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USA: Room for doubt, no room for execution

Final briefs filed after federal evidentiary hearing in Troy Davis case

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I write concerning your impending decision regarding the fate of Troy Davis. I do not write to influence your decision, but only to say that I am praying that justice be done. When so much is contested, the penalty of death seems so inappropriate. May you be guided by wisdom.
Letter to US District Court Judge William T. Moore from resident of Atlanta, Georgia[1]

Even for proponents of the death penalty, the risk of the state executing a person for a crime they did not commit is surely a troubling one.

It is disturbing, then, that US Supreme Court Justice Antonin Scalia should have characterized as "a fool's errand" the decision of his colleagues in 2009 to order a federal evidentiary hearing in the case of Troy Davis, a death row inmate in Georgia about whose guilt there is serious doubt.[2] Surely, for the death penalty advocating state, it would be the height of foolhardiness to send a condemned prisoner to the execution chamber without knowing for sure that it had the "right" person.

As far as Amnesty International is concerned, there is no such thing as a right execution, regardless of questions of guilt or innocence. The death penalty is incompatible with respect for human rights and human dignity. What is more, no criminal justice system can guarantee to be error-free. Thankfully, progress towards global abolition of the death penalty continues, with 139 countries abolitionist in law or practice today. They reject the judicial execution of anyone, let alone someone whose guilt is in doubt.

Doubts about Troy Davis's guilt are widespread and, notwithstanding Justice Scalia's assertion that his innocence claim is a "sure loser" and that transferring the case to the District Court for further scrutiny could "serve no purpose except to delay the State's execution of its lawful criminal judgment", concern extends to members of the US judiciary.[3] In 2009, for example, a federal judge argued that to execute Troy Davis on the current state of the evidence would be "unconscionable". Her two fellow judges disagreed, so Troy Davis lost 2-1. More recently, the former Chief Justice of the Georgia Supreme Court wrote that if he had still been on that Court in 2008 when, by four votes to three, it denied Troy Davis an evidentiary hearing in state court, the result instead might have been 4-3 in favour of the condemned man. "It is by such razor-thin margins" added the former Chief Justice, "that we determine who lives and who dies".[4] Razor-thin margins demonstrate an absence of certainty. An absence of certainty should give proponents of this irrevocable punishment pause for thought.

Some might argue that the burden on the state at trial to prove the defendant's guilt "beyond a reasonable doubt" would be enough to ensure certainty thereafter. Or perhaps they might argue that in those capital cases where jurors have a residual doubt over the defendant's guilt, this would always lead them to vote for a life sentence rather than death.

Clearly, this is not the case. More than 130 people have been released from death rows on grounds of innocence in the USA since 1976, including at least 17 cases where DNA testing was a major contributor to the exoneration.[5] In each case, the defendant had been found guilty beyond a reasonable doubt at trial and any lingering doubt in the minds of jurors did not prevent them voting for execution.[6] It

is beyond dispute, then, that the US capital justice system is capable of mistakes at the trial stage. The system must apply a post-conviction standard that allows errors to be discovered and remedied and ensures that procedural and legal obstacles do not block this.

In its March 2008 decision refusing to grant a new trial or hearing for Troy Davis, the four Georgia Supreme Court Justices in the majority wrote that, despite all the evidence gathered since trial casting doubt on his conviction, "we simply cannot disregard the jury's verdict in this case". Yet there are doubts in the minds of some of those very same jurors about the decision they made nearly two decades ago. 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.

The evidentiary hearing ordered by the Supreme Court in August 2009 was held before Judge William Moore in the US District Court for the Southern District of Georgia on 23 and 24 June 2010. His task, according to the Supreme Court, was to "receive testimony and make findings of fact as to whether evidence that could not have been obtained at the time of the trial clearly establishes petitioner's innocence". After hearing various witnesses at the two-day hearing, Judge Moore ordered the State of Georgia and lawyers for Troy Davis to file their final briefs with him by 7 July 2010. Judge Moore asked the two parties to address a number of questions, including whether the US Constitution prohibits the execution of a person who has had "a full and fair trial without constitutional defect, but can later show his innocence", and if such executions are prohibited, what the burden of proof would be for the prisoner to demonstrate his or her innocence.

