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Was Troy Davis Actually Innocent?

The State of Georgia executed Troy Anthony Davis on September 21, 2011. Troy Davis' crusade for exoneration attracted media attention comparable to other notable criminal defendants, such as Casey Anthony, O.J. Simpson, and Scott Peterson. Unlike defendants who eventually concede guilt, Troy Davis maintained his innocence until the moment of his execution. In search of exoneration, Troy Davis' case ultimately reveals the procedural hardships encountered when offering newly-discovered evidence, the difficulties in exhausting post-conviction remedies, and the attempt to overcome cultural biases.

Innocence is undoubtedly an important concern, but it becomes even more significant in the context of capital punishment. As United States Supreme Court Justice Stevens stated, "There is no question that death as a punishment is unique in its severity and irrevocability."[1] For Troy Davis, the evidence he submitted did not outweigh the procedural obstacles, circumstantial evidence, and racial discrimination he encountered. Regardless of Davis' factual and legal circumstances, Davis' fate has become nothing more than a statistic in whether the American justice system permits actually innocent persons to be executed.

[1] *Gregg v. Georgia*, 428 U.S. 153, 187 (1976).

Evidentiary and Cultural Obstacles

American law has never constitutionally condoned the execution of the innocent.[2] As United States Supreme Court Justice Blackmun has explained, "nothing could be more contrary to contemporary standards of decency, or more shocking to the conscience, than to execute a person who is actually innocent."[3] Notwithstanding this standard of "decency," the defendant's plight is not in vain. Exoneration efforts necessarily follow the defendant's guilt or innocence phase, which shifts the prosecution's burden of proof to the defendant.[4] In short, the defendant's presumption of innocence disappears, thereby increasing the likelihood that the defendant cannot prove innocence.

Since 1973, approximately 130 American inmates have been exonerated.[5] For every 10 people that would have been executed, therefore, one wrongfully convicted inmate has escaped capital punishment.[6] The Innocence Project compiles these statistics by defining exoneration broadly to encompass those acquitted of all charges, those pardoned by the government, or those whose charges have been dismissed by the prosecution.[7] Because the database includes pardons, dismissals, and acquittals, the list is not necessarily indicative of exonerees who have established innocence, but it does indicate broadly-defined exonerations as well as the post-conviction remedies available.

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[2] *See Herrera v. Collins*, 506 U.S. 390, 419 (1998) (O'Connor, J., concurring).
[3] *Id*.
[4] *Id.* at 399.
[5] CNN, *Death Penalty Statistics: More Than 3,200 Inmates Await Execution*, http://www.cnn.com/2011/09/22/justice/georgia-execution-fact-box/. (accessed Oct. 27, 2013).
[6] Death Penalty Information Center, *The Innocence List*, http://www.deathpenaltyinfo.org/innocence-list-those-freed-death-row (accessed Oct. 27, 2013).
[7] *Id*.

For the exonerees that have been successful in proving their innocence, the requisite proof has rested primarily upon DNA.[8] As a result, it is often difficult to determine whether defendants have been wrongly sentenced to death or executed if DNA is not relevant to the defendant's case.[9] Because most exonerees use DNA evidence, most congressional and state efforts have been geared towards this effort.[10] The Innocence Project, for example, rarely takes cases if DNA evidence cannot be utilized.[11] Undoubtedly, these congressional and non-profit organizational efforts are helpful to prevent wrongful sentencing, but for cases like Troy Davis' where DNA evidence is inapplicable, these procedural mechanisms fall short of providing a meaningful avenue for the potentially innocent.

Troy Davis' conviction centered almost entirely upon eyewitness testimony.[12] According to leading psychologists, eyewitness testimony is faulty for a number of reasons.[13] Most commonly, once witnesses have recalled events in a particular way, they are unable to reevaluate these initial perceptions.[14] Quite literally, witnesses cannot remember things differently, so once a witness identifies a perpetrator there is little

[8] The Innocence Project, *DNA Exonerations Nationwide*, http://www.innocenceproject.org/Content/DNA_Exonerations_Nationwide.php (accessed October 28, 2013).
[9] *Id*.
[10] *See e.g.* The Justice For all Act, 18 U.S.C.A. § 3600 (West 2012) (providing funding and procedures for DNA testing for individuals sentenced to life or death).
[11] The Innocence Project, *Non-DNA Exonerations*, http://www.innocenceproject.org/know/non-dna-exonerations.php (accessed Oct. 27, 2013).
[12] *In re Davis*, No. CV409-130, 2010 WL 3385081 at *2 (S.D. Ga. Aug. 24, 2010).
[13] Laura Engelhardt, *The Problem with Eyewitness Testimony: Commentary on a Talk by George Fisher & Barbara Tversky*, 1 Stan. J. of Legal Stud. 25, 27 (1999).
[14] *Id*.

probability that it will subsequently change.[15] For capital punishment, eyewitness misidentification accounts for 75% of convictions later exonerated with DNA evidence.[16]

Some states have taken an interesting approach in combatting misidentifications. In Maryland, for example, the legislature requires the prosecutor to show a videotape of the crime, a videotaped confession, or DNA evidence when the prosecution relies upon eyewitnesses.[17]

The United States Supreme Court has spoken little on this matter. In *Manson v. Braithwaite*, according to the Court, "reliability is the linchpin in determining the admissibility of identification testimony."[18] Opponents of eyewitness identification have used *Manson* to support greater protections for defendants, such as sequential photographic line-ups.[19] However, the Supreme Court has consistently held that it is the fact finder's job to assess witness credibility.[20] Most recently, the United States Supreme Court stated, "The fallibility of eyewitness evidence does not, without the taint of improper state conduct, warrant a due process rule requiring a trial court to screen such evidence for reliability before allowing the jury to assess its creditworthiness."[21]

Davis' case adds an additional layer of complexity to eyewitness identification in that the Savannah police department mishandled the eyewitnesses from the beginning of

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[15] *Id*.
[16] The Innocence Project, *Eyewitness Misidentification*, *http*://www.innocenceproject.org/understand/Eyewitness-Misidentification.php (accessed Oct. 27, 2013).
[17] USA Today News, *Troy Davis Execution Fuels Eyewitness ID Debate*, http://usatoday30.usatoday.com/news/nation/story/2011-09-27/troy-davis-eyewitness-testimony/50563754/1 (accessed Oct. 27, 2013).
[18] *Manson v. Braithwaite*, 432 U.S. 98, 114 (1977).
[19] *Supra* n. 17.
[20] *See Perry v. New Hampshire*, 132 S. Ct. 716, 728 (2012).
[21] *Id.*

