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A Personal Perspective on Media and the Law: The Case of Death Row Inmate Troy Anthony Davis

BY: GEMMA PUGLISI

To our readers: This Article was written before the execution of Troy Anthony Davis in the hopes that he would be granted a new trial. Despite the efforts, Davis was executed on September 21, 2011.

I. INTRODUCTION

As a former journalist and public relations media executive, I never expected to find myself passionately involved in the field of law. Working in a newsroom, we covered major stories, and certainly the biggest trial during my career was of O.J. Simpson.¹ The closest I got to a courtroom was serving on a jury for one week in New York City back in the 1980s. The point I remembered until this day is the defense attorney reminding me that I could not come back with a “guilty” verdict if I had *any* doubt.² As I entered my teaching career years later, I felt pretty comfortable in the media and public relations world. So I thought; my involvement in the legal field in a very abstract way was yet to come—and it all happened exactly four years ago in July 2007 after reading the newspaper.³ The media introduced me to Troy Anthony Davis, a forty-two-year-old man on death row in the state of Georgia;⁴ and in doing so, also opened my eyes to a very complicated and intricate world—the legal system and the death penalty. The Casey Anthony trial exemplified the general principle that the public often knows little about the death penalty until a heinous crime draws attention to it and become interested.⁵

I never imagined I would understand all the complexities of the death penalty until I heard about Davis’ case in 2007:

Georgia man is scheduled to be executed by lethal injection on Tuesday for killing a police officer in 1989, even though the case against him has withered in recent years as most of the key witnesses at his trial have recanted and in some cases said they lied under pressure from police.

Prosecutors discount the significance of the recantations and argue that it is too late to present such evidence. But supporters of Troy Davis, 38, and some legal scholars say the case illustrates the dangers wrought by decades of Supreme Court decisions and new laws that have rendered the courts less likely to overturn a death sentence.

Three of four witnesses who testified at trial that Davis shot the officer have signed statements contradicting their identification of the gunman. Two other witnesses — a fellow inmate and a neighborhood acquaintance who told police that Davis had confessed to the shooting — have said they made it up.

Other witnesses point the finger not at Davis but at another man. Yet none has testified during his appeals because federal courts barred their testimony.⁶

Combing the newspapers remains a ritual of mine. I did it as a journalist years ago—so too, as a media/public relations executive. The tradition continues as a professor. I often look for projects for my students to pursue and sometimes I would get

ideas from stories I read. This story jolted me. I found it hard to believe that this man, Troy Anthony Davis, would be executed within days⁷ and that there was so much *doubt* about *his* case. As such, the following controversies were at issue: (1) there were seven witnesses that recanted their testimony years after the murder and no court had ever heard them;⁸ (2) the failure of the investigators to find a murder weapon;⁹

and (3) the Antiterrorism and Effective Death Penalty Act of 1996¹⁰ made it difficult to present new evidence.¹¹ This case centered completely on eyewitness testimony¹²—clear and simple. To add to all this, Davis was breaking new ground; this was a death-penalty case involving the “innocence” issue — an issue the Supreme Court has not ruled on.¹³

Unexpectedly, this story changed my life and opened my world, from a communications’ professor, to a complex, riveting, and extraordinary field. It was my introduction to Law 101.



II. THE TROY ANTHONY DAVIS CASE

The Troy Anthony Davis case *should* have been quite simple on so many fronts, but it tragically became more complex. Now, more than twenty years after Officer Mark MacPhail's murder, there is still great doubt about Troy Davis' guilt, and a potentially innocent man faces his fourth scheduled execution.¹⁴

This case is based solely on the testimony of witnesses and the issue of *INNOCENCE*, which is why it has received tremendous media coverage. There are still questions on what exactly happened. Here is what is known: on August 19, 1989, police officer, Mark MacPhail, was off-duty and working as a security guard at a restaurant in Savannah, Georgia.¹⁵ That evening, several young black teens were hanging out at pool hall near a Greyhound Bus Station.¹⁶ Larry Young, a homeless man, walked over to a convenience store to purchase a beer.¹⁷ Sylvester "Red" Coles wanted the beer and harassed Young.¹⁸ "Coles threatened the retreating homeless man by exclaiming, 'You don't know me. Don't walk away from me. I'll shoot you.'"¹⁹ Near the scene were other young teens including Troy Anthony Davis and Darrell Collins.²⁰ Young was hit on the head with the pistol.²¹ According to his testimony in August 1991, Davis said, "Sylvester 'Red' Cole 'just turned and slapped the guy (Young)' as they walked across the Burger King parking lot."²² He received no assistance.²³ Officer MacPhail soon arrived.²⁴ Before he could investigate, shots were fired and the twenty-seven-year-old officer fell.²⁵ Everyone near the scene fled upon hearing the shots.²⁶ MacPhail died before the paramedics arrived.²⁷ "[T]he police . . . had no suspects."²⁸

The following day, "Red" Coles and his attorney approached the police to exonerate Coles.²⁹ He identified Troy Anthony Davis as the shooter.³⁰

Mr. Coles did not mention that he had been carrying a .38 caliber gun—the same caliber as the murder weapon—on the night of the shooting. After Coles' self-interested revelation, the Savannah police never questioned [his] involvement. The police never searched [his] house for the murder weapon, never included Coles' picture in witness photo spreads and paraded [him] in front of four state witnesses as a mere bystander in a crime scene.³¹

Shortly after Coles pointed the finger at Davis, the witnesses, several young teens, claimed that the twenty-year-old committed the murder.³² Years later, one of three witnesses recanted.³³ Several claimed that the police coerced them into confessing that Davis committed the murder.³⁴

As in any crime involving the death of a police officer, tensions run high. The police had their man—Troy Anthony Davis. Shortly after Coles' identification of Davis, the manhunt

began.³⁵ Before the incident, Davis had planned a trip to Atlanta and was leaving Savannah.³⁶

Law enforcement mainly investigated Davis and even added a color Polaroid of Davis to the photo lineup.³⁷ Within days the police tracked Davis' friends and family and searched his mother and sister's home.³⁸ The search for Davis grew strong and his trial attorneys described it as "the most intensive investigation probably done in the history of this country."³⁹

