shot, that shot was fucked up'. It was clear to me that he was talking about the officer's killing because we had just been talking about that. I had told Red about how mad I was about the way the cops treated me that night and how they said that I killed the officer, and that's when he said that he shouldn't have done it. I told him that he needed to straighten it out because they had someone else locked up for the murder. Red sat there and cried when I said that.

I wish I had come forward with this information sooner, but I need to tell the truth and clear my conscience".

5. CAUGHT IN A TRAP: FEDERAL APPEALS DENIED

The enactment of the 1996 Anti-terrorism and Effective Death Penalty Act [has] further jeopardized the implementation of the right to a fair trial as provided for in the [International Covenant on Civil and Political Rights] and other international instruments
UN Special Rapporteur, 1998[65]

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. As the US Supreme Court explained in a death penalty case in 1993, "once a defendant has been afforded a fair trial and convicted of the offense for which he was charged, the presumption of innocence disappears." When a condemned prisoner raises on appeal evidence that he or she has been wrongfully convicted, "in the eyes of the law, petitioner does not come before the Court as one who is innocent, but, on the contrary, as one who has been convicted by due process of law of [capital murder]".[66] To overturn such a conviction is an uphill task, and one that faces many legal and procedural hurdles.

In 1993, the Georgia Supreme Court affirmed Troy Davis' conviction and death sentence. In 1994, he 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

[65] 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.
[66] *Herrera v. Collins*, 506 U.S. 390 (1993).

> 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 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 did not shoot Officer MacPhail. His first 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."[67] 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."[68]

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."[69]

The Act is complex. The US Supreme Court has said of the AEDPA that, "in a world of silk purses and pigs' ears, the Act is not a silk purse of the art of statutory drafting".[70]

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". Some said that this deferential "reasonableness" standard represented "a remarkable departure from the traditional role of federal courts…to declare what the law is".[71] Two US law professors have written that since the AEDPA was passed into law:

> "[T]he success rate of capital federal habeas corpus petitioners in the lower federal courts has fallen sharply – so sharply as to raise a serious doubt whether those courts are in fact conducting the independent review of state law that Article III of the Constitution mandates. Quite apart from legal considerations, our results warrant an urgent look at a grave policy

[67] President William J. Clinton, Statement on signing the Anti-terrorism and Effective Death Penalty Act of 1996. 24 April 1996.
[68] President William J. Clinton, Remarks on signing the Anti-terrorism and Effective Death Penalty Act of 1996, 24 April 1996.
[69] *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).
[70] *Lindh v. Murphy* (1997).
[71] 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.

> question: has the [AEDPA] in practice imperilled the bedrock role of capital habeas proceedings as a safeguard against injustice".[72]

Even without the AEDPA, the US Supreme Court had already curtailed the ability of death row inmates convicted under state law to obtain *habeas corpus* relief in the federal courts. On the question of innocence, the 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, concerning the case of Texas death row inmate Leonel Herrera, 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 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".[73]

In the *Herrera* case, the Supreme Court did not definitively rule on whether the execution of person raising a "free-standing" claim of "actual innocence" would violate the constitutional ban on "cruel and unusual" punishment because it found that Leonel Herrera had failed to make a "truly persuasive demonstration of actual innocence". A decade and a half later, the constitutionality of executing an innocent prisoner convicted in a trial deemed free from constitutional error remains an open question. In January 2009, in a Texas case involving a potentially innocent death row inmate, a federal judge wrote a separate opinion to address "the elephant that I perceive in the corner of this room: actual innocence". Judge Jacques Wiener on the Court of Appeals for the Fifth Circuit continued: "Consistently repeating the mantra that, to date, the Supreme Court of the United States has never expressly recognized actual innocence as a basis for habeas corpus relief in a death penalty case, this court has uniformly rejected stand-alone claims of actual innocence as a constitutional ground for prohibiting imposition of the death penalty." He added that "this question is a brooding omnipresence in capital habeas jurisprudence that has been left unanswered for too long".[74]

The Supreme Court has recognized that where constitutional error has caused the conviction of an innocent person, his or her execution would violate the US Constitution. Under the 1995 ruling *Schlup v. Delo*, a condemned prisoner can obtain judicial review of otherwise procedurally barred claims of constitutional error 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.[75] 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."

