Clearly Established Innocence?

An Account of the Troy Davis Evidentiary Hearing, June 23-24, 2010

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On August 17, 2009, the United States Supreme Court ordered a federal district court to have an evidentiary hearingand determine whether Troy Davis could "clearly establish" his innocence. This was a historic decision; the Supreme Court had not granted a habeas petition in nearly 50 years. Although there was speculation that the hearing would take place in the fall of 2009, it was eventually scheduled for June 30. The date was then moved forward one week to June 23. The two day long evidentiary hearing took place in a federal court in Savannah, Georgia, presided by Judge William T. Moore Junior. I attended 4/5 of the hearing, and the following account of the hearing is based on my own memory and observations as well as the notes I took during the hearing. Although I have tried my best to be accurate in my description of the hearing, it is quite possible that the account contains errors, caused either by a misunderstanding of the events (for instance, the many complex legal questions posed to both sides at the end of the hearing), or through an error in transcription or memory. Although I support Troy Davis, I have tried my best to make this account a relatively objective one. The majority of quotations are paraphrased from what was actually said.

The account is structured chronologically by witness, and summarizes what each witness was asked and what his or her answer was. As is evident from the length of this account, I tried to write in as much detail as possible. Although this makes the account rather tedious to read at times, I feel that in such a historic hearing it is better to err on the side of being too absorbed with minutiae than to skim over what may end up being an important detail. In any case, a concise summary of day one of the hearing can be found here: http://www.wtoc.com/global/story.asp?s=12699354, and a summary of day two can be found here: http://www2.wsav.com/news/2010/jun/24/davis-hearing-ends-state-claims-nothing-new-ar-438463/.

Wednesday, June 23 (Day One)

I was unable to attend the first part of the hearing on this day because I was working as a volunteer for Amnesty International and helping to run the various events in Wright Square just outside the courthouse. The first part of hearing took place from 10:00 AM to around 12:50 PM, at which point the court recessed for lunch. I received varying impressions of the hearing from different people; one thought that the witnesses' credibility had been questionable and the fact that they answered many questions with "I can't remember" certainly did not help. Others told me it had gone well, and that the testimonies of the witnesses (all of these witnesses were Defense witnesses) strengthened Davis's case. Others told me it was difficult to determine whether the outcome was positive or negative. Another person told me that the judge, William T. Moore Jr., had been fairly subdued during this part of the hearing, so it was difficult to tell where

he was leaning. Shortly after the recess, I learned that we had an extra ticket to get into the courthouse (only 90 or so tickets were available to the general public, and people waited in line as early as five AM to get them) and I was offered a chance to view the remainder of the hearing for the day. I rushed back to the hotel to change into more formal clothes, and thanks to the speedy driving of a friend managed to get into the court literally five seconds before the judge entered the courtroom. After hearing the Court Marshall say, "All rise" and shortly thereafter permit us to be seated, the hearing resumed.

The first witness called in by the Defense in the post lunch proceedings (I believe the Defense called in five witnesses prior to this point in time—Antoine Williams, Kevin McQueen, John Hanus, Jeffrey Sapp, AND Darrell "D.D" Collins, four of whom were recanters) was Quiana Glover, a large, African American woman who was in her late 20s. Glover's voice was extremely hoarse, and it was difficult to hear her. First the State (the prosecution) complained that Glover could not be heard, and eventually Judge Moore sternly admonished the Defense for bringing in a witness who could barely be heard. The Defense explained that she had been in the emergency room the day before and eventually she was dismissed from court. Judge Moore said they could try to have her testify the next day.

The second witness was April Hester, an African-American woman of regular build. In her testimony, she told the court that she and three other women had walked near the scene of the murder. There, she saw Sylvester "Redd" Coles speaking to Tonya Johnson. Johnson walked away, at which point Coles told her to "come walk back with me [Coles] so that it looks like I didn't do anything." Hester's original testimony/police report omitted Coles saying this statement. Somewhere along this point the State objected to this evidence, since it was hearsay evidence, which is generally not admissible in court. Judge Moore then asked the Defense why such evidence should be admitted. The Defense said that the evidence was useful for incriminating Coles, and that in a previous case[1] the hearsay evidence was accepted. Judge Moore, after some thought, said the objection had been noted but that he would allow for the hearsay evidence. However, he advised the Defense that he could easily give no credence or weight to any hearsay evidence presented in the court. Judge Moore also said that Coles should've been subpoenaed. However, Defense attorney Jason Ewart argued that there was no point in subpoenaing him, as he would not admit to confessing the crime. Continuing her testimony, Hester said that when she and Coles parted, Coles gave her a hard stare that, to her, clearly meant "Don't say nothing." When asked why she hadn't said anything up to this point, Hester responded that she was scared of Coles. Pressing this point, the Defense tried to get Hester's general impressions of Coles, but the State objected and the line of questioning was abandoned. When asked why, after two decades, she came forward with this new statement, she said she wanted to tell the truth in order to set an example to her children about doing the right thing.

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1 The three main cases cited in the hearing were *Herrara, House*, and *Schlup* [may be spelled differently]

The third witness was Anthony Hargrove, a fairly well built African-American man wearing a white Georgia Department of Correction jumpsuit. Hargrove was a self proclaimed "career criminal" who had spent somewhere on the order of 20 years in prison. Hargrove said he knew Redd Coles because they both dealt drugs. One of them sold drugs in Cloverdale and the other dealt drugs in Yamacraw village. One day they were both on a porch, smoking marijuana. According to Hargrove they had been passing the joint back and forth for ten minutes when Coles said that he had once done something and that "Troy took the fall for it." The State at this point reiterated their objection to hearsay evidence, but Judge Moore retained his view that he would accept hearsay evidence but may not end up giving it any consideration. The Defense then asked Hargrove why he had not testified before, to which he responded that he had two outstanding warrants for his arrest as well as other legal problems, and as a result going to the police would've been unwise. He said he finally came forward to get the burden off his chest and because now, at least in terms of legal consequences, he had nothing to lose.