Officer MacPhail's murder investigation.[22] After the shooting, Savannah police detectives brought all of the eyewitnesses to the crime scene to reenact the night's events and prompt their recollections.[23] Essentially, the eyewitnesses were given the opportunity to discuss their memories together, which could account for why most of the eyewitness testimony accounts aligned, rather than diverged, in specific matters, such as Davis' attire on the night of the murder. In addition, each eyewitness identified Davis in a photographic line-up in which all suspects were grouped together. [24] Lastly, out of Davis and two neighborhood acquaintances present at the time of the shooting, Davis was the only one out of the three to be included in the photographic lineup.[25]

Other than evidentiary obstacles, Troy Davis experienced cultural hurdles in the form of racial discrimination. Troy Davis, as a young African American male convicted of shooting and killing a white police officer, resulted in a Georgian manhunt for the young cop killer, wanted "dead or alive."[26] Davis was convicted before his trial ever began.[27] Nationally, the media did not deem Davis a victim or even maintain coverage of

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[22] Nathan Thornburgh, *Witness Testimony and The Death Penalty: After Troy Davis, a Push for Reform*, http://content.time.com/time/nation/article/0,8599,2095209-2,00.html (accessed Oct. 27, 2013); Ltr. from Barry Scheck, Peter Neufield, Madeline deLone, & Karen Newirth, The Innocence Project, to Georgia State Board of Pardons & Paroles, (Sept. 16, 2011) (available at http://www.amnestyusa.org/pdfs/InnocenceProj.pdf); NAACP, *Significant Doubt About Troy Davis' Guilt: A Case for Clemency*, http://www.naacp.org/pages/troy-davis-a-case-for-clemency (accessed Oct. 27, 2013).
[23] Thornburgh, *supra* n. 22.
[24] *Id*.
[25] *Id*.; *Davis v. Terry*, 2007 WL 1211664 at *7 (2004).
[26] Jen Marlowe, Martina Davis-Correia & Troy Davis, *I am Troy Davis* 40 (Haymarket Books 2013).
[27] Gamma Puglisi, *A Personal Perspective on Media and the Law: The Case of Death Row Inmate Troy Anthony Davis*, American University Criminal Law Brief, no. 1, 41 (2011).

his efforts until his execution date loomed near.[28] There are two possible explanations for why Davis' reputation was restored by the media. First, the media's scrutiny of Davis could be explained by the media's tendency to cover America's capital punishment in an episodic nature.[29] That is, the media does not find the death penalty relevant until a relatable person faces imminent death.[30] Another explanation is Davis' initial investigation, followed by his conviction, were the result of embedded racial disparities.[31]

Racial disparities have been linked to the death penalty through several studies.[32] In a study conducted by the U.S. General Accounting Office, white victims of black perpetrators are more likely to result in the death penalty.[33] In addition, the American Bar Association reported in a 2007 examination of Philadelphia's death penalty, one-third of the African American death row inmates would have received life imprisonment sentences had they been white.[34] Lastly, according to the Bureau of Justice Statistics, as of 2011, of the 3,100 people that are currently on death row, 42% of them are people of color.[35] These results are startling, but not surprising when one considers that death-

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[28] Julie Moos, *Troy Davis Execution Raises Questions About Episodic Coverage of Death Penalty*, http://www.poynter.org/latest-news/top-stories/146851/troy-davis-story-illustrates-episodic-coverage-of-death-penalty/ (accessed Oct. 13, 2013).
[29] *Id*.
[30] *Id*.
[31] David Dow, *Death Penalty, Still Racist and Arbitrary,* http://www.nytimes.com/2011/07/09/opinion/09dow.html?_r=1& (accessed Nov. 15, 2013).
[32] Benjamin Jealous, *Remembering Troy Davis*, http://www.huffingtonpost.com/benjamin-todd-jealous/remembering-troy-davis-an_b_3963850.html (accessed Oct. 23, 2013).
[33] Amnesty International, *Death Penalty and Race*, http://www.amnestyusa.org/our-work/issues/death-penalty/us-death-penalty-facts/death-penalty-and-race (accessed Oct. 27, 2013).
[34] *Id*.
[35] Office of Justice Programs, *Capital Punishment, 2011-Statistical Tables*, http://www.bjs.gov/index.cfm?ty=pbdetail&iid=4697 (accessed Oct. 27, 2013).

qualified jurors have been found to be more susceptible to racial biases than jurors excluded from serving on capital punishment cases.[36]

Not only did Troy Davis begin his quest with racial tension, but he also faced it in a jurisdiction known for its discriminatory proclivities. In a study conducted by David C. Baldus, a University of Iowa law professor, since the death penalty had been reinstated in Georgia, black defendants were 1.7 times more likely to be sentenced to death over their white counterparts.[37] As indicated in the Philadelphia study, moreover, black defendants accused of murdering white persons were 4.3 times more likely to be sentenced to death.[38]

In sum, Davis not only carried the burden of proof according to ordinary criminal procedure, but he also faced cultural and evidentiary obstacles that prevented him from demonstrating his innocence to an impartial jury. Although the evidentiary and cultural obstacles dominated Davis' case, the following provides a closer examination of the procedural hurdles inherent in the American post-conviction relief process that had a similarly negative impact.

Cloverdale Neighborhood Shooting

On August 28, 1991, Troy Davis was convicted of malice murder, obstruction of law enforcement officer, two counts of aggravated assault, and possession of a firearm during commission of a felony by the Chatham County Superior Court of Georgia.[39] On August 30, 1991, Davis was sentenced to death in accordance to Georgia's death penalty

[36] Death Penalty Information Center, *Studies: The Role of Implicit Racial Bias in the Death Penalty*, http://www.deathpenaltyinfo.org/studies-role-implicit-racial-bias-death-penalty (accessed Oct. 27, 2013).
[37] *Supra* n. 31.
[38] *Id*.
[39] *In re Davis*, 2009 WL 8497887 at *5 (S.D.Ga. Oct. 9, 2009).

statute that provides an aggravating sentencing factor for murder of a law enforcement officer.[40]

The facts of Troy Davis' case are not complex, but they do intertwine with a shooting ("Cloverdale Shooting") that happened nearby shortly before Officer MacPhail's murder. Davis was prosecuted and convicted of this earlier shooting.[41] Thus, for the prosecution, this earlier shooting was critical in connecting Officer MacPhail's shooting with the nearby incident.[42]

According to the Chatham County Prosecutor, the possibility of any jury confusion from introducing the Cloverdale shooting into the MacPhail murder trial was unlikely and resolved at trial.[43] It is interesting to note, however, that Davi's jury deliberated for over seven hours, and asked the trial judge for clarification on what the minimum and maximum incarceration periods would be under a sentence of parole in comparison to a sentence of death.[44] The jury's request for clarification could indicate confusion by the presentation of the Cloverdale neighborhood evidence.