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[72] Dow, D.R. and Freedman, E.M., The effects of AEDPA on justice. Chapter 13, The future of America's death penalty. Eds.: Lanier, C.S.; Bowers, W.J. and Acker, J.R., Carolina Academic Press (2009).

[73] *Herrera v. Collins*, 506 U.S. 390 (1993). The Court said that Herrera was "not left without a forum to raise his actual innocence claim". He could file a petition for executive clemency: "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". Executive clemency has time and again proved not to be a failsafe in Texas and elsewhere in the USA and Herrera was put to death on 12 May 1993, maintaining his innocence: "I am innocent, innocent, innocent. Make no mistake about this; I owe society nothing. Continue the struggle for human rights, helping those who are innocent…I am an innocent man, and something very wrong is taking place tonight."

[74] *In re: Larry Ray Swearingen*. US Court of Appeals for the Fifth Circuit, Judge Wiener, specially concurring. Judge Wiener noted that the Supreme Court had made certain statements that "at least strongly signal that, under the right circumstances, it might add those capital defendants who are actually innocent to the list of persons who – like the insane, the mentally retarded, and the very young – are constitutionally ineligible for the death penalty".

[75] *Schlup v Delo*, 513 US 298, 23 January 1995.

Troy Davis' first federal habeas corpus petition was filed on 14 December 2001 before District Court Judge John F. Nangle.[76] The petition did not make a free-standing claim of "actual innocence", as in the Herrera case, but rather sought to get through the *Schlup* "gateway" by arguing that constitutional violations had occurred at trial, including that the prosecution knowingly presented false testimony and failed to disclose exculpatory evidence, and that the legal representation provided to the defendant at trial had been inadequate.

Among other things, Judge Nangle ruled that the Georgia Supreme Court's decision not to grant Troy Davis a new trial on the basis of the controversial testimony of Dorothy Ferrell (see above), was not "unreasonable". Furthermore, he rejected the argument that the state's failure to disclose to the defence that Ferrell had written to the District Attorney's office about the possibility of its assistance in return for her testimony had been unconstitutional. The prosecution's non-disclosure of her letter did "not undermine confidence in the outcome of the trial", Judge Nangle ruled.

In relation to the testimony of Kevin McQueen, Judge Nangle was presented with the 1996 affidavit in which McQueen said that he had lied at the trial when he testified that Troy Davis had confessed in jail to murdering Officer MacPhail. Troy Davis' petition argued that not only had McQueen's trial testimony been false, but that its prejudicial effect had been compounded when the prosecutor emphasised in closing arguments to the jury that "there is not a reason on earth to doubt [McQueen's] word". Judge Nangle rejected the claim, including on the grounds that McQueen's affidavit showed only that this witness, "on his own and prompted by no one else", had lied at the trial.

> "Even if [Troy Davis] had been prejudiced by McQueen's false testimony to some degree, it is evident that [Davis] cannot prevail on the merits of this subclaim because McQueen's affidavit fails to provide evidence of State misconduct... A showing of state misconduct requires, at minimum, an allegation that the State presented McQueen's testimony while knowing it was false...McQueen did not present the affidavit recanting his testimony until well after the trial had ended, and no evidence has been presented to indicate that the State knew that his trial testimony was false".

Citing *Schlup v. Delo*, Judge Nangle ruled that

> "recanted testimony presented to show 'actual innocence' cannot, of itself, serve as a basis for federal habeas corpus relief. Rather, the appropriate inquiry is whether constitutional impropriety existed. In that McQueen volunteered the allegedly false information to the warden, to the police, and to the court, and in that he was under no State compulsion to testify, [Davis'] allegations concerning McQueen's false testimony fail to state a [constitutional violation]".

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 Judge 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:

> "This claim has been procedurally defaulted, and Petitioner has failed to show cause for the default. Furthermore, 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."[77]

[76] Judge Nangle, nominated to the federal judiciary by President Richard Nixon in 1973, died on 24 August 2008 at the age of 86.
[77] *Davis v. Head*, Order. US District Court, Southern District of Georgia, Savannah Division, 13 May 2004.