Hargrove could be described as a "sassy" or "snarky" witness; several times the court erupted in laughter at his sarcastic, mocking, and even contemptuous responses, particularly towards the State. When the Defense had finished its direct examination, State attorney Beth Burton introduced herself by saying, "Good afternoon, Mr. Hargrove, I'm Beth Burton" to which Hargrove replied in a suave voice, "Well hello, Beth," to the audience's laughter. The State asked Hargrove once again why he had not mentioned Coles's confession before. Hargrove, annoyed at having to answer the same question twice, sarcastically replied, "It's called self-preservation…" much to the audience's amusement. The State asked Hargrove whether Davis's attorneys had approached him for his testimony. He said that they had not contacted him, but rather he had written to Davis about what Coles had said, and was only contacted by Davis's attorneys afterwards.

At the conclusion of the State's questions, the State began reading off Hargrove's entire rap sheet one by one, asking him after each listing whether he had been convicted of that particular crime. This eventually became a bit absurd; while the State was obviously trying to weaken the witness's credibility by showing that he was a convicted felon, reading off his lengthy list of prior convictions one by one seemed like overkill. Both the judge and the audience could clearly see Hargrove's Georgia Department of Corrections jumpsuit and could easily find his rap sheet independently. Hargrove himself became very amused, smiling as he confirmed conviction after conviction, although he indicated for a small number of crimes that he was not guilty but had plead guilty. Even here he behaved comically; when asked about whether he had been convicted of credit card fraud in Florida in sometime in the 1990s, he emphatically replied "No, I did not do that." After pausing for a few seconds, he smiled and continued, "I was convicted in Georgia."

The Defense then called Benjamin Gordon to the stand. Gordon, also clad in a spotless white Georgia Department of Corrections jumpsuit, was a thin, 36 year old African-American man

with a shaved head. Gordon said he knew Coles very well, and that they had spoken "thousands of times." In fact, Benjamin Gordon is Sylvester Coles's nephew.

The same night that officer Mark MacPhail had been shot, a pool party had taken in Savannah's Cloverdale neighborhood. Gordon, and three others (Joseph Blige, Michael Cooper, and one other who I can't recall) were leaving the pool party. While sitting in a car, with Blige hanging outside the window, a shot was fired, hitting Cooper in the jaw. The three others then dropped Cooper off to the hospital and went to Yamacraw village (another Savannah neighborhood) to pick up guns. They returned to the party and fired shots outside the house (though Gordon stated that he did not fire any of the shots) and left without seeing if anyone had been hit. The Michael Cooper shooting is significant because an underlying premise of the State's case was that the Michael Cooper shooting and the MacPhail shooting were related, and that in fact it was the same person who shot both Cooper and MacPhail.

In his written statement taken by the police the night of the shooting, Gordon stated that Cooper's shooter wore dark pants/jeans and a white shirt with a Batman logo. However, at the hearing, Gordon stated that in fact he did not see the shooter. The description of the shooter, as well as many other details in the police statement, actually came from the conversation between Gordon, Blige, and the other person in the back of the police car. Gordon also said that the police only instructed him to sign the typed statement, and that they never instructed him to read it.

However, the greatest revelation of the hearing was yet to come. Gordon described what he did after the Cloverdale shooting—eventually he had headed near the spot where MacPhail would soon be shot because he was worried about his friend, Joseph Blige, who was in the area. Gordon then said that he heard a shot. He did not see who fired it, because his head had been turned away from the direction of the shot. Gordon turned towards the shot and saw Sylvester Coles fire a second shot at a police officer on the ground.

Naturally this was a staggering assertion. Here was a witness who was not saying that he had originally said Davis shot the police officer when in reality he didn't know, or that he didn't see who fired shot, like many other witnesses had. Rather, here was someone claimed to have seen the shooter, and that the shooter was Sylvester Coles, the man Davis had said was the real shooter all along. In his original 1989 statement, as well as in affidavits in 2003 and 2008, Gordon never said that he saw MacPhail's shooter. This was the first time that anyone besides Davis himself had ever said to have actually seen Coles shoot officer MacPhail. When asked why he had not said any of this in prior affidavits, Gordon said that he feared Coles's retribution towards himself and his family.

After his allegation that Coles killed officer MacPhail, Gordon went on to discuss a conversation he had with Coles. In this conversation, Gordon claimed that Coles had made a clear reference to MacPhail's murder and had finally said, "I shouldn't have done that s***." According to Gordon, when he asked Coles to explain more, Coles began to cry. Around this point, the State

once again brought up the argument that this hearsay evidence should not be admissible to the court and during the cross-examination, they set several traps for Gordon. However, he appeared to answer all of their questions without contradicting himself. The State did try to undermine Gordon's story by suggesting that Coles may have been talking about something else, but Gordon stated emphatically that Coles was clearly referencing the MacPhail shooting. The State then, like they had with Hargrove, read out Gordon's rap sheet conviction by conviction. Upon the conclusion of the cross-examination, the Defense announced that, with the exception of Quiana Glover who could not testify due to her health, they would rest their case. With Gordon's lengthy testimony concluded, Judge Moore called a ten minute recess, after which the State would then make their case. As Judge Moore exited the court room, we all rose and began talking. Troy briefly looked around the room, caught my eye, and nodded. We all exited the courtroom amid chatter and speculation about the hearing, and outside in the lobby I heard various voices giving their own analyses of the events. I borrowed several sheets of paper from a friend and briefly discussed what had taken place with a few others. We returned the courtroom and once Judge Moore had taken his seat, the State began presenting its case.