Marina Correia, Davis' sister said Davis was calm when he went to her home and asked for a ride.⁴⁰

They went the wrong way and stopped to ask a South Carolina state trooper for directions, not something someone running from the law would do. . . . Correia dropped her brother off at a construction site in College Park and drove back to Savannah. She says she still had no idea that she had just ferried a wanted man out of town. When she got home Sunday, she turned on her television and saw her brother's face. Underneath it was a ticker flashing the manhunt for a *cop killer*. She watched, stunned, thinking surely there had been a mistake.⁴¹

When Davis called his sister from Atlanta about job prospects, Correia told him that the police were "looking for [him]."⁴² Davis "assured his sister he was innocent."⁴³ Davis "was confident that when he gave his account of that night to the police, they would let him go."⁴⁴ Davis turned himself in and was immediately arrested.⁴⁵ Pastor Derrick Johnson stated that when he picked Davis up and brought him back to Savannah, the police never asked him anything about what Davis said in the car.⁴⁶ "They never wanted to hear his side of the story."⁴⁷ Two years later, Davis was convicted of the murder of Officer Mark MacPhail.⁴⁸ The police also never found a murder weapon, Coles' gun, or the one Davis allegedly owned.⁴⁹

Davis was portrayed as the murderer in several articles retrieved recently (August 2011) from the Live Oak Public libraries in Savannah, Georgia, during the two-month period of 1989 after the death of Officer Mark MacPhail.⁵⁰ "The slaying was referred to as a 'brutal, execution-style murder.'"⁵¹ Day after day, Davis' picture appeared on several of the front pages of the Savannah Morning News and the Savannah Evening Press.⁵² Davis' mother and sister were concerned over his safety, so they began negotiating with police several days before he surrendered.⁵³ According to his sister, it was to tell the police what he knew, and not to surrender for a crime he did not commit. Police never recovered the murder weapon, yet once Davis turned himself in, the media continued to portray him as the killer.⁵⁴ Throughout the articles, the journalist stated that it was "reportedly" Davis who asked the "man for a drink of his beer and when the man refused, Davis struck him in the face with a pistol."⁵⁵ There was never any mention of "Red" Coles at the scene.⁵⁶

One reporter interviewed a former teacher of Davis who stated, “he was a dumb kid and a worse student.”⁵⁷ The only objective story was an interview with a neighbor who stated, “Troy was like a big brother to the kids around here.”⁵⁸ Even before the trial was scheduled, District Attorney Spence Lawton, Jr., stated that he would seek the death penalty for Davis.⁵⁹ There were no in-depth articles about Davis and any statements he made. They just did not exist. There was no need for a trial. The media had declared Davis guilty, and his sentence was death.

III. THE CAMPAIGN TO FIGHT FOR TROY ANTHONY DAVIS

As the years passed and Davis lingered in a prison, the first scheduled execution date approached. It was the evening before—July 16—that got my attention through the media.

The campaign to help Davis had begun earlier with the help of the human rights group, Amnesty International, which established a campaign to save his life.⁶⁰ Martina Correia was instrumental in spreading the word out about her brother.⁶¹ In small communities throughout Georgia and later throughout the world, she became the messenger for her brother’s plight.⁶² The campaign continued to keep Davis alive with the help of prominent individuals who supported his claim of innocence.⁶³ Supporters included Pope Benedict, former President Jimmy Carter, Desmond Tutu, Sr. Helen Prejean, the Reverend Jesse Jackson, Congressman John Lewis, actor Mike Farrell, and the list goes on.⁶⁴ More organizations and institutions also offered their support including: the American Civil Liberties Union (ACLU); the National Association for the Advancement of Colored People (NAACP); the European Union; the National Association of Criminal Defense Lawyers; the National Black Law Students Association; Murder Victims Families; and the European Parliament.⁶⁵

These individuals or organizations were cited in almost every story written about Davis during the first scheduled execution.⁶⁶ There is no question that this visibility played a role in saving his life. When I read the first article about his imminent death, I knew I needed to help in some way. That was

quite out of character for me to become involved in something I knew very little about. The next day, I learned that Davis had received a stay.⁶⁷ It was not until months later that I learned all the details in the hearing that saved Davis’ life. One of the most compelling was of Congressman John Lewis, who addressed the Georgia State Board of Pardons and Paroles, proclaiming Davis was innocent and implying the real killer was “Red” Coles.⁶⁸ Little did anyone know, this hearing would be one of several.

IV. MY INVOLVEMENT WITH THE TROY ANTHONY DAVIS CASE

I contacted Amnesty International immediately, and then received a phone call from Martina Correia. In several of my classes I assign my students projects, and one relevant example is in a graduate writing class, where students were asked to write to the media about Davis’ case. Students also wanted to write a blog about the class and what Davis’ story meant to them.⁶⁹

I wrote about Correia’s surprise visit to my class to thank the students for their help.⁷⁰ Students also wrote opinion pieces.

I also wrote articles and several were published including an “exclusive” with Davis the weekend before the Georgia Supreme Court’s hearing.⁷¹ By writing the *Court’s Chance to Do the Right Thing*, I hoped that the Georgia Supreme Court would make the right decision and reopen the case. I knew it would bring visibility to the issue, and so I was happy to learn that the Atlanta Journal Constitution would publish it the day of the hearing. However, what was more extraordinary was finally having the opportunity to meet Davis several months after I was exposed to his case. My visit with him opened my eyes to the intricacies of his case and sadly the injustice he has endured. I had never been to a prison and I now found myself in the same place

that attorneys go to visit their clients. Davis was at the Georgia Diagnostic Classification Prison in Jackson, Georgia. My first visit was with his family, including his late mother, Virginia Davis (who passed away this past April),⁷² Martina, and his nephew, DeJaun, who was twelve-years-old at the time.

