

July 11, 2007

Mr. Garland Hunt  
Georgia State Board of Pardons and Paroles  
2 Martin Luther King, Jr. Drive SE  
Suite 458, Balcony Level, East Tower  
Atlanta GA 30334-4909

Re: Troy Anthony Davis

Dear Mr. Hunt and Members of the Board:

I am writing to encourage the Board of Pardons and Paroles to commute the death sentence of Troy Anthony Davis when you meet on July 16, 2007. I know that others, including his attorneys and advocates, have submitted detailed accounts of the record in the case to suggest his innocence in the murder of police officer Mark MacPhail. While I, too, believe there is a serious likelihood that he is innocent, I write separately to express my concern that race played a substantial and improper role in Mr. Davis' case.

By way of introduction, I am Chairman of the Board of the Southern Center for Human Rights, based in Atlanta, which handles death penalty and prison condition cases in Georgia and other southern states. I have served on several committees of the American Bar Association and other professional organizations dealing with criminal justice matters. As a legal scholar, I have written extensively about criminal justice, race, and the death penalty.

I engage these important questions not merely with professional interest, but with personal emotion as well. I am a family member of a homicide victim. In 1983, my beloved sister, Barbara Jean Ogletree Scoggins, was stabbed to death, following an unforced entry into her living room in our hometown of Merced, California. Barbara served as a police officer with the Merced County Sheriff's Office. She was highly regarded by colleagues and by the prisoners she escorted to court proceedings. She was also a young mother at the time of her murder. The police in Merced had many suspects, but no one has ever been prosecuted for her murder. Barbara's death ripped our family apart. It caused all of us incredible anxiety and pain. It also ignited some soul-searching on my part, since at the time of Barbara's murder, I was representing clients in criminal cases as a public defender in Washington, DC. It took a great deal of reflection and prayer to accept that my younger sister had been murdered. This brutal fact haunts and pains me to this day. My commitment to finding the person responsible for her death has not diminished. I have offered a reward for information leading to an arrest. While

Barbara's killer should be punished, taking that person's life based on the kind of self-contradictory and recanted statements of unreliable witnesses found in the Davis case would not be a solution that Barbara, my family or I could endorse.

As a respected police officer no doubt committed to peace, justice and fairness, it is terribly difficult for me to believe that Officer MacPhail would have endorsed the decision to execute Mr. Davis despite a complete absence of physical evidence or reliable eye-witness testimony. The fact that the jury—the ultimate fact finder—never knew about the accusations of police coercion that the prosecution's major witnesses have repeatedly made since recanting their most-likely fabricated trial testimony invites grave concern. The further fact that no court could review the merits of this newly uncovered exculpatory evidence compounds the problem beyond, I suggest, the level at which any government can carry out the irreversible act of executing a human being.

While the courts have excluded the recanted testimony as “procedurally defaulted,” I believe consideration of the context of that testimony is very much within the scope of your deliberations. As the American Bar Association specifically noted in its Analysis of Georgia's Death Penalty Laws, Procedures, and Practices, “the clemency decision making process should not assume that the courts have reached the merits on all issues bearing on the death sentence in a given case...” Like the ABA, I implore you to investigate rigorously how the recanted statements impact the already flimsy case against Mr. Davis.

In light of all my experience, the case of Troy Anthony Davis truly cries out for commutation. Although many others will speak more specifically to his innocence or at least the serious questions of his guilt, and I believe that should suffice to sway you, there are other reasons within your mandate to consider that should compel you to act in favor of his request. Not the least of these is the fact that this case presents a resounding example of the unfortunate persistence of racial disparities throughout our system of justice both nationally and in Georgia. Troy Anthony Davis, an African American man, is accused of killing a white police officer, was tried by a white prosecutor before a white judge and convicted on the testimony of numerous African American “witnesses” who feel that they were coerced or threatened by the police, and was then sentenced to death. These racial realities underscore the possibility that racial bias may have been a significant factor in determining Mr. Davis' fate, from the initial police investigation to the imposition of his death sentence.

It is difficult to ignore the racial contrasts offered in the Davis case, just as it is to ignore the glaring racial disparities surrounding the case. While African Americans make up less than a third (29.2 percent) of Georgia's total population, they are highly overrepresented in the state's justice system. Blacks make up 61.3 percent of Georgia's prison population and 45.7 percent of death row. These disparities are certainly not unique to Georgia, but characterize national trends.

Although it is disturbing enough that people of color are far more likely to be sentenced to death than whites, the case of Mr. Davis shares an unfortunate similarity to

one of the most truly problematic trends in the post-McCleskey imposition of the death penalty; namely his is yet another such sentence imposed for the death of a white victim. Numerous studies have shown that both the race of the suspect and the race of the victim are predictors for the imposition of capital punishment. A comprehensive review of the death penalty published by Amnesty International reports the following:

The population of the USA is approximately 75 per cent white and 12 percent black. Since 1976, blacks have been six to seven times more likely to be murdered than whites, with the result that blacks and whites are victims of murder in about equal numbers. Yet, 80 percent of the more than 840 people put to death in the USA since 1976 were convicted of crimes involving white victims, compared to the 13 percent who were convicted of killing blacks. Less than four per cent of the executions carried out since 1977 were for crimes involving Hispanic victims. Hispanics represent about 12 percent of the US population. Between 1993 and 1999, the recorded murder rate for Hispanics was more than 40 percent higher than the national rate.