The State's first witness was Captain Richard Zapal, a white middle-aged man who at the time of MacPhail shooting was a police officer for the Savannah Police Department. Capt. Zapal didn't remember much, and often would answer questions with "I don't remember" or "I don't recall." Capt. Zapal was the first detective on the scene of the MacPhail shooting. After assessing the facts, he spent 15-20 minutes in Yamacraw village searching for a suspect. He then returned to the scene and separated the witnesses from the rest of the crowd, and spent the following hour taking preliminary notes from various witnesses. He interviewed Dorothy Farrell, a woman on the scene. From her interview, he believed the shooter was around six feet tall, had a thin face and was light skinned. The State then repeated what Capt. Zapal said as a confirmation[2]. The State asked Capt. Zapal, like they did with all of their police witnesses, whether he had intimidated, coerced, threatened, or led any of the people he interviewed into naming Troy Davis, to which he (obviously) replied no.

The Defense then began the cross-examination, and asked Capt. Zapal whether he remembered interviewing Michael Wiles the night of the shooting. Capt. Zapal, who was one of three interviewers that night, said he did not, after which the Defense provided a report on the interview Capt. Zapal had written that same night to jog his memory. Upon seeing the report, Capt. Zapal said he remembered the interview. The Defense then asked Capt. Zapal if he knew what a "snitch" was. Being a jailhouse snitch, Defense attorney Stephen Marsh said, could be dangerous and put that person in harm's way from others in the jail. Capt. Zapal responded that he knew this. The Defense then asked Capt. Zapal, "Would you ever tell someone that you would put them in jail and label them a snitch, or put them under that impression, in order to make them think that they would have to tell the police certain information to avoid this?" As

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2 Interestingly, when confirming what Captain Zapal said, the State said all of the aforementioned details (including the six feet tall part, which is close to Troy's height) but neglected to repeat the fair-skinned detail (Coles is fair skinned; Troy is not)

expected, Capt. Zapal responded that on principle he would not do such a thing and cannot recall ever doing so in the past. The Defense then began playing a recording from Capt. Zapal's 1989 interview with Wiles, which had been enhanced to improve the quality, and asked Capt. Zapal if the voice asking the questions was his. After Capt. Zapal's affirmative, the Defense then began playing a second clip from the interview. To the best of my recollection, the clip went as follows:

Zapal: "Do you know what a material witness is?"

[Some murmuring, presumably from Wiles]

Zapal: "A material witness is someone who we believe may be in danger from other people. We can place a material witness in a jail for their safety—in essence they will be labeled a snitch. We can do that—we have the power to do that."

[More murmuring, again presumably from Wiles, clip ends]

The Defense then asked Capt. Zapal, "Didn't you say this in order to get Mr. Wiles to think that if he did not answer your questions, or did not answer them the way you wanted them to be answered, he would be put in jail and labeled a snitch?" Capt. Zapal answered no, to which the Defense responded, "Oh, so was this just a public service for Mr. Wiles?" upon which the State objected. Judge Moore sustained the objection and then sternly told the Defense, "The recording says what it says. Stop putting your own twist on it!" and said that in the recording Capt. Zapal was just defining what a material witness was. To me, this was a bit bizarre; from my point of view, Capt. Zapal's tone in the recording seemed to be a suggestive one, and it seems highly plausible that the information was meant to intimidate or frighten Wiles. A friend of mine sitting next me was also surprised at Judge Moore's rebuke, because rather than putting a twist on the recording, the Defense attorney had said what we had both been thinking. Nonetheless, perhaps it would've been wiser to ask a more neutral question such as, "Why did you tell Mr. Wiles what a material witness was?" even if it may have elicited an "I don't remember" or "I cannot recall" response.

The Defense then moved on from the recording and went through all of Capt. Zapal's interviews that night one by one. The Defense also subsequently pointed out an unexplained time gap between 4:14 AM, the time of Dorothy Farell's interview, and 3:22 AM, the time of the previous interview (Antoine Williams). After discussing this (Capt. Zapal said he did not remember what occurred between those two times), he was dismissed.

The State's next witness was Lieutenant Carl Ramey, an African-American man who appeared to be in his 50s or 60s. Lt. Ramey is an ordained minister and a professor of Criminal Justice at a local Savannah college, but in 1989 he was employed as a detective of robberies and homicides in the Savannah Police Department. Lt. Ramey had interviewed three people in relation to the MacPhail shooting: Jeffrey Sapp (who had testified before the lunch break), Monty Holmes, and Craig Young. According to Lt. Ramey, he was in a patrol car when Sapp flagged him down.

Sapp then said, "I know why you're here. You're all here because of Troy." According to Lt. Ramey, Sapp told him that Davis rode through the neighborhood on a burgundy bicycle and told Sapp that he had shot a police officer because the officer had been reaching for his gun. Davis then allegedly told Sapp that he went to "finish the job" because the officer had seen his face after the first shot[3]. Lt. Ramey said that Sapp gave him the names of Monty Holmes and Craig Young, two others who Sapp said could provide Lt. Ramey with more information. At this point, the State asked whether Lt. Ramey had influenced the testimony at any point, or had done anything to make the statements similar. After Lt. Ramey gave the expected negative, the State, in a bizarre move, apologized to Lt. Ramey for asking that question. Again, my friend and I looked at each other in surprise. In a case where several witnesses have cited police intimidation, coercion, and misconduct, and where the Defense has repeatedly contended that the police handled the investigation inappropriately, why is the State apologizing for asking such a question?

The State moved along with its questioning, and asked Lt. Ramey about the testimony of Monty Holmes. According to Lt. Ramey, Holmes described Davis as riding a burgundy bike and wearing shorts. Holmes also told Lt. Ramey that Davis had admitted to shooting a police officer. During the cross-examination, the Defense noted that there was a discrepancy between Lt. Ramey's report and the date in the statements. The Defense also brought to the court's attention the fact that Lt. Ramey's report mentions Sapp saying that Davis confessed to Monty Holmes despite there being no mention of Holmes in Sapp's statement. After a brief discussion of these discrepancies, Lt. Ramey was dismissed from the court.