According to Troy Davis' own testimony, on the evening of August 18, 1989, Davis and some friends attended a pool party in the Cloverdale neighborhood of Savannah, Georgia.[45] Upon his departure from the party, he observed a vehicle rounding

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[40] *Id.*; *see also* Ga. Code Ann. § 17-10-30 (West).
[41] Mallory Simon, *Prosecutor Says He Has No Doubt About Troy Davis' Guilt*, http://news.blogs.cnn.com/2011/09/20/prosecutor-says-he-has-no-doubt-about-troy-davis-guilt/ (accessed Oct. 27, 2013) (Georgia prosecutor stating Davis had been convicted for Cloverdale neighborhood shooting).
[42] *In re Davis*, 2010 WL at *n. 2 (S.D. Ga. Aug. 24, 2010); *see also* supra n. 39 at 9.
[43] *Supra* n. 41.
[44] Petr.'s Br. for Writ of Habeas Corpus Under O.C.G.A. §§ 9-14-41 Et. Seq. 2, (Sept. 21, 2011) (available at http://big.assets.huffingtonpost.com/ButtsSuccessor.pdf).
[45] *In re Davis*, 2010 WL. at *79.

the corner at the end of the street and subsequently heard a gunshot.[46] Davis then testified he left the party and had no further information.[47] Michael Cooper, as the passenger of the vehicle shot at, was the victim of the seemingly random shooting.[48] According to the State, the Savannah Police Department ("SPD") received a 911 call about the Cloverdale neighborhood shooting where the caller described the shooter as "a young, tall, African-American male wearing a white batman shirt, a black hat, and shorts."[49] Because eyewitnesses later would testify that Officer MacPhail's murderer had been wearing similar attire, and because the SPD linked munitions between the MacPhail and Cloverdale shootings, the State's reliance on the Cloverdale shooting to tie Davis to both crimes cannot be overstated.

Troy Davis' Recollection of MacPhail Shooting

Following the neighborhood pool party, Troy Davis' night began innocently enough at a pool hall with some friends.[50] Davis was with Darrell Collins and Eric Ellison when he was notified that another neighborhood acquaintance, Sylvester "Redd" Coles, was in the parking lot arguing with an individual later identified as Larry Young.[51]

Davis walked outside the pool hall, followed by Collins, to investigate the disgruntlement further, and discovered Coles arguing with Young over a beer.[52] Davis told Coles to leave Young alone, but Coles continued to follow Young towards the

[46] *Id*. at *80.
[47] *Id.*
[48] *Id*. at *3.
[49] *Id*.
[50] *Id*. at *80.
[51] *Id*.
[52] *Id*.

neighboring Burger King parking lot and verbally threatened Young's life.[53] This statement alarmed Davis and motivated Davis to catch up with Coles and Young in the middle of the Burger King parking lot in order to deescalate the situation.[54]

Davis again pleaded with Coles to leave Young alone, but as he did, Coles slapped Young across the side of his head with what appeared to be a pistol.[55] At this point, Davis decided to leave the scene and retreat towards the pool hall.[56] As he was walking, he noticed that Collins had left the pool hall and was running, which prompted Davis to begin jogging away from where Coles and Young remained.[57] As he made one last glance back, Davis spotted a police officer entering the Burger King parking lot.[58] Davis turned back towards the pool hall and heard one gunshot and accelerated his speed.[59] After hearing several more shots, Coles ran past Davis, and both fled in the direction of the Yamacraw neighborhood.[60] Davis never looked back to see who was shooting.[61] Davis also never described what clothing he was wearing.[62]

The State's Eyewitnesses

The State produced 34 witnesses, seven of which were eyewitnesses.[63] The following accounts include the eyewitnesses relevant to Davis' recantation evidence submitted in his post-conviction relief proceedings.

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[53] *Id*. at *81.
[54] *Id*.
[55] *Id*.
[56] *Id*.
[57] *Id*.
[58] *Id*.
[59] *Id*.
[60] *Id*.
[61] *Id*. at *82.
[62] *Id*. at *80.
[63] *Supra* n. 26 at 69.

On August 19, 1989, Harriet Murray was the first eyewitness to provide a statement to the police on the night of Officer MacPhail's murder.[64] She identified Davis in the courtroom as Young's assailant and as MacPhail's murderer.[65] In Murray's first statement, she stated that she had been waiting for her boyfriend, Larry Young, outside of a convenience store when she witnessed him get struck in the head with the butt of a gun.[66] Murray stated the assailant then turned and shot Officer MacPhail upon seeing the officer's approach to the scene.[67] Murray described the shooter as a medium-colored man about 4 inches taller than Officer MacPhail who was wearing a white shirt and dark colored pants.[68]

On August 24, 1989, Murray offered the police a second statement.[69] After viewing a photographic lineup, Murray identified Davis as MacPhail's murderer.[70] It is not clear whether Murray admitted to seeing Davis in the media coverage of MacPhail's murder, but Murray further identified Coles as the man who caused Young to turn around before he was pistol-whipped.[71] Together, the two statements implicated Davis as the shooter.

Larry Young stated he first encountered three individuals after exiting a convenience store to purchase beer.[72] Young relayed that he got into a verbal altercation

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[64] *Id.*
[65] *Id.*
[66] *Id.* at *5.
[67] *Id.*
[68] *Id.*
[69] *Id.* at *25.
[70] *Id.*
[71] *Id.*
[72] *Id.* at **6-7.

with one of the young men who was wearing a yellow tank top and "jam" pants.[73] According to Young, he became cornered by the three individuals and was struck in the side of the head by the individual who was not wearing the yellow tank-top.[74] Mr. Young told police he could not identify the skin color or the individual's facial features, but that his assailant had been wearing a white hat and a white t-shirt with a graphic design.[75] As he ran towards help, Young heard gunshots, but did not recall anything further about MacPhail's shooting.[76]

Antoine Williams gave his first statement on August 19, 1989.[77] Williams stated that as he arrived at the Burger King for his work shift, he noticed one man in the parking lot being followed by three other individuals.[78] Williams stated he heard an argument among the group.[79] Next, Williams alleged witnessing one of the individuals slap another man with a rusty, brownish-colored revolver.[80] Williams simultaneously noted a police officer running towards the scene.[81] Williams then stated the two unarmed men fled the scene while the assailant attempted to conceal his weapon.[82] Williams recalled the armed individual shooting the officer when the officer got within approximately 15 feet of the armed man.[83] Williams described the armed man as a 6 foot and 4 inch tall person who

[73] *Id*. at *8.
[74] *Id*. at *7.
[75] *Id*. at *8.
[76] *Id*. at *7.
[77] *Id*. at *9.
[78] *Id*.
[79] *Id*.
[80] *Id*. at *10.
[81] *Id*. at *9.
[82] *Id*.
[83] *Id*. **9-10.

was wearing a blue or white t-shirt and dark jeans.[84] Williams asserted that his perception of the color of the t-shirt could be skewed due to his vehicle's tinted windows.[85]