Judge Nangle's ruling meant that Troy Davis would not receive a federal 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.[78] The case moved to the next level of federal review, the US Court of Appeals for the 11th Circuit. On 26 September 2006, a three-judge panel of the 11th Circuit 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". 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. In 2007, the US Supreme Court refused to take the case.

An execution date of 17 July 2007 was set, and Troy Davis' lawyers filed an "extraordinary" motion in trial-level court arguing that he should receive a new trial on account of the state of the post-conviction evidence. The judge denied the motion, without holding a hearing. His decision was appealed to the Georgia Supreme Court. Meanwhile, the Georgia Board of Pardons and Paroles issued a stay of execution a few hours before it was due to be carried out, and two weeks after that the state Supreme Court agreed to consider whether the trial-level court had abused its discretion in dismissing the motion for a new trial without conducting a hearing. On 17 March 2008, it decided that there had been no such abuse of discretion, outlining the heavy burden that the petitioner must overcome in order to prevail on such a claim. Among other things, the four judges in the majority noted, under state case law, "the general lack of credibility that should be assigned to recantation testimony in the context of an extraordinary motion for new trial… Trial testimony is closer in time to the crimes, when memories are more trustworthy".[79] This position ignores the repeated occasions on which trial testimony has been found to have been unreliable, including in the many cases where such testimony has contributed to wrongful capital convictions in the USA.

Three of the seven judges on the Georgia Supreme Court dissented in an opinion authored by Chief Justice Leah Ward Sears. Joined by two of her fellow Justices, she wrote:

> "I believe that this case illustrates that this Court's approach in extraordinary motions for new trials based on new evidence is overly rigid and fails to allow an adequate inquiry into the fundamental question, which is whether or not an innocent person might have been convicted or even, as in this case, might be put to death… [I]t is unwise and unnecessary to make a categorical rule that recantations may never be considered in support of an extraordinary motion for new trial… If recantation testimony, either alone or supported by other evidence, shows convincingly that prior trial testimony was false, it simply defies all logic and morality to hold that it must be disregarded categorically…
>
> In this case, nearly every witness who identified Davis as the shooter at trial has now disclaimed his or her ability to do so reliably. Three persons have stated that Sylvester Coles confessed to being the shooter. Two witnesses have stated that Sylvester Coles, contrary to his trial testimony, possessed a handgun immediately after the murder. Another witness has provided a description of the crimes that might indicate that Sylvester Coles was the shooter. Perhaps these witnesses' testimony would prove incredible if a hearing was held. Perhaps the majority is correct that the alleged eyewitness's testimony will actually show Davis's guilt rather than his innocence. But the collective effect of all Davis's new testimony, if it were to be found credible by the trial court

[78] 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"."

[79] *Davis v. State*, Georgia Supreme Court, 17 March 2008.

> in a hearing, would show the probability that a new jury would find reasonable doubt of Davis's guilt or at least sufficient residual doubt to decline to impose the death penalty."

One more vote with this dissenting opinion would have turned it into a majority ruling and the trial court would have been required to have held a hearing on the post-conviction evidence. Instead the state moved to set an execution date.

Troy Davis' lawyers appealed to the US Supreme Court, arguing among other things that the case provided the Justices with "an opportunity to determine what it has only before assumed: that the execution of an innocent man is constitutionally abhorrent". The petition pointed out that since the 1993 *Herrera* ruling, "the country has become sceptical of the infallibility of our criminal justice system".[80] Less than two hours before the execution of Troy Davis was due to be carried out on 23 September 2008, the Supreme Court issued a stay. Three weeks later, however, the stay was dissolved when the Court announced that it would not consider the merits of the appeal. Another execution date was set, this time for 27 October 2008.

Davis' lawyers appealed to the 11th Circuit for an emergency stay of execution and for permission to file a second federal habeas corpus petition in the District Court raising, for the first time, a free-standing claim of actual innocence. Three days before the execution was due, the same three-judge panel which had ruled on the case in 2006 granted the stay of execution and ordered the parties to brief it on the question of whether Troy Davis should be allowed to file a second federal petition under the strictures of the AEDPA.