Visiting someone on death row is quite an extraordinary experience. Upon entering the prison, you are searched and

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limited to bringing only car keys, a driver's license, and coins, with which you may purchase food for inmates in vending machines. The food is horrible and the coins must be placed in a clear plastic bag. That is it. I could not write anything down while he was telling me about his case since no pencils, pens, or paper were allowed, so as soon as I ran back to the airport, I scribbled as much as I could on napkins, loose paper, anything for this article—it was all so compelling I did not want to miss any details. It was incredible trying to remember everything Davis said to me. The importance obviously is that Davis was convicted solely on the testimony of nine witnesses.⁷³ Seven of the witnesses' recantations had not yet been considered and Davis' attorneys were doing everything they could do have this "new evidence" presented.⁷⁴ When I learned about the Georgia Supreme Court's decision to hold a hearing,⁷⁵ I decided to fly out and be a part of it. I noticed Davis' lawyers only had about fifteen to twenty minutes to discuss his case. That was it. On March 17, 2008, the Georgia Supreme Court denied the appeal by a four to three majority.⁷⁶ The response by the majority was that the recanting witnesses "have merely stated they now do not feel able to identify the shooter," that the trial testimony could not be ignored, and that the court "in fact, favor[ed] that original testimony over the new."⁷⁷ In his dissent, the Chief Justice wrote, "[i]f 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."⁷⁸

That was one of the many blows Davis has received since I discovered his case in 2007. Davis has endured several scheduled executions⁷⁹—one that I experienced with him and several close friends hours beforehand. It was in September 2008 when Davis had exhausted appeal after appeal in the state of Georgia. In this situation, however, Davis' lawyers appealed to the United States Supreme Court to listen to his case one more time.⁸⁰ Despite this appeal, the state of Georgia decided to go ahead with a scheduled execution.⁸¹ Two hours before Davis was scheduled to be executed, as we all waited by a Wendy's Restaurant across the street, I was with one of Davis' lawyers when she got the call that the High Court had granted Davis a stay to look over his case.⁸² It was an extraordinary moment to witness his attorney and her reaction. Shortly after this, Davis faced another scheduled execution.⁸³ Finally, in August 2009, the United States Supreme Court ordered that the Savannah Federal District Court "receive testimony and make findings of fact as to whether evidence that could not have been obtained at the time of trial clearly establishes [Davis'] innocence."⁸⁴

Throughout this time, I continued to write pieces about my experiences with Davis and his case.⁸⁵ After my four years of knowing him and understanding the appeals, the rejections, and the numerous stays, the climax finally came in June 2010. The evidentiary hearing Davis prayed for was finally here.⁸⁶ He was

allowed in the courtroom in Savannah, on June 23, 2010, and I was sitting with his family along with NAACP's Ben Jealous and Amnesty International's head, Larry Cox. The hearing lasted two days.⁸⁷ Also, the hearing was quite contentious and sadly, biased. Judge William T. Moore, Jr., did not allow several of the witnesses to finish speaking and chastised the defense for not calling "Red" Coles to testify.⁸⁸ The defense first argued that they could not find Coles and later stated when they subpoenaed him it was too late.⁸⁹ Judge Moore issued his devastating response on August 24, 2011.⁹⁰

Although the District Court Judge agreed that the execution of an innocent man "would violate the Eighth Amendment of the United States,"⁹¹ the United States Supreme Court asked Moore to give his assessment of innocence since the High Court has yet to take a case on that is based solely on the innocence issue.⁹² Judge Moore also went on to say,

However, Mr. Davis is not innocent: the evidence produced at the hearing on the merits of Mr. Davis's claim of actual innocence and a complete review of the record in this case does not require the reversal of the jury's judgment that Troy Anthony Davis murdered City of Savannah Police Officer Mark Allen MacPhail on August 19, 1989. Accordingly, the petition is DENIED.⁹³

The tragedy is that several witnesses came forward and testified that they were scared and threatened by the police years ago.⁹⁴ One of the witnesses testified that he actually saw "Red" Coles pull the trigger.⁹⁵ The evidentiary hearing brought more media attention to the case and helped raise significant questions and, most importantly, raised *doubt*. There were no cameras in the courtroom, but the papers and local stations continued to cover the hearing full speed ahead.

The last ditch attempt to save Davis' life was on appeal to the U.S. Supreme Court. Finally, on March 28, 2011, the Court ruled against Davis.⁹⁶ In a brief article in the New York Times, reporter Adam Liptak wrote, "[t]he Supreme Court on Monday turned down what were probably the last set of appeals from Troy Anthony Davis, a death row inmate from Georgia who was convicted of murdering an off-duty police officer and whose case has attracted international attention."⁹⁷ The High Court failed to acknowledge the innocence issue.⁹⁸ The Court had asked Judge Moore if executing an innocent man violates the Eighth Amendment?⁹⁹ While Moore acknowledged that it did, the Court never commented on or reacted to that determination.¹⁰⁰

Yet again, Davis is tragically facing another imminent execution.¹⁰¹ Less than three weeks after the Supreme Court's decision, Davis' mother, Virginia, died suddenly and peacefully at her home.¹⁰² The burden of carrying all this for over twenty years took its toll on her and the Davis family.¹⁰³ The media

reported the story and it is possible that the state of Georgia did not execute Davis immediately because of the death of Virginia Davis. The controversy ensuing the prison where Davis is held might also have affected his execution date.¹⁰⁴ Months ago, the Drug Enforcement Agency confiscated drugs used in lethal injections.¹⁰⁵ The controversy centered on serious concerns about the executions and that the drugs used were not effective and inhuman. The drugs caused several of the death row inmates pain.¹⁰⁶ Despite this, the prison found an alternative drug to use and executions were reinstated.¹⁰⁷ Two inmates were recently executed and complaints were filed again concerning the drugs' effectiveness.¹⁰⁸ The last execution took place on July 21, cameras videotaped Andrew Grant DeYoung's final moments.¹⁰⁹ Another death row inmate granted the videotaping because he was concerned about the new drug used in the process was inhuman and ineffective.¹¹⁰

As Davis awaits his next scheduled execution, many continue to support him by sending letters to the Georgia Board of Pardons and Paroles—which has the power to save his life, or reduce his sentence.¹¹¹ Throughout my time knowing him and following his case, Davis' life has become an international story.¹¹² His support continues and his case has reached millions. In Google searches, his name has surpassed over three and a half million hits.