Dorothy Farrell gave her first statement to police on August 19, 1989.[86] Farrell stated that as she was descending from the Thunderbird Inn, which was located some distance across the street from the Burger King, she saw a police officer yelling and walking towards a group of people.[87] She stated she saw a gunman wearing a white t-shirt with writing, dark colored shorts and a white hat shoot Officer MacPhail.[88] Farrell believed she could identify the gunman, but initially did not identify Davis.[89]

Farrell provided a second statement on September 5, 1989.[90] In this report to the police, Farrell identified Davis as the shooter with 80 to 90 percent confidence.[91] Farrell conceded seeing Davis' picture on the television prior to the identification.[92] In addition, Farrell reported previously identifying Davis as the shooter after seeing Davis' photo while talking to the police on an unrelated matter.[93]

Darrell Collins first provided a statement on August 19, 1989.[94] Collins stated that he witnessed Davis commit the shooting in the Cloverdale neighborhood.[95] In addition, Collins stated that he was behind Davis and personally witnessed Davis strike Young

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[84] *Id*. at *10.
[85] *Id*.
[86] *Id*.
[87] *Id*. at **10-11.
[88] *Id*.
[89] *Id*.
[90] *Id*. at *29.
[91] *Id*.
[92] *Id*.
[93] *Id*. at **28-29.
[94] *Id*. at *20.
[95] *Id*.

across the head and then shoot at Officer MacPhail.[96] He described Davis as wearing blue or black shorts and a white t-shirt with writing on the front.[97]

On August 25, 1989, Darrell Collins provided a second statement to police in which he stated that Redd Coles had placed a pistol in the vehicle the group took to the pool hall.[98] He also informed the police that he saw Davis two previous times with the gun that had ben used in the Cloverdale shooting.[99]

Jeffrey Sapp provided a statement to police that on August 19, 1989, between 2 and 3 o'clock in the afternoon following the two shootings, he ran into Davis in the neighborhood, and Davis confessed to the MacPhail shooting.[100] Sapp stated that Davis told him he shot the officer, because the officer was reaching for his gun.[101]

Kevin McQueen did not provide a statement to police, but testified at trial.[102] McQueen testified Davis confessed to him, while in jail, for the MacPhail shooting.[103] McQueen recalled Davis telling him he was arguing with someone who owed him drug money when MacPhail approached, which left Davis with no choice but to shoot the officer in fear he would become connected with the Cloverdale neighborhood shooting.[104] McQueen denied any prior arguments with Davis and denied receiving any benefits from the State for his testimony.[105]

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[96] *Id*. at *21.
[97] *Id*.
[98] *Id*. at *26.
[99] *Id*. at *27.
[100] *Id*. at *22.
[101] *Id*. at *23.
[102] *Id*. at *72.
[103] *Id*.
[104] *Id*.
[105] *Id*. at *73.

Redd Coles initially stated he witnessed Davis hit Young, but that he did not see who the shooter was.[106] He also could not recall what Davis had been wearing the night of the murder.[107] In his second statement, Coles admitted to carrying a gun on the night of the shooting, but stated he left it in a car for safekeeping while he played pool.[108]

Altogether, it is important to note that a majority of the eyewitnesses initially were unable to identify Davis as the shooter until the witnesses were brought to the crime scene for a police reenactment more than a week after the shooting.[109] Because Davis' photograph had already been spread all over the news as the alleged cop killer, it is probable that the eyewitnesses already had subconscious biases against Davis. In addition to Davis' immediate media attention, Davis' photo was the only one submitted to the eyewitnesses for identification.[110]

Interim Appellate Proceedings

On March 16, 1992, after he was appointed additional counsel, Davis was denied a motion for new trial.[111] Thereafter, he was denied a direct appeal.[112] In March of 1994, Davis filed a state habeas petition arguing ineffective assistance of counsel and that the death penalty violated the 8th Amendment's ban of cruel and unusual punishment.[113] In support, he submitted 33 affidavits with 5 purporting to qualify as recantations.[114] In September of 1997, the state habeas court denied his petition, and Davis immediately

[106] *Id*. at **19-20.
[107] *Id*.
[108] *Id*. at *26.
[109] *Supra* n. 22.
[110] *Id*.
[111] *In Re Davis*, 2009 WL at *5.
[112] *Id*.
[113] *In re Davis*, 2010 WL at *84.
[114] *Id*.

filed a petition for probable cause to the Georgia Supreme Court.[115] There, Davis argued that his counsel failed to provide additional evidence of innocence to inculpate Redd Coles for the murder.[116] Thereafter, Davis appealed the Georgia Supreme Court's denial to the United States Supreme Court, which denied Davis' writ for certiorari in October of 2001.[117]

In December of 2001, Davis filed his first petition for writ of habeas corpus in federal district court arguing that the prosecution knowingly presented false testimony at his trial, that the prosecution failed to disclose materially exculpatory evidence, and that his counsel was ineffective.[118] Davis submitted affidavits to the court and requested an evidentiary hearing to provide the court with testimony of the affiants.[119] At this time, Davis raised some constitutional arguments for the first time, which necessitated a gateway showing of actual innocence in accordance with *Schlup v. Delo*.[120] In May of 2004, the district court denied Davis' petition on the constitutional claims without ruling on whether Davis had an actual innocence claim.[121] In September of 2006, the Eleventh Circuit Court of Appeals affirmed the district court's decision.[122]

In July of 2007, Davis filed an extraordinary motion for new trial in Chatham County Superior Court in which he argued new evidence would prove his innocence and would implicate Coles as the killer.[123] This motion was almost immediately denied.[124]

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[115] *In Re Davis*, 2009 at *5.
[116] *Id*.
[117] *In re Davis*, 2010 WL at *85.
[118] *In Re Davis*, 565 F.3d 810, 813 (11th Cir. 2009).
[119] *In re Davis*, 2010 WL at *85.
[120] *In re Davis*, 565 F.310 at 813; *see Schlup v. Delo*, 513 U.S. 298, 329 (1995).
[121] *In re Davis*, 2010 WL 3385081 at **85-86.
[122] *Id*. at *86.
[123] *Id*. at *87.