The State's final witness for the day was Sergeant Whitcomd. Sgt. Whitcomd had interviewed Larry Young (the homeless man who had been assaulted shortly before the shooting). Young had not known the identity of his assailant. Sgt. Whitcomd had also spoken to Antoine Williams, a limousine driver who had been at the scene of the shooting and who had testified for the Defense before the lunch recess. Sgt. Whitcomd's interview with Williams took place at 3:22 AM. From his interview with Williams, he had determined that the shooter was between 6-2 and 6-4 and wore a hat and dark jeans, and that the gun used was a rusty revolver. Sgt. Whitcomd briefly went over his interview with Eric Ellison, who said he saw Davis walking towards the Cloverdale pool party. The questioning then brought up the Sgt. Whitcomd's interview of Lamar Brown. According to Brown, the person who shot Michael Cooper at the Cloverdale pool party was wearing a Batman shirt. Brown was also shown a photo array, where he presumably picked out Davis from five pictures. After this discussion, Sgt. Whitcomd was dismissed. The time was about 5:30 PM, and Judge Moore told the audience that court would resume at 9:30 AM the following morning.

Thursday, June 24 (Day Two)

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3 To me, this evidence seemed very similar to the hearsay evidence the State had objected to before.

My friends and I had entered the courthouse around 7:45 AM, more than an hour and a half before the start of the hearing. As a result, we had good seats—right behind the MacPhail family in fact. Mark MacPhail's son was sitting right in front me. As the seats began to slowly filling up, the courtroom became more and more noisy. To pass the time, we played hangman on my notepad, though I'm sure none of us realized the irony at the time. Around 9:15, Davis was escorted in by five or six guards, and there was a sudden hush as he walked in and sat down at the Defense table. The State's attorneys arrived shortly afterwards, and after the Court Marshall concluded the opening ceremonies with "God Bless the United State of America and this Court", day two of Troy Davis's evidentiary hearing began.

The State's first witness for the day was Corporal Elizabeth Sosbe, a middle aged white woman. In August 1989, at the time of the shooting, Corp. Sosbe was a regular beat officer. Sosbe was the police officer who took the report from Michael Cooper after he was shot, at sometime around 11:45 PM. According to Sosbe, Cooper was shot in the lower jaw, and the assailant was reportedly a black male in his late teens or early 20s wearing a Batman T-shirt. The gun used in the shooting may have been a .38 caliber gun.

After Sosbe's relatively short testimony, the State then called Chambliss Stebens. Stebens is currently employed as a federal probation officer, but in 1990 had been employed as a state probation officer. Michael Cooper had been Stebens's probationer and had not been reporting regularly. Cooper had told Stebens that he was addicted to crack and wanted in patient treatment. Cooper also informed Stebens that he owed a drug dealer $700. To Stebens, it appeared that Cooper only wanted in-patient treatment in order to get a 30 day reprieve from the drug dealer. As a result, she only offered Cooper out-patient treatment options. From there, the conversation between Cooper and Stebens turned towards the Cloverdale shooting. Cooper had told Stebens that he had been shot in the leg (interestingly, no one pointed out the inconsistency of being shot in the leg versus being shot in the face, as previous witnesses had testified to) by Troy Davis. At this point, the Defense objected that this was not based on Cooper's own personal knowledge, and he could've gotten Davis's name from the news. Steben's testimony, like Sosbe's, was fairly quick, and in due time the State called its next witness.

This next witness was Captain Dean Fagerstrom, a thin, middle aged white man. At the time of the shootings, Fagerstrom was a detective. He interviewed Harriet Murray (Larry Young's girlfriend) at 2:27 AM. According to Capt. Fagerstrom's police report, Young's assailant had a narrow face, medium skin, dark colored pants, a narrow face, high cheekbones, and was 4 inches taller than the police officer and weighed around 130 pounds[4]. Capt. Fagerstrom also obtained a pair of dark shorts from Davis's mother's washing machine[5,6]. Capt. Fagerstrom did not

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4 Conflicting details; Davis is tall enough that he could've been four inches taller than Officer MacPhail, but at nearly six feet it seems unlikely that he would've weighed a mere 130 pounds

5 From what I've read, these shorts were inadmissible in court because they were obtained without a warrant

6 The shorts purportedly belonged to Virginia Davis's (Troy Davis's mother) boyfriend, not Troy

remember much, answering many questions with "I do not remember" or "I cannot recall". During the cross-examination, the Defense noted that the Murray interview ended at 2:41 AM, 29 minutes before Larry Young's interview occurred (3:10 AM). The Defense then asked Capt. Fagerstrom whether he would've given the information he had obtained from his interview to other officers in the field, especially given the ample time there had been between the interviews. Capt. Fagerstrom responded yes, and the Defense then pursued a different line of questioning. I think the point of asking this question was to build up to the argument that the Defense would make in their conclusion—that the police got the idea that Davis was the shooter from preliminary interviews, and as a result in subsequent interviews coerced, intimidated, or suggested to witnesses to point out Davis as the shooter.

The Defense then asked Capt. Fagerstrom about his interview with Steven Sanders. In this interview, Sanders made no reference to the assailant's hat and instead said that the assailant had a "fade away" haircut. Since Sanders described the haircut, his interview implied that the assailant did not wear a hat. Sanders also said that the assailant had a white shirt on. Sanders had sent Young into a convenience store to buy cigarettes and beer. When Young came out of the store, the assailant accosted him, apparently over the beer. Young wanted to avoid an altercation and began walking away from the assailant, who then said, "Don't walk away from me. You don't know me. I'll shoot you." The assailant then began digging at his shirt in what appeared to be an attempt to pull a gun. The Defense noted that the "Don't walk away from me" statement was not included in Capt. Fagerstrom's supplemental report that was released after Davis's arrest, although the report did mention that the assailant and Young were "fussing". Once the Defense finished the cross-examination, the State asked Capt. Fagerstrom an additional question. "So these two reports were fairly consistent in the description of the assailant, right?" to which Capt. Fagerstrom responded, "Uh, yes, I believe so." The Defense then pointed out to Capt. Fagerstrom that there were in fact major inconsistencies; one witness had said fade away haircut and shorts, the other had said hat and dark pants. Capt. Fagerstrom agreed that the statements were inconsistent, and was summarily dismissed from the courtroom.