The obstacles under the AEDPA to a death row prisoner being able to file a second or successive federal habeas corpus petition are substantial. The prisoner must show that "(i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and (ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable fact-finder would have found the applicant guilty of the underlying offense".

On 16 April 2009, the 11th Circuit panel ruled by two votes to one that "Davis has completely failed to meet the procedural requirements [under the AEDPA], and, therefore, we are constrained to reject Davis's application to file a second or successive habeas petition in the district court".[81] The majority asserted that the AEDPA was "plainly…designed… to bring some finality and certainty to the seemingly never-ending collateral attack process". A common theme in the congressional debates on the Act, the two judges noted, was "the desire to prevent habeas petitioners from having successive 'bites at the apple'." Under the AEDPA, they noted, petitioners would have to establish actual innocence by "clear and convincing evidence", a "far more demanding" showing than the previous "more likely than not" standard. They said that the statute's clause, "but for constitutional error", also "undeniably" requires the petitioner to establish a constitutional violation.

The two judges in the majority ruled that Davis could have brought his actual innocence claim in his first federal petition and the only avenue left to him was if there was evidence in support of this claim that "could not have been discovered previously through the exercise of due diligence". Of the various affidavits being filed in support of the claim, however, they said that "only one satisfies this procedural requirement", as the rest had been available before or during the first federal habeas corpus proceedings. This affidavit was the one signed in September 2008 by Benjamin Gordon in which, as the 11th Circuit noted, Gordon said that Sylvester Coles "had suggested to him, long after the shooting, that he (Coles) was the one who had killed Officer MacPhail" (see Section 4.4).

[80] *Davis v. State*, Petition for a writ of certiorari, In the US Supreme Court, 14 July 2008.
[81] *In re: Troy Anthony Davis*. In the US Court of Appeals for the 11th Circuit, 16 April 2009.

The majority said that "even if we were to completely read out of the statute the phrase 'but for constitutional error'", Benjamin Gordon's affidavit "is plainly insufficient to establish a prima facie showing that, but for this evidence, no reasonable factfinder would have found Davis guilty of the underlying offense". Troy Davis, "therefore, cannot file a successive petition". The majority also rejected the argument that it should grant Davis permission to file such a petition on grounds of fairness:

> "We have neither the power nor the inclination to turn back the clock and pretend that the AEDPA was not enacted. It was enacted, and its provisions govern second or successive petitions."

The two 11th Circuit Court judges said that even if "we could somehow employ our equitable powers as gatekeeper reviewing a successive petition and ignore the plain requirements found in [the AEDPA], Davis has not presented us with a showing of innocence so compelling that we would be obliged to act today", adding that "for starters, we repeatedly have noted that recantations are viewed with extreme suspicion by the courts". In the opinion dissenting from her two fellow judges, Judge Rosemary Barkett wrote:

> "The majority takes the position that we cannot permit Davis to bring his evidence before the district court because our discretion to do so is constrained by AEDPA. But AEDPA cannot possibly be applied when to do so would offend the Constitution and the fundamental concept of justice that an innocent man should not be executed".

Again, as in the Georgia Supreme Court ruling in March 2008, Troy Davis was one vote short of obtaining judicial relief.

The two 11th Circuit judges in the majority concluded that Troy Davis could still appeal to the US Supreme Court, and extended for 30 days the stay of execution it had granted on 24 October 2008 in order that such a petition could be produced. That stay of execution expired on 16 May 2009. Troy Davis' habeas corpus petition was filed in the Supreme Court three days later.

6. HOWEVER 'SLIM' THE RESIDUAL DOUBT, JUSTICE DEMANDS CLEMENCY

The death sentence is unlike any other. There is no turning back once it has been carried out; to state the obvious, a mistake cannot be fixed… Mistakes do happen. Innocent people are convicted and sentenced to die.

US Senator Joseph Biden, AEDPA congressional debates, 7 June 1995[82]

In the absence of judicial relief for Troy Davis, whether he lives or dies in Georgia's execution chamber will be a political decision. There is no court order requiring that he be killed. His death is not a societal necessity. It can be stopped if the political will and moral courage can be found in those with authority and influence over the case.

