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WITH SOME MISTAKES THERE'S NO GOING BACK

In capital cases finality of the process must take a back seat

> 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 photospreads shown to eyewitnesses even included a picture of Coles. Additionally, three affiants now state that Coles confessed to the killing. To execute Davis, in the face of a significant amount of proffered evidence that may establish his actual innocence, is unconscionable and unconstitutional.

These aren't the words of a crusading reporter or ACLU lawyer. They're from the minority opinion in a recent decision by the U.S. Eleventh Circuit Court of Appeals rejecting Troy Davis's petition to file a Writ of Habeas Corpus.

Roll back twenty years. During the early morning hours of August 19, 1989 Davis, Coles and a juvenile named Collins asked a homeless man for some of his beer. When the man refused he was struck in the head with a gun butt. Savannah police officer Mark MacPhail chased Davis and Coles. During the encounter he was shot and killed. Later that morning Coles went to police and fingered Davis.

The case was tried two years later. The facts seemed compelling. Four eyewitnesses, including Coles, testified that Davis was the shooter. Two others said that Davis confessed. The homeless man identified Davis as his assailant. What's more, ballistics matched the fatal rounds to bullets from a shooting that took place hours earlier (that victim survived.) Davis, the State suggested, was responsible for not one shooting but two.

There was no physical evidence other than bullets. Davis was convicted of the officer's murder and sentenced to death.

In time Davis' new defense team poked holes in the case. Two of the four eyewitnesses said they never got a good look at the shooter but were pressed by police to identify Davis. Both witnesses who said that Davis confessed took it back. Defense investigators also dredged up three new witnesses, each of whom gave affidavits swearing that Coles admitted killing the officer.

Coles and an eyewitness named Steve Sanders held firm. Only problem is, Sanders originally told police that he couldn't ID the killer, so he was never shown the photospread and only picked out Davis at the trial. By then, of course, the defendant was well known.

In March 2008 the Georgia Supreme Court refused to grant Davis an evidentiary hearing. Justices were badly split, with four against and three in favor. Those who prevailed felt that on balance the trial testimony was more credible, particularly as the recanters didn't actually say that Davis was innocent. The losing side's views were summarized by Chief Justice Lea Ward Sears:

> While the majority wisely decides to look beyond bare legal principles and seeks to consider the strength of Davis's new evidence, I believe that it has weighed that evidence too lightly. 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...Perhaps these witnesses' testimony would prove incredible if a hearing were held...But the collective effect of all of Davis's new testimony, if it were to be found credible by the trial court 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.

Once there's a conviction the burden of proof shifts to the defendant. To justify a post-conviction evidentiary hearing Georgia law requires that "the new evidence [must] be so material that it would probably produce a different verdict." By the slimmest of margins, the judges thought not. Davis appealed their decision to the US Supreme Court (it agreed to review the matter only two hours before his scheduled execution.) Having done so, it too declined to intervene. Davis then applied to the Eleventh Circuit for leave to file a Writ of Habeas Corpus. In a 2-1 decision against Davis the prevailing justices disparaged the merits of his case:

> All told, the testimony by [eyewitnesses] Murray and Sanders remains; the two other eyewitnesses do not now implicate anyone, much less Coles; Coles continues to implicate Davis; and the testimony of Larry Young [homeless man] and Valerie Coles [Coles' sister] still collides with Davis's. When we view all of this evidence as a whole, we cannot honestly say that Davis can establish by clear and convincing evidence that a jury would *not* have found him guilty of Officer MacPhail's murder...As the record shows, both the state trial court and the

> Supreme Court of Georgia have painstakingly reviewed, and rejected, Davis's claim of innocence. Likewise, Georgia's State Board of Pardons and Paroles thoroughly reviewed, and rejected, his claim, even conducting further research and bringing in witnesses to hear their recantations in person....

As a last ditch effort, on May 19, 2009 Davis filed for a Writ of Habeas Corpus with the US Supreme Court. And that's where his case stands.

State and Federal courts have ruled that Davis isn't entitled to an evidentiary hearing because his new evidence would not, in their opinions, have affected his trial's outcome. Yet it's precisely in capital cases where referring to long-past judgments by admittedly fallible juries is morally unsatisfying. Actually, many prosecutors would probably agree. Only problem is, when physical evidence is lacking the passage of time can seriously erode the State's ability to present a compelling case, let alone counter new claims. It's not an idle concern. Based on the public record and his own experiences, the blogger thinks it more likely than not that Davis is guilty. He also believes that Davis stands an excellent chance of being acquitted if retried.

On the other hand, maybe Davis really *is* innocent. Yet on retrial he could be convicted anew. Georgia's Chief Justice, who clearly thinks him innocent, suggested that a new jury might at least spare his execution, if not grant an outright acquittal. It's a nice thought, but not something on which a genuinely innocent person would want to rest their hopes.

If the death penalty is to be retained, how can we help assure that it's justly applied?

- There were plenty of witnesses against Davis but no DNA. A rule might forbid imposition of the death penalty in the absence of compelling physical evidence.

- Evidentiary hearings could be required before death sentences are carried out. Depending on the strength of the defendant's arguments, judges could remand cases for a new trial or reduce the penalty to life without parole.

We depend on police, prosecutors and the courts to protect the innocent, deter potential violators and provide a sense of closure to victims and families. Yet the law has become an impossibly complex insider's game that can obscure if not displace the greater moral values it's meant to uphold. Fears that the legal process rather than facts are driving Davis's execution explain why his pleadings have, rightly or not, drawn such extraordinary international support. It's something that America, which offers itself as a model of enlightened justice, can't afford to ignore.