The State's next witness was Corporal F.W. Praylo. Corp. Praylo had been in the Criminal Investigation Unit in 1989. Corp. Praylo had taken the statement of the 16 year old Benjamin Gordon. Gordon's statement references the Cloverdale shooting and says the assailant wore a white Batman shirt[7]. Corp. Praylo also took the statement of Antoine Williams. According to Williams's (eventually recanted) statement the shooter had a white t-shirt and a pair of jeans. He was between six feet and six feet four, weighed 180 pounds and was between 20-23 years old, and used a rusty brownish revolver. During the cross-examination, the Defense brought up Williams's claim in his recantation (and his prior testimony in the early hours of day one of the hearing) that he was illiterate, and that when he signed his statement he did not know what he was signing. The Defense then asked Corp. Praylo if he asked Williams if he could read. Corp. Praylo said yes, because it is his personal and police practice to ask if the person signing a

7 Gordon's prior testimony claimed the details from the statement actually came from the conversation in the back of the police car. Gordon also claimed to have never seen Cooper's shooter.

statement could read and understand English. The Defense, however, kept asking if Corp. Praylo *specifically* remembers asking Williams if he could read. After the Defense dug at this point for some time, Corp. Praylo eventually said he did specifically remember asking Williams if he could read. When the Defense asked how, nearly 21 years later, Corp. Praylo remembered. He went along the lines of it being a general practice. Corp. Praylo also stated that he took the bullets from the scene and gave them to the crime lab, and was then dismissed.

The State's next witness was Lavon Oglesby. In 1989, Oglesby had been an investigator for the Detective Office in the Savannah Police Department. He had been led to Monty Holmes by Jeffrey Sapp and had interviewed Holmes. Holmes said Davis was wearing a white shirt and blue shorts. During the cross-examination, the Defense pointed out that Holmes had spoken with Sergeant Hood 36 hours before. The Defense further pointed out that the description of the clothes was not present in the interview with Sgt. Hood, and that Holmes's description could have possibly come from news and press coverage about the clothes. After his brief testimony, Oglesby was dismissed.

The State then called Deputy Sweeney to the stand. Back in 1989, Dept. Sweeney had been a Sergeant in the Detective Office of the Savannah Police Department during the night shift and had also been the shift supervisor. He took the statement of Darrell "D.D." Collins (Collins, like Williams and Gordon, recanted his statement). According to this statement, Collins had described Coles's gun as chrome with a brown handle and a long barrel. Collins said Davis had a gun as well, and described it as black in color with a short barrel. When asked about the Cloverdale shooter, Dept. Sweeney said the shooter had a Batman shirt, black pants and a hat. Sometime during the cross-examination there came to be a discussion about a reenactment of the shooting taking place with several of the witnesses and Coles present. This would've given Coles a chance to hear the stories and testimony of the other witnesses. Responding to a question, Dept. Sweeney bizarrely said he would not be bothered if a suspect heard witness testimony, even if this gave the suspect the ability to tailor his or her testimony to corroborate with the witness testimony. During the cross-examination Dept. Sweeney confirmed that Coles informed Lieutenant Ramsey that he too had had a gun only at the reenactment, which occurred one day *after* Davis's arrest. After having Dept. Sweeney affirm this information, he was dismissed.

The State's main witness was Lieutenant Gregory Ramsey. In 1989, Lt. Ramsey was an investigator in the criminal investigations unit. He was the officer who interviewed Sylvester Coles and was the leader of the investigation into the MacPhail shooting. According to the interview, Coles had been in a pool hall located on Oglethorpe Avenue.. According to Coles, D.D. Collins and Troy Davis were present at the scene and Coles has gotten into an altercation with Young after Young had purchased some beer. Coles wanted the beer, and eventually the altercation ended with Davis hitting Young with a pistol[8]. According to the interview, officer MacPhail ran past Coles to the scene of the altercation. The gun used had a short handle, was

8 There was never any clearly established motive as to why Davis would intervene in an altercation between Young and Coles solely to hit Young with a pistol. When asked, Lt. Ramsey himself did not know of any motive.

black, and was possibly a .38 caliber. Coles also said Davis had worn shorts and a t-shirt that day.

Lt. Ramsey also conducted the follow-up interview with Coles on August 24, the day after Davis was arrested. In the follow-up interview, Lt. Ramsey found out for the first time that Coles did have a gun with him at the time. Coles described his gun as a chrome, shiny long barrel revolver. Lt. Ramsey had also conducted a follow-up interview with Harriet Murray, who had previously been interviewed by someone else. According to Murray, the person who hit Young had a white shirt[9]. In Lt. Ramsey's follow-up interview with Dorothy Farell, Farell had said that the assailant had a white t-shirt, shorts, tennis shoes, and that the shorts were of a dark color (black or navy blue) and that the shirt had writing on it. Lt. Ramsey had then presented Farell with a photo lineup of five people. This lineup had a picture of Davis and four people who looked similar to Davis. From the lineup, Farell picked out Davis's picture. However, the Defense noted that Coles and D.D. Collins had not been in the photo lineup, even though they were at the scene that night. This same photo lineup was also shown to Antoine Williams. Williams at the time said he was 60% sure that Troy Davis was the one who killed officer MacPhail (a statement he later recanted). He said Davis's t-shirt was either blue or white shirt. Lt. Ramsey also mentioned something about someone telling Michael Cooper that Davis had shot him.