Removing the death penalty from any particular case reinstates the possibility of rehabilitation and reform on the part of an offender. Taking away 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. Clemency is justified whether Troy Davis is guilty or innocent of the murder of Officer Mark Allen MacPhail. Under international standards, clemency is demanded by the fact that his guilt is not clear.

To use the words of federal judge Rosemary Barkett in April 2009, Troy Davis is caught in the "AEDPA's thicket of procedural brambles", and to execute him in the face of evidence that could establish his innocence would be "unconscionable". What must not be lost sight of, she said, is whether Troy Davis

[82] Congressional Record – Senate, 7 June 1995, S7841.

"may be lawfully executed when no court has ever conducted a hearing to assess the reliability of the score of affidavits" that, if reliable, would entitle Davis to federal habeas corpus relief.

Thirteen years earlier, during a debate in the US House of Representatives on the Anti-terrorism and Effective Death Penalty Act, Congressman Robert Scott had warned that

> "If this bill is enacted, we will find that those who are factually innocent and can present evidence of innocence will in fact be put to death… That is not an effective death penalty when we put innocent people to death. Those who could show that they are probably innocent will not even get a hearing, under this bill".[83]

Congressman Robert Scott – now the Chairperson of the House Subcommittee on Crime, Terrorism and Homeland Security – voted against the AEDPA. So did Congresswoman Nancy Pelosi, who had argued that:

> "The habeas corpus provisions in this bill are dangerous to ordinary citizens. They increase the risk that innocent persons could be held in prison in violation of the constitution, or even executed… It limits their right in almost all cases to only one round of Federal review, and severely limits the power that Federal courts have to correct unconstitutional incarceration."[84]

Nancy Pelosi is now Speaker of the House, and as such is second in the line of presidential succession. First in that line is Vice President Joseph Biden. As a Senator in 1996, Joe Biden voted in favour of the AEDPA. He had unsuccessfully sought an amendment to the bill on the federal deference question, and during a Senate debate in June 1995, he highlighted the danger of federal over-deference to state courts by pointing to the case of Leo Frank, who was sentenced to death for murder in Georgia in 1913 after a trial in which an angry mob outside the courtroom may have inflamed the jury against the defendant. Leo Frank's sentence had been upheld by the state courts, however, and the US District Court for the Northern District of Georgia dismissed the case without holding an evidentiary hearing. On 19 April 1915, the US Supreme Court upheld the District Court's decision.[85] Justice Oliver Wendell Holmes dissented, arguing that the federal District Court should have "proceeded to try the facts". Federal over-deference to state court decisions, he wrote, would threaten "removal of what is perhaps the most important guaranty of the Federal Constitution".[86]

Eighty years later, in the AEDPA debates, Senator Biden recalled this case as one where "because of the deference rule, an innocent man was executed, and that is what is at stake today".[87] In 1982, 77 years after Leo Frank's death, a person came forward implicating the state's key witness as the murderer. In 1986, Leo Frank was posthumously pardoned.[88] Ten years later, Senator Clairborne Pell was another who voted against the AEDPA. During congressional debates on the bill, he had described the death penalty

[83] Congressional Record – House, 18 April 1996, H3611.
[84] *Ibid.*, H3614.
[85] *Frank v. Magnum*, 237 U.S. 309 (1915).
[86] *Ibid.*, Justice Holmes dissenting ("It is significant that the argument for the state does not go so far as to say that in no case would it be permissible, on application for habeas corpus, to override the findings of fact by the state courts. It would indeed be a most serious thing if this court were so to hold, for we could not but regard it as a removal of what is perhaps the most important guaranty of the Federal Constitution…. We do not think it impracticable in any part of this country to have trials free from outside control. But to maintain this immunity it may be necessary that the supremacy of the law and of the Federal Constitution should be vindicated in a case like this. It may be that on a hearing a different complexion would be given…But supposing the alleged facts to be true…, it is our duty to act upon them now, and to declare lynch law as little valid when practised by a regularly drawn jury as when administered by one elected by a mob intent on death").
[87] In 1915, the Governor of Georgia commuted Leo Frank's death sentence to life imprisonment because of doubts about his guilt. Two months later, Leo Frank was lynched.
[88] In Spite of Innocence: Erroneous convictions in capital cases, Radelet, M., Bedau, H., and Putnam, C. (1992), Northeastern University Press.