Now, Davis is rarely portrayed as a blood-thirsty murderer. Rather, he is portrayed as a man who may very well be innocent and may be executed for a crime he did not commit. The *DOUBT* is now more pronounced. His support involves musicians, former attorney generals, police officers, and even death penalty advocates.¹¹³ The media, who had once condemned Davis, has kept him alive.

The recent Casey Anthony trial¹¹⁴ has also opened the doors for Davis in some way. Her trial was controversial, even before the jury returned a “not guilty” verdict because of *doubt*.¹¹⁵ The media frenzy, despite many who feel Anthony was guilty, continued; in the end, a jury of her peers made the decision to acquit her. The hope is that the case of Troy Anthony Davis will continue in the eyes of the media, and that he will one day receive a new trial. Further, Davis should be judged by his peers and not the system that has failed him. Should that day arrive that he will be free, which he truly believes may happen, it will help me understand that you do not have to be a lawyer, law student, or in the legal world to contribute and understand the importance of becoming involved in something remarkable. Perhaps, Davis sums it all up in a letter he wrote to me back in May 2011:

When we have a system that is willing to execute someone with NO EVIDENCE at all linking them to a crime, then we have a system that does not work—one that can randomly pick anyone off the street and sentence them to death as long as they are poor or people

of color. . . . Every law has been altered to 1) cut the amount of appeals deathrow [sic] inmates have; 2) shorten the amount of time to argue New Evidence; 3) Increase the standard of proof needed to reverse a conviction or innocence; 4) Claiming Innocence is not a strong enough claim to stop an execution, etc . . .” We don't need a system that purposely traps Innocent people on deathrow[sic] and create laws making it acceptable to execute them. . . . The death penalty creates two families who become victims of murderous actions. Imagine being told the day, time, and method your love [sic] one will die and you are helpless to stop it while you pray and cry for your love [sic] one, others cheer for their death. . . . Lawyers paid by the state are given limited funds [sic] so they do limited work and every mistake they make, your love [sic] one on deathrow [sic] suffers because of it. Even with DNA that proves your innocence, [it] may not be enough if the Judge(s) refuses to allow DNA testing. . . . It's time to open the eyes of Justice so that all of us can see that 'INNOCENCE' should always matter. . . . Instead of making laws that trap innocent people behind bars, make them to free the innocent. . . . Deter prejudice, hatred, and racism by ending the Death Penalty now. An “eye for an eye” leaves the entire world blind. How can the US be a beacon of freedom to the rest of the world when justice includes the death penalty through a system that executes innocent citizens?¹¹⁶

V. THE AFTERMATH

Troy Anthony Davis was executed on September 21, 2011.¹¹⁷ His final words were:

I'd like to address the MacPhail family. Let you know, despite the situation you are in, I'm not the one who personally killed your son, your father, your brother. I am innocent. The incident that happened that night is not my fault. I did not have a gun. All I can ask . . . is that you look deeper into this case so that you really can finally see the truth. I ask my family and friends to continue to fight this fight. For those about to take my life, God have mercy on your souls. And may God bless your souls.¹¹⁸

Troy Anthony Davis lives on and the fight to clear his name continues. It could no doubt be the deciding factor in future cases regarding eyewitness testimony, innocence, and true justice.

¹ *People v. Simpson*, No. BA097211 (Cal. App. Dep't Super. Ct. Oct. 3, 1995).

² *But see* FEDERAL PATTERN JURY INSTRUCTIONS CRIMINAL §§ 2.01, 3.01, 4.01 (2011) (defining reasonable doubt as “proof of a convincing character that a reasonable person would not hesitate to rely upon in making an important decision.” Reasonable doubt is “not caprice or whim. It is not speculation or suspicion. [Reasonable doubt] is not an excuse to avoid the performance of an unpleasant duty [nor] guilt beyond all possible doubt . . .”).

³ *See* Peter Whoriskey, *Execution of Ga. Man Near Despite Recantations*, WASH. POST (July 16, 2007), <http://www.washingtonpost.com/wpdyn/content/article/2007/07/15/AR2007071501250.html> (referring to an article about Troy Anthony Davis, a Georgia man scheduled for execution for the 1989 killing of a police officer, who is working to overturn his death sentence after several key witnesses have recanted. However, witnesses have been barred by federal courts from testifying at his various appeals).

⁴ *See id.* (setting forth that Troy Anthony Davis has experienced difficulties introducing new evidence to help overturn his death sentence because of the Anti-Terrorism and Effective Death Penalty Act of 1996, a law aimed to limiting reasons to overturn cases like Davis', signed into law in the aftermath of the Oklahoma City bombing).

⁵ *See* Lizette Alvarez, *A Murder Trial as Tourist Draw in Central Florida*, N.Y. TIMES, (June 25, 2011), <http://www.nytimes.com/2011/06/26/us/26casey.html?scp=18&sq=casey%20anthony&st=cse> (describing the mass onslaught of people to Casey Anthony's 2011 trial for the murder of her two-year-old daughter, and the high fervor of emotions elicited by the case, which lead one woman to apply to law school to become a children's advocate and another woman to overcome her phobia of flying to attend the trial).

⁶ Whoriskey, *supra* note 3.

⁷ *See* Kim Severson, *Digital Age Drives Rally to Keep a Georgia Inmate from Execution*, N.Y. TIMES (Sept. 16, 2011), <http://www.nytimes.com/2011/09/17/us/supporters-rally-to-save-troy-davis-from-execution-in-georgia.html> (observing that Davis had supporters from a wide array of society, including Jimmy Carter, Cee Lo Green, and fifty one members of Congress, and that the ease of social media and Davis' captivating story helped spread awareness of his case).

⁸ *See* Warren Richey, *Supreme Court Declines Case of Death-Row Inmate Who Became Cause Célèbre*, CHRISTIAN SCI. MONITOR (Mar. 28, 2011), <http://www.csmonitor.com/USA/Justice/2011/0328/Supreme-Court-declines-case-of-death-row-inmate-who-became-cause-celebre>; *see also* Whoriskey, *supra* note 3 (noting that several witnesses who had initially implicated Davis in the murder later recounted and claimed to have initially perjured themselves due to intense police pressure and threats, however, the federal courts rejected this new testimony).