The Georgia Supreme Court found that Davis' presentation of recantation affidavits were not done diligently, because some of the affidavits were over 5 years old.[125] Although it denied the motion, the Georgia Supreme Court still reviewed Davis' allegedly new evidence, but determined none of it had the materiality required to merit a new trial.[126]

After the denial of the extraordinary motion for new trial, Davis appealed to the Georgia Supreme Court and was granted a discretionary appeal.[127] At the same time, the Georgia State Board of Pardons and Paroles granted a temporary stay and scheduled a clemency proceeding.[128] A divided Georgia Supreme Court ultimately denied Davis' motion after reviewing the innocence affidavits.[129] The United States Supreme Court again denied petition for writ of certiorari.[130] As for his clemency petition, the Georgia State Board of Pardons and Paroles denied Davis' petition after reviewing Davis' affidavits, permitting Davis to present his witnesses, and retesting some of Davis' physical evidence.[131]

Davis' last option was to file a second habeas petition to the Eleventh Circuit.[132] Davis primarily argued his execution violated the 8th Amendment's ban on cruel and unusual punishment, because he was actually innocent.[133] Under the Antiterrorism and

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[124] *Id.*
[125] *Davis v. State*, 660 S.E.2d 354, 359 (Ga. 2008).
[126] *Id.* at 362-363 ("Particularly in this death penalty case where a man might soon be executed, we have endeavored to look beyond bare legal principles that might otherwise be controlling to the core question of whether a jury presented with Davis' allegedly-new testimony would probably find him not guilty or give him a sentence other than death.")
[127] *Id.*
[128] *In re Davis*, 2009 WL at *6.
[129] I*n re Davis*, 2010 WL at *88.
[130] *Id.*
[131] *Id.* at *89.
[132] *In re Davis*, 565 F.3d at 813.
[133] *Id.*

Death Penalty Act of 1996 ("AEDPA"), to raise a second habeas petition in federal court, a three-judge panel of the United States Court of Appeals would have to find the following: that petitioner's claim "relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable" or that it relies on facts that could not have been discovered previously through the exercise of due diligence, and that if proven, would "establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense."[134]

The Eleventh Circuit denied Davis' application for failing to prove a prima-facie case for the second exception to AEDPA's procedural bar, that of newly-discovered evidence.[135] The Eleventh Circuit based its decision on the fact that Davis admitted to having the necessary evidence for a freestanding actual innocence claim prior to his second habeas petition and thus had not pursued the actual innocence claim with due diligence.[136]

Once Davis' petition to the Eleventh Circuit was denied, Davis filed a Petition for Writ of Habeas Corpus under the Supreme Court's original jurisdiction under 28 U.S.C. § 2241(b).[137] In a move it had not made in over 50 years, the United States Supreme Court exercised this jurisdiction and transferred Davis' petition to federal district court to "receive testimony and make findings of fact as to whether evidence that could not have been obtained at the time of trial clearly establishes Mr. Davis' innocence."[138] Justice

[134] *Id*. at 816; *see also* 28 U.S.C.A § 2244b(2) (West 2012).
[135] *In re Davis*, 565 F.3d at 816.
[136] *Id*. at 821.
[137] *In re Davis*, 2010 WL at 90; *see particularly* 28 U.S.C.A. § 2241(b) (West 2008).
[138] *In re Davis*, 130 S. Ct. 1 (Mem) (2009).

Stevens stated, "The substantial risk of putting an innocent man to death clearly provides an adequate justification for holding an evidentiary hearing."[139]

The Dissent, however, took a different perspective on the United State's transfer of Davis' case. The opposition believed the Court's decision undermined the purpose of AEDPA, which was to bring finality to prisoner's collateral attack processes by limiting them to state violations of clearly-established federal law.[140] According to Justice Scalia's dissent, Congress's decision to limit prisoner's relief through AEDPA should be given deference and supersede any equitable claims of actual innocence.[141] Scalia stated, "A state court cannot possibly have contravened, or even unreasonably applied, 'clearly established Federal law, as determined by the Supreme Court of the United States,' by rejecting a type of claim that the Supreme Court has not once accepted as valid."[142]

Judge Moore Determines Troy Davis' Fate

As can be seen, Davis had a long and difficult journey to get his evidence submitted to the court. Davis' most important evidence was recantation affidavits and testimony. Although it should not be discounted, Davis' other evidence submitted at Judge Moore's evidentiary hearing were given essentially no weight by Judge Moore and thus will not be thoroughly analyzed. This other evidence included confessions composed of hearsay, alternative eyewitness accounts and evidence regarding the physical evidence in the case.[143]

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[139] *Id.*
[140] *In re Davis*, 565 F.3d at 817.
[141] *In re Davis*, 130 S.Ct. at 2 (Scalia, J. dissenting).
[142] *Id.*
[143] I*n re Davis*, 2010 WL at **150-164.

An actual innocence claim is only available in post-conviction relief proceedings to overcome a miscarriage of justice.[144] The United States Supreme Court examined the actual innocence claim in *Herrera v. Collins*.[145] Herrera's case is strikingly similar to Davis' circumstances. In *Herrera*, the defendant was charged and sentenced to death for the murder of two police officers.[146] Also similarly, the State relied substantially upon eyewitness testimony in order to convict Collins.[147] As in Davis' case, after numerous appeals, Herrera filed a second petition for federal habeas relief on the claim it would violate the 8th Amendment's ban on cruel and unusual punishment to execute an actually innocent person.[148] The evidence Herrera submitted for the Court's review included alternate eyewitness accounts.[149] For Herrera, like Davis encountered with AEDPA, he had been previously unable to present his newly-discovered evidence for court evaluation, because he failed to show that the state violated a clearly-established federal law.[150]

At this time, the Court had the opportunity to address whether a defendant had a freestanding claim of actual innocence based on newly-discovered evidence absent an independent constitutional violation occurring in the underlying trial.[151] However, because of the weak factual evidence that Herrera submitted, the Court avoided

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[144] *Schlup*, 513 U.S. at 329 ("[A] petitioner does not meet the threshold requirement unless he persuades the district court that, in light of the new evidence, no juror, acting reasonably, would have voted to find him guilty beyond a reasonable doubt.")
[145] *Herrera*, 506 U.S. at 393.
[146] *Id*.
[147] *Id*. at 396.
[148] *Id*. at 393.
[149] *Id*. at 417.
[150] *Id*. at 400.
[151] *Id*.

answering the question.[152] In dicta, the Court examined the policy rationale behind avoiding whether a freestanding claim of actual innocence existed: "This rule is grounded in the principle that federal habeas courts sit to ensure that individuals are not imprisoned in violation of the Constitution – not to correct errors of fact."[153] Thus, because the Court gave deference to state court's factual findings, actual innocence claims still needed to meet a threshold showing required by precedence established in *Schlup*.[154]

Herrera can be distinguished from Davis' case, however, because Herrera was unquestionably guilty.[155] In her concurring opinion, Justice O'Conner stated, "Dispositive to this case, however, is an equally fundamental fact: that petitioner is not innocent, in any sense of the word."[156] Therefore, although the Court did not address whether an actual innocence claim could be freestanding without a gateway showing, the Court based its finding primarily upon Herrera's insufficient evidence.[157] Importantly, a majority of the justices indicated it would be constitutionally unsound to execute an actually innocent individual, which indicates a freestanding constitutional claim of actual innocence may be accepted in the future.[158]

The case of *Schlup* is also relevant here. In *Schlup*, the defendant was sentenced to death for the murder of a fellow inmate.[159] Although Schlup also brought a successive

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[152] *Id*.
[153] *Id*.
[154] *Id*.; *see e.g. Felker v. Turpin*, 518 U.S. 651, 662 (1996) (recognizing the limitations imposed by AEDPA); *see also Schlup*, 503 U.S. at 326-327.
[155] *Herrera*, 506 U.S. at 396-397.
[156] *Id*. at 419 (O'Connor, J. concurring).
[157] *Id*. at 418-419 (O'Connor, J. concurring).
[158] *Id*. at 427. (O'Connor, J. concurring) ("Nowhere does the Court state that the Constitution permits the execution of an actually innocent person.").

