STATEMENT IN RESPONSE TO
THE DENIAL OF CERTIORARI
BY
THE SUPREME COURT OF THE UNITED STATES
IN
DAVIS v. GEORGIA

14October 2008

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Since Troy Davis' conviction seventeen years ago, until today, I've been silent. In the face of an international firestorm of public relations campaigning by advocates of Troy Davis – or by activists opposed to the death penalty with or without reference to Troy Davis – I have made no attempt to sway judicial or world opinion by extra-judicial gesticulating.

Our canons of legal ethics prohibit a lawyer – *prosecutor and defense counsel alike* – from commenting publicly, or engineering public comments, on the issue of guilt or innocence in a pending criminal case. Accordingly, I have been constrained until today to limit my statements to pleadings and arguments in court.

The merits of the case are no longer pending. The matter has been decided. This frees me to offer the prosecution's perspective. I hope the following will be helpful.

I

The Facts:

Here are the facts as they were proved at trial:

On a Friday evening in August, 1989, Troy Davis (aka RAH [Rough as Hell]) was at a pool party in a residential neighborhood when a group of young men from another neighborhood arrived. Apparently because this group attracted the attention of some young women who ignored Davis, he became agitated and shot one of the interlopers (Michael Cooper) in the face. Friends drove Davis to a nearby pool hall and convenience store which, in turn, was adjacent to a bus station with an on-premises fast food restaurant. At around midnight, when a homeless man (Larry Young) emerged from the convenience store with beer he was carrying to the bus station parking lot to continue his conversation with Harriet Murray, he was followed by Davis and another

man (Sylvester Coles, aka Red) who harassed him for his beer. When they arrived at the parking lot, Davis hit Young in the head with his pistol. Bleeding, Young ran to the door of the restaurant. Officer MacPhail, who was working in uniform off-duty at the bus station and restaurant, heard the ruckus and ran out of the station and into the parking lot. Passing Coles, Officer MacPhail ran toward Davis. Davis shot the officer, who fell to the pavement. He then stood over Officer MacPhail and, smiling, shot him in the face. There were a total of total of three shots finding their target (leg, chest and face). Officer Mark MacPhail, twenty-seven years old, a former Army Ranger and father of two young children, died without ever having drawn his weapon. Davis quickly departed to Atlanta. Coles, for his part, went to the police to tell what he knew.

At trial, every one of the now-recanting witnesses was pressed forcefully by defense counsel to get them to qualify or retract their testimony. All refused.

Davis was unanimously convicted by a jury of 7 blacks and 5 whites, of murder of a police officer for killing Mark MacPhail, aggravated assault for shooting Michael Cooper, aggravated assault for pistol-whipping Larry Young, and other related offenses. The jury sentenced him to death.

II

Great weight is placed by the defense upon the fact that 7 of 9 witnesses at trial have "recanted" their trial testimony.

Even if all of the affidavits can be said to rise to the level of actual recantations, every one of them failed to meet the legal threshold requirements of a basis for new trial.

The law is understandably skeptical of post-trial "newly-discovered evidence." Such evidence as these affidavits might, for example, be paid for, or coerced, or the product of fading memory.

Would it not be ironic, for instance, in a case such as this one, if affidavits claiming coercion by police were themselves obtained by coercive tactics?

Imagine a witness of limited sophistication, having undergone the grueling trauma of testifying at trial in a death penalty case, who is approached, a decade later, in the privacy of her own home, by strangers representing Troy Davis. And suppose she is reminded of the lateness of the hour of the shooting, the suddenness and violence of the event, the *possibility*, at least, of her own error, the fact that Davis has been in prison all this time, that the State is seeking to kill him, and that she has it in her power to save him merely by signing an affidavit. Imagine the almost inevitable product of such an interview: An affidavit, perhaps?

If every verdict could be set aside by the casual acceptance of a witness's changing his mind or suggesting uncertainty, it is easy to see how many cases would have to be tried *at least* twice (perhaps *in infinitum*). Thus the law sets strict standards for such evidence (see Judge Freesemann's order discussing the *Timberlake* case).

For example, it cannot be for a lack of diligence that the new evidence was not discovered sooner, and the defendant is expected to present that evidence at the earliest possible time.

Yet these affidavits were not offered as a motion for new trial until eight days before the first scheduled execution in 2008. If this affidavit evidence was so compelling, why didn't they rush to seek a new trial in 2003 when they had most of the affidavits they now rely upon?