While international law is abolitionist in outlook, it recognizes the fact that some countries still retain the death penalty. Pending abolition, the international community has agreed that certain safeguards must be met in capital cases. One of these safeguards concerns the burden of proof on the death penalty state:

> "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".[7]

Clearly, given the mistakes that have been shown to occur before and at trial, this standard should apply beyond that stage in a case. Indeed, in reporting to the United Nations under this safeguard, governments have pointed to the post-conviction reversal of death sentences in cases where there was doubt over the condemned prisoner's guilt after the trial. Notably, the 2005 Report of the UN Secretary General on "Capital punishment and implementation of the safeguards guaranteeing protection of the rights of those facing the death penalty" added that:

> With respect to the aspiration for there to be no room for an alternative explanation of the facts in capital cases, it is worth quoting the conclusion of the Commission set up by Governor Ryan to review the system in Illinois: 'The Commission was unanimous in its 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'.[8]

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. Yet some still maintain that the USA's exonerations of condemned inmates are a sign of the system working. Among those who have perpetuated this myth is Justice 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."[9]

In the USA, the risk was not insignificant to the more than 130 individuals released from death rows since 1976 who spent, on average, more than nine years between conviction and exoneration.[10]

In his dissent from the Supreme Court's August 2009 decision to order a federal evidentiary hearing in the Troy Davis case, Justice Scalia displayed firm confidence in the jury's verdict from 18 years earlier. He stressed that "after a trial untainted by constitutional defect, a unanimous jury found petitioner Troy Anthony Davis guilty of the murder of Mark Allen MacPhail". Senior Associate Justice John Paul Stevens, with more than three decades of service on the Court, responded that Justice Scalia was wrong because he "assumes as a matter of fact that petitioner Davis is guilty of the murder of Officer MacPhail. He does so even though seven of the State's key witnesses have recanted their trial testimony; [and] several individuals have implicated the State's principal witness as the shooter".[11] In other words, despite the jury's 1991 verdict of guilt beyond a reasonable doubt, the current state of the evidence is less than clear and convincing, and there is room for an alternative explanation of the facts. From Amnesty International's perspective, this has not changed as a result of the evidentiary hearing held in June before District Court Judge William Moore.

Nevertheless, it is clear from the Georgia Attorney General's brief filed in Judge Moore's court on 7 July 2010 that the state intends to do all it can to get Troy Davis to the execution chamber, on the grounds that he has "certainly failed to show his innocence". Given the "unreliable and untrustworthy evidence" presented at the hearing, it said, there was no need for Judge Moore to answer the question of whether the execution of an innocent person violates the Constitution.[12] Neither, it said, need he decide the appropriate burden of proof because the evidence presented was "clearly insufficient to meet any extraordinarily high threshold which may ultimately be adopted by the Supreme Court".

Is not the international safeguard placing a burden on the state to prove guilt in a capital case by "clear and convincing evidence leaving no room for an alternative explanation of the facts" more appropriate than applying an "extraordinarily high" burden on a prisoner to prove his innocence when the state is preparing to commit the irreversible act of killing him? Again, the backdrop is not one of a capital justice system proven to be unerringly reliable, but one in which there have been an 'extraordinarily high' number of mistakes. In 2006, US Supreme Court Justice David Souter, joined by three other Justices, pointed to the growing "evidence of the hazards of capital prosecution".

> "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 convictions in homicide cases, and the corresponding incentive for the guilty to frame the innocent."[13]

Witness evidence is the broken backbone of the prosecution's case against Troy Davis. Experts in witness testimony have noted that "the advent of DNA testing has revealed that faulty eyewitness identification is the single most likely factor to result in wrongful conviction".[14] According to the USA's Innocence Project, there have been some 255 "DNA exonerations" of prisoners convicted of various crimes in the US criminal justice system since the advent of DNA testing.[15] In 75 per cent of these cases, eyewitness misidentification played a role in the original conviction.[16]

In the brief filed before Judge Moore on 7 July 2010, the lawyer for Troy Davis acknowledged that there is "no exonerating DNA evidence in Mr Davis's case" and added that there is "no physical evidence linking Mr Davis to Officer MacPhail's murder". He wrote:

> "But as Mr Davis's counsel explained at the evidentiary hearing, DNA exonerations are simply the canary in the coal mine – indicators of the disturbing extent to which trials with constitutional safeguards can result in wrongful convictions, usually by witness misidentification".[17]

There is now a high level of public belief in the USA that the criminal justice system makes mistakes. The findings of an opinion poll conducted across the USA in March 2008, for example, included the following:

> "There is one issue almost all Americans agree on – 95 percent of US adults say that sometimes innocent people are convicted of murder while only 5 percent believe that this never occurs. This is a number that has held steady since 1999. Among those who believe innocent people are sometimes convicted of murder, when asked how many they believe are innocent, the average is 12 out of 100 or 12 percent."[18]

Recognition of the potential for error may be one reason why death sentences in the USA are on the decline, along with the adoption across the country of life imprisonment without the possibility of parole as a sentencing option for capital jurors. At the time of the Troy Davis trial, jurors in Georgia did not have this option. 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.[19] This reflects a national trend. In 1991, the year that Troy Davis was tried, there were 268 death sentences passed in the USA. In 1995 there were 326. For the past six years, there have been fewer than 150 death sentences passed each year, and in 2009, the lowest total since 1976 was recorded (106).