[159] *Schlup*, 513 U.S. at 302.

federal habeas relief claim, his claims can be distinguished from Herrera's, because Schlup presented his evidence as a gateway claim to circumvent procedural bars that would otherwise prohibit courts from evaluating the constitutionality of his conviction proceedings.[160] Schlup argued his actual innocence was due to ineffective assistance of counsel and the withholding of evidence by the prosecution, which are both independent constitutional claims.[161] *Herrera*, in comparison, primarily argued that it was unconstitutional to execute an actual innocent person.[162] In *Schlup*, therefore, the defendant relied upon presenting an actual innocence claim as a gateway showing, while Herrera argued innocence as an independent constitutional claim.

Although Davis' case aligns more with *Herrera* in that Davis argued for the court to recognize actual innocence without a gateway showing, *Schlup* is important to Davis' case, because it sets out a burden of proof that Judge Moore could have applied to evaluate Davis' evidence.[163] In *Schlup*, the Court determined that the defendant must prove that "more likely than not" a reasonable jury would have found him innocent based upon the newly-discovered evidence.[164] Davis argued the *Schlup* standard should apply at the evidentiary hearing.[165] Because the court had not answered the question of whether actual innocence was an independent claim, it was within Judge Moore's discretion to use a more lenient or more burdensome standard.[166]

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[160] *Id*. at 307.
[161] *Id*.; *Strickland v. Washington*, 466 U.S. 668 (1984); *see also Brady v. Maryland*, 373 U.S. 83 (1963).
[162] *Herrera*, 506 U.S. at 396.
[163] *In re Davis*, 2010 WL at *97.
[164] *Schlup*, 513 U.S. at 330.
[165] *In re Davis*, 2009 WL at 12.
[166] *In re Davis*, 2010 WL at **114-119.

In his ruling, Judge Moore recognized that actual innocence claims existed as an independent basis in which to request successive habeas relief.[167] Judge Moore first surveyed the scope of the Eighth Amendment.[168] According to the precedence set in *Trop v. Dulles*, Judge Moore considered objective indicia of society's standards and whether the punishment in question would independently be constitutionally impermissible.[169] For what society deemed acceptable, Judge Moore noted that 47 states have enacted legislation assisting convicts in proving their innocence after *Herrera* was decided.[170] In addition, Judge Moore found no penological goals fulfilled by permitting punishment of the innocent.[171] In recognizing actual innocence claims, Judge Moore stated, "It is unclear why a patently erroneous, but fair criminal adjudication would change the transcendental fact that one who has not actually murdered cannot be executed."[172]

Although Judge Moore recognized Davis' claim, the standard of review remained in his discretion. Relevant caselaw instructs federal courts in assessing actual innocence claims as a whole. According to *House v. Bell*, "the actual innocence inquiry requires the federal court to assess how reasonable jurors would react to the overall, newly supplemented record."[173] Accordingly, Judge Moore was required to assess Davis' entire trial record, and any new evidence, to predict whether the jury would have come out differently. Because Judge Moore had little guidance from the United States Supreme Court, he ultimately applied a more stringent standard than *Schlup*: "Mr. Davis must

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[167] *Id*. at *107.
[168] *Id*. at **97-102.
[169] *Id*. at *102; *see also Trop v. Dulles*, 356 U.S. 86, 100-101 (1958).
[170] *In re Davis*, 2010 WL at *106.
[171] *Id*. at **110-112.
[172] *Id*. at 110.
[173] *House v. Bell*, 547 U.S. 518, 538 (2007).

show by clear and convincing evidence that no reasonable juror would have convicted him in light of the new evidence."[174]

The higher burden imposed by Judge Moore increased Davis' obstacles in proving his innocence. Davis primarily relied upon recantations from 7 of the State's 9 witnesses.[175] Generally, it is important to note that courts view recantations with suspicion.[176] Especially for actual innocence purposes, "affidavits are disfavored because the affiants' statements are obtained without the benefit of cross-examination and an opportunity to make credibility determinations."[177]

At trial, Georgia used Antoine Williams to verify Larry Young's assailant was the same person as Officer MacPhail's shooter.[178] At the evidentiary hearing, Williams testified he could no longer confidently identify Davis as the shooter and that he had previously identified Davis under pressure from police.[179] Unfortunately, according to Judge Moore, Williams's recantation was not credible or significant, because he stated at trial, during cross-examination, that he had never been pressured by police officers.[180] In addition, Judge Moore did not believe William's testimony amounted to recantation, because Williams never admitted his original statements to the police were false.[181]

Kevin McQueen gave testimony that Davis confessed to Officer MacPhail's shooting while they were both serving time in jail.[182] At the evidentiary hearing,

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[174] *In re Davis*, 2010 WL at *119; *see also Schlup*, 513 U.S. at 325-326.
[175] *In re Davis*, 2009 WL at *1.
[176] *United States v. Baker*, 479 F.3d 574, 578 (8th Cir. 2007).
[177] *Herrera*, 506 U.S. at 417.
[178] *In re Davis*, 2010 WL at *127.
[179] *Id*. at **128-129.
[180] *Id*. at *129.
[181] *Id*. at *128.
[182] *Id*. at *131.