In any event, each of the now-"recanting" witnesses was vigorously cross-examined at trial by lawyers representing Davis, specifically on the question whether they were in any way pressured or coerced by police in giving their statements or testimony. All denied it.

And while an 80% recantation rate – the first in the history of the world? – may seem to some as overwhelmingly persuasive, to others of us it invites a suggestion of manipulation, making it very difficult to believe.

III

Davis' advocates nevertheless claim that the courts have failed to consider their so-called "newly-discovered evidence."

The first time any of the "recantations" were presented was in state habeas. That means they were reviewed by one judge and then by the seven Georgia Supreme Court justices on appeal from denial of habeas relief. Then they were reviewed in federal habeas by one judge and then by the three Eleventh Circuit judges on appeal. Then they were reviewed in cert petition form by nine Supreme Court justices. Then they were reviewed by the trial judge during the extraordinary motion for new trial and then by seven justices of the Georgia Supreme Court. Therefore, the affidavits, in various combinations, had already been reviewed by 29 judges in seven different types of review, over the course of 17 years, before today's ruling by the U.S. Supreme Court.

While it is true that none of those courts has heard direct testimony from the recantation witnesses, it is also true that the Parole Board did hear from them, and questioned them closely.
(In any event one wonders, what would be the benefit of direct testimony simply restating what the affidavits said? Or might we expect the witnesses to vary again?)
All that aside, and as for the courts, they did consider the affidavits in substantive terms. Here's a more specific sample of the post-conviction appellate approach, which is obviously not at all dismissive, contrary to Davis' counsel's representations.
At the state level:Chatham Superior Court Judge Penny Haas Freesemann, July 13, 2007. Order denying motion for evidentiary hearing on witness affidavits:

"The Court has exhaustively reviewed each submitted affidavit and considered in great detail the relevant trial testimony" given by the same people. . . . And,"Defendant has failed to carry his burden on each and every submitted affidavit."

Supreme Court of Georgia, majority opinion upholding Freesemann's order and denying motion for new trial, March 17, 2008:

"Particularly in this death penalty case where a man might soon be executed, we have endeavored to look beyond bare legal principles . . . to the core question of whether a jury presented with Davis's allegedly new testimony would probably find him not guilty or give him a sentence other than death." Considering the evidence at trial, favoring it, and considering the post-trial evidence, "We conclude that the trial court did not abuse its discretion in denying Davis' extraordinary motion for a new trial."

State Board of Pardons and Paroles, July 16, 2007, order suspending Davis' planned execution to consider new evidence:

"The members of the Georgia Board of Pardons and Paroles will not allow an execution to proceed in this State unless and until its members are convinced that there is no doubt as to the guilt of the accused."

State Board of Pardons and Paroles, Sept. 22, 2008, statement regarding its denial of clemency on Sept. 12, 2008.

"The Board has now spent more than a year studying and considering this case....The Board gave Davis' attorneys an opportunity to present every witness they desired . . . The Board heard each of these witnesses and questioned them closely." And

". . . The Board has studied the voluminous trial transcript, the police investigation report and the initial statements of all witnesses. The Board has also had certain physical evidence retested and Davis interviewed." And

"After an exhaustive review of all available information regarding the Troy Davis case and after considering all possible reasons for granting clemency, the Board has determined that clemency is not warranted."

* * * **Federal court rulings**:U.S. District Court Judge John Nangle, May 13, 2004, denying federal habeas corpus relief:

". . . [B]ecause 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."

* * * Eleventh U.S. Circuit Court of Appeals, Sept. 26, 2006, affirming Nangle's ruling

denying habeas petition in unanimous ruling by Judges Joel Dubina, Rosemary Barkett and Stanley Marcus.

> "Davis does not make a substantive claim of actual innocence. Rather, he argues that his constitutional claims of an unfair trial must be considered, even though they are otherwise procedurally defaulted, because he has made the requisite showing of actual innocence." And...Davis "argues that the district court erred in declining to consider evidence of his actual innocence and instead reached the merits of his constitutional claims. Davis cannot prevail on this issue."

IV

Davis' advocates also suggest that the case relied entirely on eyewitness testimony, making it fundamentally weak, and that there was no physical evidence to support it.