⁹ *See* Greg Bluestein, *Execution Day Looms Again for Troy Davis, the Georgia Man Convicted of Killing Police Officer*, STAR TRIB., <http://www.startribune.com/nation/129890803.html> (last updated Sept. 15, 2011) (lambasting Georgia's pardons board, Davis' supporters, politically liberal and conservative alike, have characterized his upcoming execution as unjust, lacking evidence and abounding with a troubling amount of ignored doubts due to the lack of physical evidence and number of witnesses who have recounted their stories).

¹⁰ 28 U.S.C. § 2254 (2006).

¹¹ *See* Bluestein, *supra* note 9 (stating that a writ of habeas corpus shall be entertained only if custody violates Federal laws and may be denied on the merits, although the applicant has failed to exhaust all remedies; the applicant has the burden of rebutting the State court's factual determination by clear and convincing evidence and absent this standard of proof, the court shall not hold an evidentiary hearing, unless the claim relies on a new rule

of constitutional law made retroactive, or a factual predicate that could not have been discovered through due diligence and the facts underlying this claim are sufficient to establish by clear and convincing evidence that but for the constitutional error, the applicant would not have been found guilty by a reasonable fact finder).

¹² *See* Richey, *supra* note 8 (statement of United States District Court Judge William Moore) (“While Mr. Davis’ new evidence,” including seven of nine eyewitnesses recanting their stories in a conviction based solely on eyewitness accounts, “casts some additional, minimal doubt on his conviction, it is largely smoke and mirrors.”).

¹³ *See* Amy Goodman, *Troy Davis and the Meaning of ‘Actual Innocence’*, TRUTHDIG (Aug. 18, 2009), http://www.truthdig.com/report/item/20090818_troy_davis_and_the_meaning_of_actual_innocence/?In (noting that for the first time in fifty years, the Supreme Court has ordered another court to consider evidence of innocence in a death penalty case and even stated that the death penalty carried out on a possibly innocent person is reason enough for an evidentiary hearing, although the Supreme Court itself has never ruled on the issue of innocence in death penalty cases).

¹⁴ *See* Richey, *supra* note 8 (explaining that Davis, convicted of killing Police Officer Mark MacPhail, has been on death row since 1991 and his execution date has been stayed three times between 2007 and 2008).

¹⁵ Goodman, *supra* note 13.

¹⁶ Jan Skutch, *Testimony to Begin in ‘89 Case*, SAVANNAH MORNING NEWS (Aug. 23, 1991), <http://multimedia.savannahnow.com/media/DavisMcPhail/1991/08231991openingstatement1.pdf>.

¹⁷ Whoriskey, *supra* note 3.

¹⁸ Petition for Writ of Certiorari, *Davis v. Terry*, No. 06-1407, 2007 WL 1211664, at *4-5 (11th Cir. Apr. 11, 2007).

¹⁹ *See id.* (discussing the actual scene of the crime and chaos that ensued).

²⁰ *See id.* at *5 n.2 (recounting that Coles' involvement in the murder was not questioned, even with evidence against him and he was asked to participate in a crime scene reenactment with witnesses Harriet Murray, Dorothy Ferrell, D.D. Collins and Larry Young, where he participated as the passive onlooker, which culminated in a photographic lineup, not including a picture of Coles, identifying Davis as the shooter); *see also* Skutch, *Testimony to Begin*, *supra* note 16 (noting that before the shooting, Collins and Davis were together at a pool hall and right before the shooting, when Officer MacPhail responded to the commotion, Collins fled and Davis initially fled, but Coles did not flee, thereby establishing Coles as a witness).

²¹ *See* Amnesty Int'l, *Unites States of America: ‘Where is the Justice for Me?’: The Case of Troy Davis*, AI Index AMR 51/023/2007, at 13 (Feb. 1, 2007), available at http://www.amnestyusa.org/sites/default/files/troy-rpt_whereisjusticeforme.pdf (citing a witness statement who reported that a black man had hit Larry Young on the side of his face with a gun).

²² Jan Skutch, *Davis: I Fled Before Shots Fired*, SAVANNAH MORNING NEWS (Aug. 28, 1989), <http://multimedia.savannahnow.com/media/DavisMcPhail/1991/08281991IFLED1.pdf>

²³ *See generally* Amnesty Int'l, *supra* note 21 (lacking a description of any assistance given to Mr. Young).

²⁴ Amnesty Int'l, *supra* note 21, at 7 (citing the Georgia Supreme Court).

²⁵ *Id.*

²⁶ *Id.* at 13.

²⁷ *Id.*

²⁸ Petition for Writ of Certiorari, *supra* note 18, at *4.

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.* at *4-5.

³² *Id.* at *5 n.2.

³³ *See* Amnesty Int'l, *supra* note 21, at 12-20 (noting that Sylvester “Red” Coles, one of the three witnesses who did not recant, was an alternative prime suspect and Steven Sanders, another un-wavering witness, stated

to police shortly after the incident that he would not recognize the shooter except for his clothing, but two years later identified Davis in court).

³⁴ See *id.* at 16-19 (citing coerced statements from Jeffrey Sapp, Dorothy Ferrell, Darrell Collins, and Larry Young).

³⁵ See Tom Rose, *Police Still Looking for Murder Suspect*, SAVANNAH MORNING NEWS (Aug. 21, 1989), <http://multimedia.savannahnow.com/media/DavisMcPhail/1989/198908AUG21LOOKING.pdf> (displaying the frenzied efforts that went into tracking down Davis, such as listing his name, age and address in the article and casting a questionable light on his past); see also Moni Basu & Sonji Jacobs, *The Troy Davis Saga: Who Killed Mark Allen MacPhail?*, ATLANTA J.-CONST. (Nov. 11, 2007), available at 2007 WLNR 22281576 (describing that although there was no evidence, but for empty shell casings, the police were under tremendous pressure to find a suspect and after Coles implicated Davis in the murder, the investigation became intensely and solely focused on Davis).

³⁶ Basu & Jacobs, *The Troy Davis Saga: Who Killed Mark Allen MacPhail?*, *supra* note 35.

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.* (emphasis added).

⁴² *Id.*

⁴³ *Id.*

⁴⁴ Basu & Jacobs, *The Troy Davis Saga: Who Killed Mark Allen MacPhail?*, *supra* note 35.