McQueen admitted to fabricating the entire alleged confession to seek revenge on Davis and for benefits received from the state in assisting its case.[183] Judge Moore found McQueen's testimony credible, but that it mattered little to Davis' current defense, because of Judge Moore's belief, upon reviewing the trial transcript, that the original jury did not rely upon McQueen's testimony in finding Davis guilty.[184]

Jeffrey Sapp testified at trial that Davis had confessed to shooting Officer MacPhail in self-defense.[185] For newly-discovered evidence purposes, Sapp admitted at the evidentiary hearing that he made up portions of Davis' confession due to police harassment.[186] Judge Moore ultimately rejected Sapp's statements, because Sapp had previously admitted fabricating Davis' confession, and therefore, the recantation evidence was not newly-discovered.[187] In addition, Judge Moore found it unlikely that police pressure existed, because Davis' confession, according to the police's testimony, contained an affirmative defense, which the police would not have included if they were trying to create incriminating evidence.[188]

Darrell Collins, the other individual involved in the dispute with Larry Young, testified at Davis' trial that Davis had been wearing a white t-shirt and that he had been the one to assault Young.[189] For his recantation, Collins testified being subjected to police pressure and that he had never seen Davis strike Young.[190] Judge Moore found Collin's statements were not credible, since he was essentially admitting to lying on the stand

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[183] *Id.*
[184] *Id.*
[185] *Id.* at *133.
[186] *Id.*
[187] *Id.* at *n. 64.
[188] *Id.* at *135.
[189] *Id.* at *136.
[190] *Id.* at *137.

originally about Davis' involvement in the Cloverdale shooting.[191] Again, Moore determined that even if the recantation evidence regarding police intimidation had been true, it was not new.[192]

Harriet Murray provided two statements to the police, in addition to testifying at Davis' trial, that she could identify Davis as Larry Young's assailant and as Officer MacPhail's shooter.[193] Judge Moore appeared to evaluate Murray's affidavit with hostility.[194] Judge Moore found it significant that Murray was deceased, and therefore unavailable to provide testimony at the evidentiary hearing, and that her written affidavit was not notarized.[195] Davis provided Murray's statements, because they recalled things differently in that she no longer knew whether the person arguing with Young was the same individual as the shooter.[196] This recantation would effectively incriminate Coles as the shooter.[197] Ultimately, Judge Moore found this inconsistency did not matter compared to the rest of the live testimony she had given at trial.[198]

Dorothy Farrell testified at Davis' trial that she witnessed the murder from a nearby motel and was clearly able to identify Davis as the shooter.[199] Since then, Farrell provided statements that she was dishonest at Davis' trial, because of the District Attorney's promise of favorable treatment in an unrelated matter.[200] Judge Moore found Farrell's statements unconvincing, because she had been available at the evidentiary

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191 *Id.*
192 *Id.* at *n. 65.
193 *Id.* at **139-140.
194 *Id.*
195 *Id.*
196 *Id.* at *141.
197 *Id.*
198 *Id.* at *142.
199 *Id.* at *143.
200 *Id.*

hearing, but had not been called to the stand by Davis' counsel.[201] Judge Moore found that most importantly, Farrell had not wavered in describing the shooter as wearing a white t-shirt, and any inconsistencies in her statements had been fully subject to cross-examination at Davis' trial.[202] Judge Moore qualified Farrell's testimony as recantation, but determined it was valueless due to Davis' strategic chose not to call her to the witness stand at the evidentiary hearing.[203]

Larry Young's recantation was the last one presented at the evidentiary hearing.[204] Young previously testified that the assailant had been wearing a white t-shirt and that he had been arguing with the man in the yellow shirt, whom he later identified as Mr. Coles.[205] Young's recantation affidavit stated he could not recall the night's events properly, because he was refused medical treatment and coerced into his testimony.[206] Judge Moore found it unconvincing, because Young was available at the evidentiary hearing, and Davis again chose not to present him to the court.[207]

Altogether, Judge Moore found that Davis overstated his recantation evidence's significance.[208] By his own evaluation, Judge Moore stated that two of the recanting witnesses did not directly admit to lying at Davis' original trial, two recanting witnesses were not at all credible, and two of the recantations were unreliable due to the fact that Davis refused to submit the persons to cross-examination.[209] Judge Moore found this

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[201] *Id*. at *145.
[202] *Id*. at *144.
[203] *Id*. at *146.
[204] *Id*. at *147.
[205] *Id*.
[206] *Id*. at *148.
[207] *Id*. at **148-149.
[208] *Id*. at *164.
[209] *Id*. at *168-169.

determinative to Davis' actual innocence claim, because the State presented credible, live testimony to rebut the affidavit recantations that Davis did not directly examine at the hearing.[210] Lastly, the court determined that Kevin McQueen's testimony at trial was patently false and thus probably did not affect the juror's determination of guilt.[211]

The Other Evidence Presented to Judge Moore

Davis introduced alleged confessions by Redd Coles by hearsay evidence.[212] The use of hearsay was problematic to Davis' case, because, as Judge Moore stated, "[w]hile hearsay confessions may tip the balance in an otherwise close case, they will rarely, if ever, form the crux of a showing of actual innocence."[213] Davis had the burden of proving that the confessions were truthful and not made by Coles to bolster his reputation as a criminal.[214] Judge Moore ultimately discounted all of the hearsay evidence, because Coles was not called for cross-examination at the evidentiary hearing.[215]

Davis also presented alternate eyewitness accounts in which the most important included accounts by Benjamin Gordon and Joseph Washington, both of which accused Red Coles of being the shooter.[216] Judge Moore discounted Gordon's testimony, because it was Gordon's third version of the night's events, which for the first time implicated Coles as the shooter.[217] Gordon testified that he had not come forth sooner, because he had been fearful of Coles.[218] Judge Moore did not find this convincing, because Gordon

[210] *Id*.
[211] *Id*.
[212] *Id*. at *150.
[213] *Id*. at *152.
[214] *Id*. at *153.
[215] *Id*. at *170.
[216] *Id*. at *156.
[217] *Id*. at **157-158.
[218] *Id*. at *158.

previously implicated Coles in a different court proceeding, which would discount any fear Gordon had of Coles.[219]

Joseph Washington also presented an alternate eyewitness account.[220] He made his allegations through an affidavit and did not appear at the evidentiary hearing.[221] Judge Moore discounted Washington's evidence primarily, because Washington had been badly impeached at trial for attempting to argue he had been at two places at once in regard to a nonrelated shooting in a nearby neighborhood.[222]

The last alternate evidence was that of Peggie Grant who was Coles' girlfriend's mother.[223] According to Grant, she had observed Coles soon after the shootings and he was wearing a white shirt.[224] The Court found that although it did provide some additional weight to Davis' argument, it was disfavored because it was presented in affidavit form.[225]

The last piece of evidence Davis presented at the evidentiary hearing was a report by the Georgia Bureau of Investigation that indicated it was unclear whether the bullets at the Cloverdale neighborhood shooting and the munitions recovered at MacPhail's crime scene were from the same firearm.[226] The Georgia Bureau found that the shell casing tests were inconsistent.[227] This munitions evidence had been critical at Davis' trial since his guilt for the Cloverdale neighborhood shootings had been bootstrapped to MacPhail's

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[219] *Id.*
[220] *Id.* at *159.
[221] *Id.*
[222] *Id.* at **159-160.
[223] *Id.* at *160.
[224] *Id.*
[225] *Id.* at **160-161.
[226] *Id.* at *161.
[227] *Id.*

murder.[228] Judge Moore found the new report did not, by itself, establish Davis' actual innocence, because it was only relied upon partially by the trial jury as a link between the two crimes.[229]

Overall, Judge Moore believed much of Davis' evidence was "too general to provide anything more than smoke and mirrors."[230] Because Judge Moore placed a burden upon Davis to prove by clear and convincing evidence that no reasonable juror would have convicted him in light of the new evidence, Davis' last opportunity to prove his innocence to the justice system and to the world was futile.