With the current state of public knowledge about the risk of errors in capital cases, 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?[20] 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, even if they voted to convict?

At least some of them have indicated that they would not. For example, one of the jurors said in 2007 that the post-conviction evidence left him with "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."[21] His view would seem to reflect the international safeguard. Where there is room for an alternative explanation of the facts, even a death penalty supporter – which all US capital jurors by definition are – should reject the ultimate punishment.

On 8 July 2010, District Court Judge William Moore instructed his clerk's office to file in the record of the case a letter sent to him by an Atlanta resident.[22] The writer said that "when so much is contested, the penalty of death seems so inappropriate". She expressed the hope that wisdom would guide Judge Moore's decision on the Troy Davis case. Her words surely make more sense than the notion that it was a "fool's errand" for the US Supreme Court to send the case to the District Court in the first place.

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

[1] Filed *In re: Troy Anthony Davis*, US District Court, Southern District of Georgia, 8 July 2010.
[2] *In re: Troy Anthony Davis*, on petition for writ of habeas corpus, Justice Scalia dissenting, 17 August 2009.
[3] A number of former federal and state judges and prosecutors were among those who joined an amicus curiae brief in 2009 urging the US Supreme Court to grant Troy Davis a federal evidentiary hearing.
[4] Norman S. Fletcher, 'Stevens leaving legacy of judicial care'. Atlanta Journal Constitution, 21 June 2010.
[5] http://www.deathpenaltyinfo.org/innocence-list-those-freed-death-row
[6] Research has shown that US capital jurors are more conviction prone than their excludable counterparts. 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*. 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. 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". In 2008, US Supreme Court Justice John Paul Stevens, writing of his concerns about the death

penalty, noted that "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." See USA: 'Unconscionable and unconstitutional': Troy Davis facing fourth execution date in two years, 19 May 2009, http://www.amnesty.org/en/library/info/AMR51/069/2009/en

[7] Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty, Safeguard 4. The Safeguards were adopted by the United Nations Economic and Social Council in 1984, and endorsed on 14 December 1984 by the UN General Assembly in Resolution 39/118.

[8] UN Doc. E/2005/3, 9 March 2005.

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

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

[11] *In re Troy Anthony Davis*. On petition for writ of habeas corpus, Justice Sevens concurring, 17 August 2009.

[12] Although the state brief argued that Judge Moore need not decide this question, it added that the State of Georgia agreed "with the principle that executing one who is legally and factually innocent would be inconsistent with the Constitution" (internal quote marks omitted). *In re Troy Anthony Davis*. Final brief on behalf of respondent. In the US District Court for the Southern District of Georgia, Savannah Division, 7 July 2010.

[13] *Kansas v. Marsh* (2006), Justice Souter, joined by Justice Stevens, Justice Ginsburg, and Justice Breyer, dissenting.

[14] *Keith v. Ohio*. Brief of memory experts as amici curiae in support of petitioner. In the Supreme Court of the United States, 5 April 2010.

[15] See http://www.innocenceproject.org/know/

[16] See http://www.innocenceproject.org/understand/Eyewitness-Misidentification.php

[17] *In re Troy Anthony Davis*. Petitioner's post-hearing brief in support of his petition for writ of habeas corpus. In the US District Court for the Southern District of Georgia, Savannah Division. 7 July 2010.

[18] Over three in five Americans believe in death penalty, 28 March 2008, Harris Interactive, http://www.harrisinteractive.com/vault/Harris-Interactive-Poll-Research-Over-Three-in-Five-Americans-Believe-in-Death-Penalty-2008-03.pdf

[19] 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).

[20] See USA: Second thoughts – Former jurors rethink death decision as execution approaches, 26 March 2010, http://www.amnesty.org/en/library/info/AMR51/025/2010/en. And USA: Oklahoma governor commutes death sentence, Amnesty International Urgent Action update, 20 May 2010, http://www.amnesty.org/en/library/info/AMR51/044/2010/en

[21] USA: 'Unconscionable and unconstitutional': Troy Davis facing fourth execution date in two years, 19 May 2009, *op. cit.*

[22] Note: Amnesty International does not organize letter-writing to judges.