** It is true that eyewitness testimony is the backbone of the case. This was a fight and murder that occurred in a fast-food parking lot adjoining a bus station, under lights, in a neighborhood where people congregate late at night, next to a housing project, across the street from a motel and up the street from a pool hall and convenience store.

** In any event, **there is physical evidence.** Crime lab tests demonstrated that the shell casings from Davis' shooting of Cooper earlier in the evening were fired from the same weapon as the casings recovered from the scene of Officer MacPhail's murder.

** Worth noting as well is the Sylvester ["Red"] Coles herring. Davis' advocates are anxious to condemn Coles based on evidence far weaker than their characterization of the evidence against Davis. This is the same Sylvester Coles who promptly presented himself to police and, who was advised by counsel to tell all that he knew – with his lawyer not even present. Which he did. "Law and Order" aside, no lawyer who thought it even remotely possible that any case could be made against client would ever allow him to give a statement to the police, and especially not without the lawyer's being present. Period.

** And, while it isn't physical evidence, consider the "testimony" of Officer MacPhail himself – evidence of his actual perceptions and conduct under fire that can't be fiddled with after the fact: ***He ran past Sylvester Coles on his way to Troy Davis*****. This makes Davis the only one of those two with a motive to shoot Officer MacPhail.**
(Can it be that four independent witnesses testified to this at trial, then all – just as independently – decided to recant that testimony?)

V

Gaming the System: Collateral damage.

As among the parties caught up in this case – the families of the accused and the victim, the criminal justice system, the public, and Davis – only Davis has been treated fairly.

[A] DELAY

The criminal justice system has been painstakingly indulgent of Davis' claims – again, hardly dismissive, as his advocates would have the world believe.

Davis killed Officer MacPhail in August of 1989. Two years later he was convicted of that offense (and of Cooper's shooting earlier on the same night as well as the pistol-whipping of Larry Young). Seventeen years after the jury's verdict, we've arrived at a final disposition rendered by the U.S. Supreme Court.

For every minute of that time, Officer MacPhail's family have suffered the agony of uncertainty. For every minute of that almost two decades – the life of a human generation – they have wondered whether the law would ever provide them with the only positive aspect of their terrible loss that could be hoped for – the redemptive effect of an acknowledgment of the basic good-and-evil truth of that awful hour. In the meantime, they have had to live through a seemingly endless succession of new technical and substantive legal threats to their faith and hope.

It must be noted that the whole process has been similarly unfair, not only to the defendant – the interminable delays broken only by intensely frenetic activity – but, far more importantly, to his family, who have suffered deeply and striven desperately.

And in this delay the criminal justice system has hardly bathed itself in glory. The judiciary's only currency – unlike the other two branches – is its credibility. There comes a point at which an obsessively punctilious focus on fairness (for one party only) becomes itself unfair. Unfairness has a corrosive effect on credibility.

[B] THE PUBLIC RELATIONS CAMPAIGN

Nor, frankly, have the media showered themselves with glory. The PR campaign has of course become the favored artifice for corrupting the independence and credibility of the truth-seeking and independent judicial branch of our government.

These campaigns are usually energized – or at least, having been set off at the center, are carried forward around the circumference of the echo chamber – by people most of whom approach the law in ignorance, or with an ideological bias that, on the face of it, should disqualify them from fact-based, rational discussion.

And these campaigns tend to be swallowed whole and regurgitated in the same form by

some of the media.

It should be obvious that the PR campaign intensifies the agony of the victim's family (rarely, so much, that of the convicted on whose account it is carried out). A constant tattoo of the plight of the Perpetrator-Victim and faint mention of the plight of the Victim-Victim (the lost life and his survivors). It does seem that a sense of common decency and ordinary fairness would inspire a more balanced coverage.

If the only characteristic of a campaign of indignation attacking what must be the most open and accountable legal system on Earth was its naivete, we could look upon it with a measure of equanimity, even perhaps amusement. But the campaign's cynicism and manipulation are inimical to the law's neutral truth-seeking purpose. That is – I speak now of the impulsive anti-death penalty folks – often, the ostensible purpose of enlightening the operation of the law has the effect of compromising its principles.

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Attachments
1. Mug Shot – Davis upon arrest in MacPhail murder
2. Order on Defendant's Extraordinary [out-of-time] Motion for New Trial, Freesemann, J. – July 13, 2007

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