Today, there is reason to believe Judge Moore's ruling could have been different had he applied a preponderance of evidence standard as in *Schlup*. In early 2013, the United States Supreme Court recognized another miscarriage of justice exception to procedural obstacles in *McQuiggin v. Perkins*.[231] In *McQuiggins*, the defendant brought an ineffective assistance of counsel claim in his first federal habeas petition 11 years after the one-year deadline prescribed by AEDPA.[232] To overcome the procedural bar, the defendant submitted evidence of his actual innocence in the form of affidavits incriminating a man that had been with him on the night of the murder in which he was convicted.[233]

In *McQuiggins*, the Court provided prisoners with the right to federal habeas relief on a showing of credible evidence of actual innocence, regardless of any obstacles presented by *Schlup* or AEDPA, which indicates the Court's move towards recognizing

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[228] *Id*. at *162.
[229] *Id*. at *163.
[230] *Id*. at *165.
[231] *McQuiggins v. Perkins*, 133 S. Ct. 1924, 1928 (2013).
[232] *Id*. at 1930.
[233] *Id*.

an independent constitutional basis for innocence claims.[234] At first glance, this may seem insignificant since Judge Moore's evaluation assumed a freestanding innocence claim.[235] What was significant, however, was that *McQuiggins* also set forth a less burdensome standard of proof than what Judge Moore issued in Davis' case.[236] In comparison to the clear and convincing standard used by Judge Moore, *McQuiggins* required prisoners to set forth that "more likely than not that a reasonable jury would not convict in light of new evidence."[237] *McQuiggins*' standard, therefore, is more defendant-favorable in that it requires less evidence than the clear and convincing standard.

Although it appears that *McQuiggins*' precedent could have a positive effect upon Davis' claim, it is uncertain whether he would have been able to use the *McQuiggins* standard for his claims. According to 28 U.S.C. 2244(b)(2)(A), a successive habeas claim would only be granted if the claimant could prove that the United States Supreme Court had made a new constitutional right retroactive to cases on collateral review.[238] In addition, in *McQuiggins*, the majority distinguished its findings to circumstances in which defendant claimed actual innocence on a first habeas petition stating, "Congress thus required a second or successive petition habeas petitioners attempting to benefit from the miscarriage of justice exception to meet a higher level of proof and to satisfy a diligence requirement that did not exist prior to the AEDPA's passage."[239] Thus, the Court indicated that successive petitions for habeas relief would probably have a greater standard of proof as compared to the first-time petitioners that were at issue in

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[234] *Id.*
[235] *In re Davis*, 2010 WL at *113.
[236] *McQuiggins*, 133 S. Ct. at 1935.
[237] *Id.*
[238] 28 U.S.C. 2244(b)(2)(A) (West 2012).
[239] *McQuiggins*, 133 S. Ct. at 1933.

McQuiggins. Ultimately, because *McQuiggins* is new precedent, has not been applied retroactively, and because it was a narrow ruling, it is unknown what effect it would have had for Davis.

Conclusion

Troy Davis fought his case actively for 20 years before he was executed on September 21, 2011, because of procedural obstacles, circumstantial evidence and racial biases.[240] Up until his death, Davis remained adamant about his innocence. In his last words Davis stated, "I did not personally kill your son, father, brother. All I can ask is that you look deeper into this case so you really can finally see the truth."[241]

Before his execution, the state parole board received over 630,000 petitions to stay the proceedings, which were granted three separate times.[242] Former President Jimmy Carter, Archbishop Desmond Tutu, 51 members of Congress and even a death penalty advocate, FBI director, William S. Sessions, supported Davis' cause.[243] Most probably, Davis' case received notoriety because death penalty politics that have been digitally enhanced by social media.[244] Benjamin T. Jealous, president of the National Association for the Advancement of Colored People, believes Davis' case was

[240] *Supra* n. 26 at 11.
[241] Kim Severson, *Georgia Inmate Executed; Raised Racial Issues in Death Penalty*, http://query.nytimes.com/gst/fullpage.html?res=9F06E5D61F3FF931A1575AC0A9679D8B63&ref=troydavis (accessed Oct. 27, 2013).
[242] *Id.*
[243] *Id*.
[244] Kim Severson, *Digital Age Drives Rally to Save Troy Davis from Execution*, http://www.nytimes.com/2011/09/17/us/supporters-rally-to-save-troy-davis-from-execution-in-georgia.html?ref=troydavis&_r=0 (accessed Nov. 17, 2013).

compelling, because it suggests that the American justice system is flawed, which demonstrates the growing divide between the death penalty's advocates and opponents.[245]

It is typical for most cultures to need alarming cases, like Davis', in order to enact change. Fortunately, the United States Supreme Court has interpreted the Eighth Amendment flexibly to take society's perspective on the death penalty into account when analyzing the death penalty's constitutionality. The Court has stated, "The Eighth Amendment stands to assure that the State's power to punish is 'exercised within the limits of civilized standards."[246]

Davis' plight for innocence, therefore, may have a larger purpose towards ending the death penalty by reflecting society's growing disgust in executing the criminally convicted. Although Congress indicated through AEDPA that prisoner litigation should be limited, there should be special procedures in place for death row inmates.[247] For example, the United States Supreme Court could recognize actual innocence claims with newly-discovered evidence as independent constitutional claims, regardless of the number of habeas petitions the claimant has brought. Alternatively, the states could be required to put stronger procedures in place, as Maryland has done, by requiring videotaped confessions or other substantive evidence when eyewitness testimony is the primary basis leading to capital punishment.[248]

Altogether, it appeared that the State of Georgia had an open-shut case against Davis with circumstantial evidence. However, the amount of conflicting evidence should

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[245] *Id.*
[246] *Woodson v. North Carolina*, 428 U.S. 280, 288 (1976) (quoting *Trop*, 356 U.S. at 100).
[247] *See generally In re Davis*, 130 S.Ct. at 2 (Scalia, J. dissenting).
[248] *Supra* n. 17.

cause the State to err on the defendant's side when there are the added components of eyewitness misidentification, a lack of DNA evidence, and underlying racial biases. If greater protections were enacted for death row inmates, not only would there be a lesser likelihood of executing the innocent, but the United State would endorse their respect for the Constitution's ban on cruel and unusual punishment, which would promote the validity of the Constitution in general. With added procedures in place for prisoners on death row, Troy Davis' fate, whether innocent or guilty, will serve a purpose in promoting greater human rights internationally by the United States taking a stance on how they treat their criminally convicted.