as "not a conscionable punishment", because "once carried out [it] cannot be reversed if it turns out that an individual really was innocent".[89]

The narrow majority of Georgia Supreme Court Justices who denied Troy Davis judicial relief in March 2008 said that they had "endeavoured to look beyond bare legal principles" to the "core question" of whether a jury presented with the current evidence would find Davis guilty or sentence him to death. Nevertheless, the four Justices deferred to the original jury's verdict, a verdict that four of the trial jurors themselves indicated in 2007 should no longer be relied upon. The three dissenting Justices argued that their colleagues in the majority had weighed the post-conviction evidence "too lightly". Surely in this case, as the evidence stands today, no one can be certain about whether the state is taking an innocent or a guilty man to its execution chamber.

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 the capital justice system's flaws has mounted. In January 2001, federal prisoner David Chandler – sentenced to death in the same year as Troy Davis – had his death sentence commuted to life imprisonment by President Clinton because of doubts about his guilt. As in Troy Davis' case, a key witness at Chandler's trial had later recanted his trial testimony.[90]

Phillip Dewitt Smith was sentenced to death in Oklahoma in 1984, seven years before Troy Davis was sent to death row in Georgia. On 9 April 2001, Oklahoma's Governor, Frank Keating, commuted Smith's death sentence to life imprisonment because of doubts about the prisoner's guilt. As in Troy Davis' case, the murder weapon was never found. As in Troy Davis' case, the trial testimony of key witnesses had been called into question. In a statement, Governor Keating said:

> "The case against Mr Smith was convincing, and it certainly met the legal threshold for conviction. But the post-conviction testimony of certain witnesses is disturbing. While these inconsistencies were dealt with appropriately by the legal system, they nonetheless raise questions in a case without eyewitnesses to the crime or forensics evidence tying the accused to the crime. Therefore, I cannot in good conscience allow the execution of this inmate."[91]

John Spirko was also sentenced to death in 1984. In January 2008, Ohio's Governor, Ted Strickland, commuted Spirko's death sentence to life imprisonment because of doubts about his guilt. The governor granted clemency despite the fact that Spirko was convicted, by a jury, of a "heinous murder"; despite the fact that state and federal courts had reviewed his conviction and upheld it; despite DNA tests not exonerating Spirko; and despite repeated recommendations against clemency by the state parole board. Governor Strickland nevertheless concluded that:

> "the lack of physical evidence linking him to the murder, as well as the slim residual doubt about his responsibility for the murder that arises from careful scrutiny of the case record and revelations about the case over the past 20 years, makes the imposition of the death penalty inappropriate in this case."[92]

Denial of clemency to Troy Davis in the face of such commutations would be another aspect of arbitrariness in the application of the death penalty in the USA.

The power of executive clemency exists as a failsafe against error and to allow consideration of evidence that the courts have been unable or unwilling to reach. In 2008, executive clemency was denied to Troy

[89] Congressional Record – Senate, 7 June 1995, S7851. Senator Pell died in the early hours of 1 January 2009.
[90] See Amnesty International Urgent Action, 12 January 2001, and update 22 January, http://www.amnesty.org/en/library/info/AMR51/008/2001/en; http://www.amnesty.org/en/library/info/AMR51/015/2001/en.
[91] See Amnesty International Urgent Action update 10 April 2001, http://www.amnesty.org/en/library/info/AMR51/057/2001/en.
[92] Governor's statement, 9 January 2008, http://www.governor.ohio.gov/Default.aspx?tabid=578.

Davis by the Georgia Board of Pardons and Paroles. The failsafe failed. Amnesty International fears that, without substantial political and popular pressure, the Board will not change its mind.