According to Coles's sister, Coles wore a gold t-shirt. From here on the cross-examination (which would go on for over an hour) led to Lt. Ramsey spewing out more or less random facts. Lt. Ramsey revealed that Jeffrey Sapp claimed to have been threatened by Virginia Davis (Troy Davis's mother). John Stevens III had said in his interview that he talked to Davis by phone and corroborated Davis's admission to the shooting; however, while he did say Davis had a gun, Stevens said Davis's gun was a pistol, not a revolver. Lt. Ramsey then revealed that the preliminary report suggested that the gun that fired the bullet in the Cloverdale shooting was a .38 caliber gun. However, the Defense then asked Lt. Ramsey if he was aware of a 2007 Georgia Bureau of Investigation (GBI) report which said there was not sufficient evidence to conclude that the bullets from the Cooper and MacPhail shootings were fired from the same gun (he was). Continuing with his interview with Coles, Lt. Ramsey said that according to Coles, Troy Davis and D.D. Collins followed Coles and Young during their altercation, and then Davis ran up and hit Young with a gun. Davis presumably ran up from behind[10].

Phillip Horton, one of the Defense attorneys, continued to ask questions about Coles and his statement and testimony, when an irritated Judge Moore asked Horton, "What exactly is the point of this line of questioning?" to which Horton responded, "Your Honor, I am trying to lay a foundation to see whether Coles's testimony seemed plausible at the time." "Then ask Lt. Ramsey directly if he thought Cole's story was plausible!" Judge Moore responded angrily. Horton then said, "I think His Honor just put it perfectly… Did you be-" when Judge Moore, not

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9 Coles had attested to wearing a yellow shirt at the time

10 The Defense made a big deal of establishing the fact of "running up from behind" during the cross-examination for no adequately explained reason

realizing Horton had begun asking the question, interrupted, saying, "I want you to ask the question!" Lt. Ramsey replied that he did find Cole's story plausible.

The line of questioning then returned to Larry Young. Young had picked Davis out from the same five picture photo lineup, and said he had gotten into an argument with Davis. However, shortly afterwards there was a time when both Young and Coles were in the police station, and when Young saw Coles he said Coles was the one who had been arguing with him. Lt. Ramsey had also showed Dorothy Farell the same photographic line up. Farell had seen Davis on the news, and it was right after discussing this with Lt. Ramsey that she was shown the photographic lineup, where she picked him out. Antoine Williams had also seen a photograph of Davis in advance on a wanted poster before he too had picked Davis out of a photographic lineup. Lt. Ramsey stated that despite later finding out that Coles also had a gun during the shooting, Coles was never considered a suspect. When Lt. Ramsey inquired about Coles's gun, Coles said he gave the gun to someone named Jeffery when Jeffery, D.D. Collins, and Davis came. Jeffery said that Collins had the gun. Collins said he picked up the gun from a car (presumably Coles's) and placed it near the bushes near the building and took it out shortly afterwards. Coles's house was never searched, and no search ever took place for the gun except at the pool hall and the bushes outside.

In Lt. Ramsey's follow-up interview with Harriet Murray, he showed Murray the same photographic lineup. Murray identified Davis as being present at the scene, but she did not identify him as the shooter. When asked whether or not Coles was ever a suspect in the investigation, Lt. Ramsey replied that Coles was not thought of as a suspect because the general description of the clothes didn't match what Coles was allegedly wearing that night, and because the description of the gun didn't match the description of Coles's gun.

The cross-examination then delved into Lt. Ramsey's role in the investigation. Upon arriving at the scene of the shooting, Lt. Ramsey was made head investigator, meaning that he would supervise the investigation. He looked over and reviewed reports made by other investigators. The Defense asked Lt. Ramsey about the Voluntary Statement Form, the form used to collect the interviews from most, if not all, of the witnesses. The statement is first written in shorthand by a stenographer. It is then typed and given to the witness for review. The witness would then initial at the beginning and the end of the statement. For minors, the parents would be notified and requested to come down to the station. Lt. Ramsey then explained that the Cloverdale shooting and the MacPhail shooting were initially separate cases, and that it was Sylvester Coles's interview that linked the two cases together. Lt. Ramsey explained that the forensics report showed the bullets from the two shootings were linked, although the Defense again mentioned the 2007 GBI report that said there was no conclusive evidence to support a link between the bullets from the two shootings. The Defense then asked Lt. Ramsey about Larry Young. Young was not given hospital treatment for his wounds until after his interview, though Lt. Ramsey said Young was given treatment by EMTs on site. After discussing Young's treatment, Lt. Ramsey concluded his lengthy cross-examination and was dismissed.

The State's next witness was Robert Falligant. Falligant was a late middle aged, balding, white man who spoke with a southern accent. He was an attorney and had represented Davis in 1989. He was contacted by Virginia Davis to represent Troy, and he took part in the plans for Troy to turn himself in (for his own safety, since police had shoot-to-kill orders). Falligant had arranged for Davis to stay in solitary confinement for his own safety as well. To assist him with the legal defense, Falligant enlisted the aid Robert E. Barker, another attorney. Falligant had also hired a detective to investigate the shooting. He tried to obtain the preliminary police report, but was told it was not available. However, through a contact in the police, he managed to get a basic outline of the events that took place the night of the shooting. Falligant told Davis not to talk about the case to anyone else. He also visited the scene of the crime. At the preliminary hearing, he did not have Davis testify because he thought it would give the witnesses another opportunity to identify Davis, especially since the way the court was set up for the preliminary hearing, the witnesses would be very close to Davis. Falligant also thought the photo lineup was unduly suggestive because it only had Davis in the photo lineup, instead of Davis, Coles, and Collins. Since Davis was the only one in the lineup at the scene, the witnesses would be more likely to point him out as the shooter than if Collins and Coles had both been in the lineup.