⁴⁵ *Id.*

⁴⁶ *Should Troy Davis' Life be Spared?*, CNN (Sept. 15, 2011) <http://www.youtube.com/watch?v=ooXQMct9Wsk>.

⁴⁷ *Id.*

⁴⁸ Petition for Writ of Certiorari, *supra* note 18, at *5 (stating that Davis was convicted of murder and sentenced to death, but that of all witnesses on the scene, only Davis' photograph was placed in the lineup and it was this eyewitness identification that was the strongest evidence against Davis).

⁴⁹ See Moni Basu & Sonji Jacobs, *The Troy Davis Saga: High Court Faces Classic Murder Mystery*, ATLANTA J.-CONST., (Nov. 12, 2007), available at 2007 WLNR 22281576 (explaining that although no gun was ever found, the police found shell casings at the scene that were linked to a previous shooting they had tied to Davis).

⁵⁰ See, e.g., Rose, *Police Still Looking*, *supra* note 35 (describing the zealous manhunt to find Davis); see also Derek Smith, *Suspect Jailed in Police Slaying*, SAVANNAH MORNING NEWS (Aug. 24, 1989), [http://multimedia.savannahnow.com/media/DavisMcPhail/1989/198908AUG24SURRENDER\(EP\).pdf](http://multimedia.savannahnow.com/media/DavisMcPhail/1989/198908AUG24SURRENDER(EP).pdf) (noting that there was a five day manhunt for Davis and that he received several death threats once in police custody).

⁵¹ Rose, *Police Still Looking*, *supra* note 35.

⁵² See *id.* (insinuating that Davis is guilty, providing large picture of him which identified him as a suspect, along with other identifying information, such as his address); see also Basu & Jacobs, *The Troy Davis Saga: Who Killed Mark Allen MacPhail?*, *supra* note 35 (indicating that Davis' photograph appears in reports announcing a manhunt for a suspected cop killer); Tom Rose, *Police Slaying Suspect Surrenders*, SAVANNAH MORNING NEWS (Aug. 24, 1989), <http://multimedia.savannahnow.com/media/DavisMcPhail/1989/198908AUG24OFFICERSREACT.pdf> (including almost a full sized picture of Davis, with arms behind his back in a position that indicates he is wearing handcuffs).

⁵³ Tom Rose, *Police Now Required to Protect Troy Davis*, SAVANNAH MORNING NEWS (Aug. 25, 1989), <http://multimedia.savannahnow.com/media/DavisMcPhail/1989/198908AUG25PENALTYPROTECT.pdf>.

⁵⁴ See, e.g., Amnesty Int'l, *supra* note 21, at 32 (acknowledging that during Davis' trial, a news reporter referred to him as a "[c]op-killer"); Rose, *Police Still Looking*, *supra* note 35 (including a somewhat graphic charac-

terization of the murder); Smith, *Suspect Jailed*, *supra* note 53, at 1; Derek Smith, *Neighbors Say Suspect Not the Man They Knew*, SAVANNAH MORNING NEWS (Aug. 24, 1989), <http://multimedia.savannahnow.com/media/DavisMcPhail/1989/198908AUG24NEIGHBORSREACT.pdf> (referring to quotes from Davis' neighbors to assume his guilt).

⁵⁵ Rose, *Police Slaying Suspect Surrenders*, *supra* note 52.

⁵⁶ See *id.* (failing to recognize Sylvester "Red" Coles at the scene of the crime).

⁵⁷ Smith, *Neighbors Say*, *supra* note 54.

⁵⁸ *Id.*

⁵⁹ Smith, *Suspect Jailed*, *supra* note 50.

⁶⁰ See generally Amnesty Int'l, *supra* note 21.

⁶¹ See e.g., Martina Correia, *Why the War to Save Troy Davis Isn't Over*, THE GRIO (Mar. 29, 2011, 8:00 AM), <http://www.thegrio.com/opinion/why-the-war-to-save-troy-davis-isnt-over.php> (displaying Martina Correia's impassioned love and support for her brother and his fight for life); Brenda Goodman, *As Execution Nears, Last Push from Inmate's Supporters*, N.Y. TIMES (July 15, 2007), <http://www.nytimes.com/2007/07/15/us/15execute.html?pagewanted=print>.

⁶² Correia, *supra* note 61.

⁶³ See generally *Supporters of Clemency for Troy Davis*, AMNESTY INT'L, <http://www.amnestyusa.org/our-work/campaigns/abolish-the-death-penalty/death-penalty-campaign-resources/supporters-of-clemency-for-troy-davis> (last visited Oct. 15, 2011) (noting that Davis' supporters are spread far and wide, and he even has international support from the European Union).

⁶⁴ See, e.g., *id.* (listing over forty prominent leaders and groups supporting Davis); Associated Press, *Rev. Jesse Jackson Intervenes in Troy Davis Case*, ATLANTA J.-CONST. (June 6, 2011),

<http://www.ajc.com/news/rev-jesse-jackson-intervenes-968800.html> (relaying that prominent figure, Rev. Jessie Jackson, planned to meet with the Georgia Pardons Board to plead Davis' case); Gemma Puglisi, *Seeking Justice on Death Row*, WASH. POST (Sept. 28, 2008), <http://www.washingtonpost.com/wp-dyn/content/article/2008/09/26/AR2008092603351.html> (describing the support that Davis received from students at American University, in the form of letters to lawmakers and media).

⁶⁵ AMNESTY INT'L, *Supporters of Clemency for Troy Davis*, *supra* note 63; James Clark, *Clemency Denied for Troy Davis – Urgent Action Needed!*, ACLU BLOG OF RIGHTS (Sept. 20, 2011, 12:41 PM), <http://www.aclu.org/blog/capital-punishment/clemency-denied-troy-davis-urgent-action-needed> (describing the Global Say of Solidarity where, after Davis was denied clemency, thousands of people marched for justice in Atlanta); *NBLSA Denounces the Execution Troy Davis*, NAT'L BLACK LAW STUDENT ASS'N (Sept. 21, 2011), <http://www.nblsa.org/links/articles/troy-davis.html?PHPSESSID=9c2f7b6e1ec83de4b19724f886bdabb8>.