More recent data are even more startling. According to the Death Penalty Information Center, from 1976 to 2006, of the 1,581 victims for whom an execution occurred, 1,256, or 79.3 percent, were white. According to an American Bar Association report, “the data shows (sic) that among all homicides with known suspects, those suspected of killing whites are 4.56 times as likely to be sentenced to death as those who are suspected of killing blacks.”

Such racial disparities have led Georgia, like other states, to investigate its legal system with the creation of the Commission on Racial and Ethnic Bias in the Court System. In August 1995, four years after Troy Davis was tried and convicted, the Commission issued a report indicating that “there are still areas within the state where members of minorities, whether racial or ethnic, do not receive equal treatment from the legal system.” The report went on to identify more than 100 recommendations to correct the problems identified. The Georgia Supreme Court subsequently created what is now the Georgia Commission on Access and Fairness in the Courts, “to implement the Commission’s recommendations.” Unfortunately, in its “Analysis of Georgia’s Death Penalty Laws, Procedures, and Practices,” the American Bar Association found the state to be out of compliance with most of its own recommendations. The ABA went on to recommend specifically that the “clemency decision...should take into account all factors that might lead the decision maker to conclude that death is not the appropriate punishment.” Among the specific factors cited by the ABA is evidence of *racial and/or ethnic bias* in the criminal justice system.

I would share with you the experience of former San Antonio prosecutor Sam Millsap, who oversaw the “successful” prosecution of Ruben Cantu for capital murder. Mr. Millsap himself would qualify that success, however, even as he warns against being too quick to cast blame for the ultimate failure of the system. Indeed, according to Millsap, the system worked in Ruben Cantu’s case; insofar as he had “a fine defense lawyer, a fair judge, and a jury that returned the only possible verdict, based on the

evidence that was presented...Ruben Cantu didn't just receive the fair trial our system promises—he received a perfect trial.” This includes an individual prosecutor in the case, “one of the most honorable and ethical people that I have ever known.” When it comes to blame, Millsap acknowledges his own “error in judgment by permitting Cantu to be prosecuted for capital murder based on the testimony of a single eyewitness.” Unfortunately, that witness, who, according to Millsap, “had absolutely nothing to gain but trouble for doing so,” recanted his testimony after Cantu was executed.

Millsap's experience, offered in testimony to the New Jersey Commission to Study the Death Penalty, led him to conclude: “Prosecutors acting entirely in good faith must make all sorts of judgments in murder cases and, because we are human, we make mistakes, even on our best days. Add to that undeniable fact, the reality that judges, jurors, defense attorneys, and witnesses also make mistakes and what you have is a system that, by definition, cannot be relied on to protect the innocent in all cases.” His testimony becomes particularly sobering in terms of the capital punishment system when one considers how racial bias—even unconscious and unintentional—can play a role in the decision-making process of not only prosecutors, but so many other actors in the criminal justice system.

Placing Mr. Millsap's experience—and Mr. Davis' case—in the context of a fallible national system where a startling 122 African Americans and another 19 Hispanics are among the at least 204 wrongly convicted individuals that have been exonerated since 1989, the most compelling issue is not that Sam Millsap made a mistake – or that neither Ruben Cantu nor officer MacPhail can be returned to his family any more than my sister can rejoin mine. Rather, it is that our experience indicates that, in extreme cases such as Mr. Davis', mistakes which result in the wrongful conviction of a person of color are far more likely to occur.

Further, an overwhelming 77 percent of the wrongful conviction cases hinged on eyewitness identification and 15 percent involved snitch testimony, and in many of these cases the evidence, even in retrospect, appears much stronger than the contradictory and now largely recanted testimony presented to Mr. Davis' jury. Unfortunately, unlike in the cases of the now exonerated individuals, no DNA exists to prove Mr. Davis' innocence beyond all doubt. More fortunately for Mr. Davis, this board has the power to prevent the possibility of a wrongful execution.

Just five months ago the state of Georgia exonerated Willie Williams after he wrongly suffered 21.5 years in state prison based in large part on erroneous—yet seemingly convincing—eyewitness testimony. Mr. Williams does not stand alone. Since 1999, six men, each African American —Robert Clark, Douglas Echols, Clarence Harrison, Calvin Johnson, Samuel Scott and Mr. Williams—have been exonerated after being wrongfully convicted by the state of Georgia. Without exception these men were all convicted on the basis of substantial—yet ultimately false—eyewitness identification.

Mr. Davis comes to you at a point when his actual innocence will mean nothing if it takes the 21.5 years it took to establish Mr. Williams' innocence. Mr. Davis is

scheduled for execution on July 17<sup>th</sup> on the basis of evidence far less certain than that presented in many of the wrongful conviction cases. Neither Mr. Davis nor I ask the board to proclaim his innocence or to set him free from incarceration. We do, however, ask that you exercise your discretion to guarantee that the state of Georgia may sometimes incarcerate, but will never execute a man whose guilt cannot be conclusively established.

Sincerely,

A handwritten signature in black ink, appearing to read "C. J. Ogletree, Jr.", written in a cursive style.

Charles J. Ogletree, Jr.