Falligant said Davis took an active part in his own defense, filling dozens of legal pads with notes. Falligant also said that Coles's uncle had met with John Calhoun, a Savannah attorney, around midday the day of the shooting (which had taken place around 1:20 AM) and Coles and Calhoun went together to the police station. Falligant made repeated attempts to contact Coles and talk to him, but Coles refused. Falligant was therefore forced to talk to Coles's friends to get an idea of what type of person Coles was. He also mentioned that Larry Young had been operated on twice for brain injuries.

When preparing for the trial, Falligant attempted to interview every witness on the State's witness list. In his interview with Antoine Williams, Falligant said he had been told that the shooter's shirt was yellow, white, or blue—Williams could not tell because of his tinted windows[11]. He spoke once to Dorothy Farell, and Farell told Falligant more or less the same thing she testified to at trial. He also talked to Harriet Murray, who gave the same statement she had given the police. He talked to Kevin McQueen, and attempted to talk to D.D. Collins, but Collins refused. Collins later said that he would talk to Falligant, but only if they talked at a courthouse. Collins did not want his parents there (at this time he was 18 years old anyways), and he said that he lied to the police because he was pressured, but he wouldn't discuss the details. Falligant tried to investigate the claims of coercion, but Collins was the only witness who ever indicated police intimidation.

At some point during the questioning (much of this was from the cross-examination) the judge argued that the questions appeared to be aimed at the effectiveness of counsel, and since this was

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11 This was an inconsistency with Corp. Praylo's testimony, as it said Williams could clearly identify the color of the shirt.

"no longer an issue" (he mentioned something about it being resolved in other courts), the questions were irrelevant. Continuing his testimony, Falligant later stated that he turned over all of the files and notes he had on witnesses and the case to the Death Penalty Resource Center[12]. During the cross-examination, Falligant said he contacted all of the witnesses at least two times asking them if they would want to be interviewed, and left his card with them in case they changed their mind. Falligant said that in his opinion, many of the witnesses appeared to be very fearful. The Defense asked him what kind of publicity there had been about Davis following the shooting. Falligant said there had been a lot of publicity about Davis and the case, to the point where articles about it were being printed on a daily basis. After Falligant continued to talk about publicity, an annoyed Judge Moore asked the Defense to move on from this line of questioning.

Falligant stated that the agreement that had been made with the police was that when Davis turned himself in, he would be quietly slipped in directly to the jail he was to be held in. However, when Davis turned himself in, he was instead paraded in front of the police station with the media present. After this, Falligant was dismissed[13].

The State's next witness was David Lock. Lock had been the Assistant District Attorney in the Western Judicial Circuit. He was also co-counsel with Spencer Lawton (see below). Lock was not concerned with any problems with the testimony in court (like D.D. Collins for instance) because the law allows for the use of the original statements given to the police. Lock claimed he had not been contacted to review possible evidence of Davis's innocence until eight days before one of the execution dates when Davis's defense team submitted the evidence. Lock said that shorts had been seized from Davis's and Coles's houses for DNA evidence. However, there was an insufficient amount of DNA on the shorts found in Davis's house to do any analysis. During the cross-examination, the Defense started questioning Lock on his expertise with DNA testing, even going down to the scientific details DNA analysis. Lock was a lawyer, not a scientist, but the Defense insisted on this irrelevant and ultimately useless line of questioning. As the questioning continued, Lock said that he went to the Savannah police department the day of the shooting to learn more about what happened, and that he was also aware of the August 24 reenactment of the shooting. When asked about Larry Young, he said he didn't know because Lawton had handled Young.

During the cross-examination, the Defense asked Lock about Kevin McQueen, the jailhouse snitch who said Davis had confessed to him. McQueen indicated in his testimony in day one of the hearing that he received preferential treatment for testifying against Davis, and that he had never heard Davis confess to the shooting. McQueen stated the only reason he had testified against Davis was because he wanted to get back at him for an argument they had. However,

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12 The Death Penalty Resource Center represented Davis until its funding was cut. Davis has since been represented by Arnold and Porter, LLP, which has provided its services *pro bono*

13 It was curious that Falligant, a State witness, seemed only to strengthen the Defense's case by mentioning fearful witnesses and the police backing out on their agreement to quietly slip Davis into jail

Lock denied giving McQueen any preferential treatment and said if any preferential treatment had been given to McQueen, he would've known about it.

At the conclusion of Lock's cross-examination, Judge Moore began to talk about the rules of evidence for an evidentiary hearing. According to the Supreme Court, an evidentiary hearing must consider any and all evidence, and as such the rules of admissibility in an evidentiary hearing are significantly relaxed.

The State's next witness was Spencer Lawton. Lawton, an elderly, white man with silvery white hair, had been the DA of Chatham County for over nearly two decades, and had only recently retired. I had first heard of Lawton about a year and a half prior as I had gotten more involved with the Troy Davis case. Many Troy Davis supporters in Savannah thought poorly of Lawton, and from his statements in the past it was clear that he had absolutely no doubt that Davis's 1991 trial was completely fair and that none of the witnesses had been coerced or intimidated in any way[14]. Lawton had a surprisingly poor recollection of the events and the case in general considering that it was his most high profile prosecution and that he had been directly involved in the events. Lawton said he did not recall any witnesses saying the police statements were inaccurate, and in response to many questions he stated, "I do not recall." He says he never told any witnesses to "stick to their testimony". During the cross-examination, the Defense began somewhere along the lines of, "Mr. Lawton, I'm sure you are very familiar with the details of the case" to which Lawton indignantly replied, "No, I am not familiar with the details of the case." The Defense then pointed out an October 2008 document about the case that Lawton authored. After being shown the document, Lawton said he didn't recall writing it, and that the only thing he ever remembers writing is an op-ed piece he wrote after he thought the case had been concluded. He stated that he specifically avoided giving interviews about the case or writing his opinion on it while it was still ongoing. When asked about Dorothy Farell, he says he doesn't recall if she ever said Coles was the shooter, but said he would've have remembered it if it had happened. The Defense then mentioned Jeffery Sapp, who had said that Lawton had told him to "stick to his story", even though he told Lawton that he didn't know for sure who was the shooter. Lawton summarily denied this accusation, and was shortly dismissed thereafter.