Amnesty International appeals to the Governor of Georgia, Sonny Perdue, to do all he can to stop the execution of Troy Davis. It also urges the new District Attorney of Chatham County, Larry Chisolm, whose predecessor prosecuted Troy Davis, to oppose this execution and call on the Board of Pardons and Paroles to commute the death sentence. To do so would be entirely consistent with the requirement under international standards for prosecutors to "perform their duties fairly" and to "respect and protect human dignity and uphold human rights, thus contributing to ensuring due process and the smooth functioning of the criminal justice system".[93] District Attorney Chisholm, who took office on 2 January 2009, has suggested that his election in November 2008 was "a strong indication that the citizens are interested in changes in the criminal justice system and I'm excited about the opportunity to try and provide the changes for the better".[94]

Amnesty International also appeals to Georgia legislators to oppose this execution. Leaders in the federal government, too, could use their influence. The federal government should ensure that the country as a whole upholds international human rights standards – in the case of treaty provisions it is under a legal obligation to do so. Amnesty International considers that the execution of Troy Davis would, at minimum, contravene Safeguard 4 the UN Safeguards guaranteeing protection of the rights of those facing the death penalty.[95]

Amnesty International recalls the words of US Supreme Court Justice Harry Blackmun who wrote in 1993:

> "Nothing could be more contrary to contemporary standards of decency, or more shocking to the conscience, than to execute a person who is actually innocent… Just as an execution without adequate safeguards is unacceptable, so too is an execution when the condemned prisoner can prove that he is innocent. The execution of a person who can show that he is innocent comes perilously close to simple murder."[96]

A death row inmate in the USA faces huge obstacles to proving his or her innocence, not least if there is no DNA evidence to test and when the courts treat witness recantations with scepticism. It is even more difficult to succeed in this uphill task when under a federal law – drafted at a time when US public and political support for the death penalty was far stronger than it is today and when the extent of the capital justice system's mistakes was yet to be revealed – no court will agree to hold an evidentiary hearing into the condemned prisoner's post-conviction evidence of innocence.

Circuit Judge Rosemary Barkett is surely right. To execute Troy Davis under these circumstances would be unconscionable.

[93] UN Guidelines on the role of prosecutors, point 12.
[94] Chisolm wins District Attorney race, Savannah Morning News, 5 November 2008.
[95] "Capital punishment may be imposed only when the guilt of the person charged is based upon clear and convincing evidence leaving no room for an alternative explanation of the facts".
[96] *Herrera v. Collins*, 506 U.S. 390 (1993), Justice Blackmun, dissenting.

7. 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

"In total disbelief I read the opinions of those who would deny me a true day in court, citing procedure and almost ignoring the innocence factor; stating recanted testimony is not important even though the witnesses who in Georgia could face life in prison for recanting their original testimonies against me. It is not as if they know I'm guilty, it is as if they are not willing to admit the injustice that has befallen me. Judges hide behind technicalities and procedures as if my life is of no consequence; they hold me

accountable for the lack of good defense lawyers from the past. Is it because I challenge the system they try so hard to protect or is it because it shows them the truth of how flawed the system really is? One thing I know is no one deserves to die on legal technicalities and everyone deserves a chance when wronged.

I have faced execution and the torment of saying goodbye to my family three times in the last two years and may experience that trauma yet again; I would not wish this on my worst enemy and to know I am innocent only compounds the injustice I am facing. Yet with so many standing with me, I know somehow a change will come and the death penalty in Georgia will crumble. The only thing they can take from me is my physical form, my soul is protected by God."

Troy Anthony Davis, May 2009

8. 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.

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).

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 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

"With all that my family has faced in the last few years it reminds me of my illness – it is like a growing cancer that keeps coming back. As I watch in amazement the strength of my brother Troy and my mother Virginia I sometimes ask why not me, but then my brother would be in my place. Fighting for a chance to be heard, fighting to save my life. All we have ever wanted was the opportunity for the truth to be exposed in a situation where we must always get it right, and if we don't innocent people die. I am beginning to think this is more about racism than the truth, more about the State of Georgia's defiance than justice. One thing I do know is that we will keep fighting, we will keep on praying and once the Pandora's Box of injustice is fully open we will win.

Troy Anthony Davis has become known to many all over the world as a man who, in the face of execution, still has dignity, compassion and faith that God will move this mountain of injustice."

Martina Correia, May 2009