⁶⁶ See, e.g., *Reps. John Lewis and Hank Johnson Urge Clemency for Inmate Troy Anthony Davis*, REDDING NEWS REVIEW (Sept. 12, 2011, 5:30 PM), http://www.reddingnewsreview.com/newspages/2011newspages/lewis_johnson_11_10000082.html (noting that over fifty members of Congress supported Davis' request for a clemency hearing).

⁶⁷ See Puglisi, *Seeking Justice on Death Row*, *supra* note 64 (remarking that only thirty minutes after the George State Board of Pardons and Paroles met following Davis' last stay, he was denied a clemency hearing).

⁶⁸ Representative John Lewis, Statement at Troy Anthony Davis Clemency Hearing (July 16, 2007), available at http://johnlewis.house.gov/index.php?option=com_content&task=view&id=121&Itemid=1.

⁶⁹ See generally 14 GRAD, <http://14grad.blogspot.com/> (last visited Oct. 15, 2011) (describing students' reactions to following Davis' case, working with him and his sister to secure his freedom, and how his treatment within the judicial system and upcoming execution has changed their perspectives on society).

⁷⁰ Puglisi, *Seeking Justice*, *supra* note 64.

⁷¹ See Gemma Puglisi, Op.-Ed., *Court's Chance to Do the Right Thing*, ATLANTA J.-CONST., (Nov. 13, 2007), at A13 (noting that at the time of the interview, Davis had been in prison for sixteen years, but still had a positive outlook and believed that as an innocent man, the justice system would eventually work in his favor).

⁷² See JoAnn Merrigan, *Virginia Davis, Mother of Death Row Inmate Troy Davis Dies*, WSAV (Apr. 14, 2011), <http://www2.wsav.com/news/2011/apr/14/virgina-davis-mother-death-row-inmate-troy-davis-d-ar-1715696/>.

⁷³ See Amnesty Int'l, *supra* note 21, at 12-13 (referring to the lack of physical evidence implicating Davis and noting that in a case based on eyewitness testimony, most of the eyewitnesses had recanted their testimony and claimed coercion by police officers during their initial testimony).

⁷⁴ See *id.* at 26-30 (describing the federal appeals process that Davis' attorneys followed in an attempt to get him a clemency hearing and the struggles of working under the Anti-Terrorism and Effective Death Penalty Act, which limits the ability of federal courts to review a decision by the state court); see also Michael King, *Timeline of Troy Davis Case*, USA TODAY (Sept. 21, 2011), <http://www.usatoday.com/news/nation/story/2011-09-21/troy-davis-timeline/50498302/1> (noting that at a June 2010 hearing, evidence of Coles' guilt was not considered because there was no opportunity for Coles to refute the evidence).

⁷⁵ See Jan Skutch, *Parole Board Bows Out of Davis Clemency Bid*, SAVANNAH MORNING NEWS, (Aug. 7, 2007), <http://multimedia.savannahnow.com/media/DavisMcPhail/2007/08072007PAROLEBOARDBOWSOUT1.pdf> (indicating that the Georgia Supreme Court would now consider Davis' appeal).

⁷⁶ See *Davis v. State*, 660 S.E.2d 354, 363 (Ga. 2008) (holding that the original testimony is favored over the new testimony and that not all witnesses have recanted, but those that have only said that they cannot identify the shooter now, years after the original trial; the dissent said that if the old evidence is false, it should be disregarded).

⁷⁷ *Id.* at 363.

⁷⁸ *Id.* at 364 (Sears, C.J., dissenting).

⁷⁹ King, *supra* note 74 (listing the execution dates as July 17, 2007, when Davis received a stay due to appeals from notable leaders, September 2008, when Davis received a stay due to appeals from additional notable leaders and the case was given to the high court and October 27, 2008, when he received a stay due to an appeal from the European Union).

⁸⁰ See *id.* (noting that on August 17, 2009 the Federal District Court, under the direction of the Supreme Court considered whether new evidence could prove Davis' innocence, but this evidence was not permitted).

⁸¹ See *id.* (setting forth that in August of 2010, the Federal District Court upheld the conviction and Davis was executed on September 21, 2011).

⁸² *Davis v. Georgia*, 129 S.Ct. 28, 28 (U.S. Sept. 23, 2008).

⁸³ See King, *supra* note 74 (noting that Davis was again scheduled for execution on October 28, 2008, which would later be extended one additional time).

⁸⁴ *In re Davis*, 550 U.S. 1, 1 (2009).

⁸⁵ See, e.g., Puglisi, *Seeking Justice*, *supra* note 64 (discussing Gemma Puglisi's class at American University which was dedicated to working with Davis through a letter writing campaign to lawmakers and the media); Puglisi, *Court's Chance*, *supra* note 71 (discussing exclusive interview with Davis in prison close to execution date); Gemma Puglisi, *Taking Risks in the Classroom*, THE CHRON. OF HIGHER EDUC. (Oct. 6, 2009), <http://chronicle.com/article/Taking-Risks-in-the-Classroom/48710/> (discussing Gemma Puglisi's discovery of the Davis case and subsequent plan to fight for his life with the help of her students).

⁸⁶ See Bill Rankin, *Court to Hear Innocence Claims in Cop's 1989 Killing*, ATLANTA J.-CONST. (June 24, 2010), <http://www.ajc.com/news/atlanta/court-to-hear-troy-553951.html> (noting that after years of appeals, on June 23, 2010, Davis was granted a hearing to establish if the new evidence clearly establishes his innocence).

⁸⁷ Bill Rankin, *Judge Must Decide Whether Troy Davis Proved Innocence in Cop Killing*, ATLANTA J.-CONST. (June 24, 2010), <http://www.ajc.com/news/atlanta/judge-must-decide-whether-556708.html>.

⁸⁸ See *id.* (recounting that of the witnesses supposed to speak at the hearing, those who were going to identify Coles, not Davis, as the shooter were not allowed to speak).

⁸⁹ See *id.* (noting that although the defense was chastised for not presenting Coles as a witness, they had attempted to locate him, but were unable to until too close to the hearing date).

⁹⁰ See *In re Davis*, No. CV409-130, 2010 WL 3385081 at *1 (S.D.Ga. Aug. 24, 2010) (stating that Davis had not proven his innocence).

⁹¹ *Id.* at *2.

⁹² See Russ Bynum, *Troy Davis Case Full of Murky Legal Questions*, ATLANTA J.-CONST. (July 5, 2010), <http://www.ajc.com/news/troy-davis-case-full-564707.html> (noting that the Supreme Court has yet to hold that administering a lethal injection violates the Constitution).

⁹³ See *In re Davis*, 2010 WL 3385081 at *61.

⁹⁴ See Rankin, *Judge Must Decide*, *supra* note 87 (noting that Jason Ewart, Davis' attorney, opined that in light of the recantations, a reasonable juror could not convict Davis).

⁹⁵ *Id.* (fighting for years to get new evidence admitted, saying that Coles, not Davis was the shooter, it was devastating to Davis and his team when this evidence was not allowed to be admitted).

⁹⁶ See Adam Liptak, *Justices Deny New Appeal by Convict in Georgia*, N.Y. TIMES (March 28, 2011), http://www.nytimes.com/2011/03/29/us/29teacher.html?_r=1 (setting forth that after Davis filed a writ for habeas corpus, he was granted a hearing by the Supreme Court).

⁹⁷ *Id.*

⁹⁸ See generally *In re Davis*, 550 U.S. 1, 2 (2009) (noting that court held that to execute an innocent person violates the Eighth Amendment, but did not expand or clarify this statement).

⁹⁹ *In re Davis*, No. CV409-130, 2010 WL 3385081 at *2 (S.D.Ga. Aug. 24, 2010).

¹⁰⁰ See *id.* at *1-2 (noting that the court says Davis has not proved his innocence and his petition is denied, but there is no explanation or reasoning provided).

¹⁰¹ See King, *supra* note 74 (recognizing the fourth execution date).

¹⁰² See JoAnn Merrigan, *Virginia Davis, Mother of Death Row Inmate Troy Davis, Dies*, WSAV (Apr. 14, 2011), <http://www2.wsav.com/news/2011/apr/14/virgina-davis-mother-death-row-inmate-troy-davis-d-ar-1715696/> (reporting that Virginia Davis died at the age of sixty-five and had not been ill prior to her death).

¹⁰³ *Id.*

¹⁰⁴ See Associated Press, *GA Executions Off: DEA Seizes Critical Drug*, WASH. TIMES (Mar. 16, 2011), <http://www.washingtontimes.com/news/2011/mar/16/ga-executions-dea-seizes-critical-drug/?page=all> (reporting that drugs used for lethal injections at the prison where Davis was held were seized and there were questions about how the drug was imported to the United States by the Drug Enforcement Agency).

¹⁰⁵ *Id.*; see Kim Severson & Robbie Brown, *Murderer is Executed in Georgia After Losing Stay*, N.Y. TIMES (Jan. 25, 2011), <http://www.nytimes.com/2011/01/26/us/26lethal.html> (alleging that the drugs may be ineffective because they may be past their expiration date).

¹⁰⁶ *Id.* (noting that the drug responsible for paralyzing the body is sodium thiopental and that these drugs have been in short supply after the American manufacturer stopped production); see also Rhonda Cook & Bill Rankin, *Planned Execution Puts Drugs Under New Scrutiny*, ATLANTA J.-CONST. (July 20, 2011), <http://www.ajc.com/news/planned-execution-puts-drugs-1028130.html> (recounting that even with calls for additional research on the drugs that Georgia uses for executions, the State went ahead and executed Andrew Grant DeYoung in July of 2011).

¹⁰⁷ See Cook, *supra* note 106 (noting that the state switched to pentobarbital as a sedative in the legal injection cocktail).

¹⁰⁸ See David Beasley, *Georgia Films Killer's Execution Amid Drug Concerns*, MSNBC,

http://www.msnbc.msn.com/id/43851667/ns/us_news-crime_and_courts/t/georgia-films-killers-execution-amid-drug-concerns/#.Tn-iLU_iZXe (last updated 7/22/2011, 4:21 AM) (noting that DeYoung looked as if he were falling asleep during the injection and his body did not move as if in pain).

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ See Vicky Eckenrode, *Clemency Board Receives Letters Supporting Davis*, SAVANNAH MORNING NEWS (July 11, 2007), <http://multimedia.savannahnow.com/media/DavisMcPhail/2007/07112007CLEMENCYBOARDRECEIVESLETTERS.pdf> (“[S]upporters for convicted killer Troy Anthony Davis turned in 4,000 letters Tuesday asking state officials to grant clemency . . .”).

¹¹² See generally Amnesty Int’l, *supra* note 21 (discussing background, progress and international notoriety of case).

¹¹³ AMNESTY INT’L, *Supporters of Clemency for Troy Davis*, *supra* note 65; see Edecio Martinez, *Troy Davis in Spotlight Again as Execution Nears*, CBS NEWS (Sept. 16, 2011, 10:20 AM),

http://www.cbsnews.com/8301-504083_162-20107225-504083.html (noting that Davis’ Supreme Court hearing to prove his innocence was the first of its kind granted in the last fifty years).

¹¹⁴ Marisol Bello & William M. Welch, *How the Casey Anthony Case Came Apart*, USA TODAY, http://www.usatoday.com/news/nation/2011-07-05-Casey-Anthony-Caylee-Anthony-acquittal-murder-case-Florida_n.htm (last updated July 6, 2011 10:57AM).

¹¹⁵ *Id.*

¹¹⁶ Letter from Troy Davis to Author (May 22, 2011) (on file with author).

¹¹⁷ Associated Press, *Georgia Executes Inmate Troy Davis After Supreme Court Denies Appeal*, FOX NEWS (Sept. 21, 2011) <http://www.foxnews.com/us/2011/09/21/georgia-executes-inmate-troy-davis-after-supreme-court-denies-appeal/#ixzz1eTq919y9>.

¹¹⁸ Associated Press, *Troy Davis Maintains Innocence in Final Words*, HUFFINGTON POST (Sept. 21, 2011) <http://www.huffingtonpost.com/huffwires/20110921/us-georgia-execution-last-words-glance/>.

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