The State then announced that it had no more witnesses to call. Judge Moore then asked the Defense if they would like to call Quiana Glover to the stand once more. Defense attorney Phillip Horton said that she had been unable to come to the court at the time because of a child care issue, but that they could call her now and she would be at the courthouse soon since she was a local resident. An agitated Judge Moore told the Court Marshall to take Horton to the court phone so he could call Glover. In the mean time, Moore said that the court would begin accepting evidence from both sides, starting with the Defense.

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14 In an op-ed he wrote for the *Savannah Morning News*, Lawton claims that having 7 out of 9 witnesses recantations is not believable and even suggested the recantations may have been paid for or coerced. The State attempted, and failed, to show the Defense had tampered with the witnesses.

The Defense's first piece of evidence for submission was a report saying that the test used to find blood present on the shorts taken from Davis's mother's house could be a false positive. Judge Moore then told the Defense that when the State Board of Pardons and Paroles made their decision to not grant clemency, they did not see this report but had seen the State's report. The Defense claimed that they weren't notified that the Board had requested a test on the shorts to be done. The State disagreed however, and said that all involved lawyers were notified. The Defense countered and said that while they were notified about the ballistics report involving the bullets from the two guns, they were never notified about the request for a test to be done on the shorts.

The next piece of evidence that the Defense wanted to submit was the signed affidavit of Tonya Johnson. Judge Moore then said that although he was planning on broaching this topic later, now was opportune time to address it: Why was it that many witnesses who had recanted had not been called to the stand? Why was it that these witnesses were good enough to have their affidavits taken, but not good enough to be cross-examined in court? The Defense rather lamely replied that it had only subpoenaed the witnesses that were the "most important". On account of Johnson not being present to be cross examined, Judge Moore did not admit her affidavit. At this point Glover had arrived, so the submission of evidence was put on hold until her testimony was complete.

Glover gave her name again, and her voice had recovered to the point of being clearly audible to the audience. She said she had been to a party in June of 2009 where Coles had been present. Somewhere around this point the State objected, again pointing out the hearsay argument. And this time, Judge Moore's reaction was significantly different. The prior day, Judge Moore had admitted the hearsay evidence on the basis of two prior court cases, although he said that ideally Coles would've been present at the courthouse. Nonetheless he did warn that he may not give any weight or credence to the hearsay testimony. Now, however, Moore said that upon further review that those two cases that had admitted the hearsay evidence had also had the suspect present. Since Coles was not present, the two prior cases did not provide for the admission of hearsay evidence. As a result, Judge Moore cut off Glover and ended her testimony, and rejected the testimony of Anthony Hargove, April Hester, and the hearsay portion of Benjamin Gordon's testimony. After finishing all of this, Defense attorney Phillip Horton meekly told Judge Moore that on the basis of his statements about hearsay evidence the day before, the Defense had attempted to subpoena Coles, but to no avail. "Too little too late," Moore responded curtly. With Glover dismissed without saying her testimony, and with neither side having any further evidence to submit, Judge Moore asked the Defense to begin its closing statement.

Defense attorney Jason Ewart, a young man with glasses and brown hair, gave the Defense's closing statement. Ewart started off with the Defense's biggest piece of evidence: that Benjamin Gordon, a relative of Sylvester Coles, had testified to actually seeing Coles shoot Officer MacPhail. Ewart then said that even if the hearsay evidence was not admissible, it was still useful in establishing what type of person Coles was. Ewart also referenced the 2007 GBI report

that said there was no conclusive evidence that the gun used in the Cloverdale shooting was the same as the gun used in the MacPhail shooting. This would undermine the State's case significantly, since the underlying premise was that the shootings were related. Judge Moore then pointed out that the original ballistics report came after Coles's statement, which Lt. Ramsey had said first led the police to think the two crimes were related. Nonetheless, Ewart alleged that the investigation was a faulty one. No search of Coles's house was ever conducted, nor was a warrant to do so ever obtained. Some eyewitnesses were interviewed only after Davis was paraded through the front the police station.

Ewart also said that Harriet Murray had an ambiguous first statement, and she seemingly forgot a lot of information at trial. Larry Young had also initially mixed up Davis and Coles. Sometime during the closing statement Judge Moore interrupted, saying something about the shooter wearing a "turtles" or a "ninja turtles" shirt, to which Ewart responded that the "ninja turtles" shirt was what Young was wearing the night of the shooting. Ewart continued with Antoine Williams, who said that he did not know who shot Officer MacPhail, and who admitted in front of the court in day one of the hearing that he was illiterate and didn't know what he was signing when he signed his statement. Ewart then continued with D.D. Collins, whose parents were not present when he made his statement, and who said that he was told he would be charged as an accessory to a crime if he did not point out Davis as the shooter. Both Jeffrey Sapp and Kevin McQueen said Davis never confessed to killing Officer MacPhail, contrary to their original testimony and police statements. Ewart also noted that while Larry Young did receive some medical care from EMTs on site, he was not permitted to go to the hospital for medical treatment until after he had made his police statement.

Ewart said the State should not complain that these witnesses are unreliable when it was the State that had originally chose them to testify at the 1991 trial. As for the whole "turtle shirt" and yellow shirt issue, Ewart said that what happened seemed to be obvious; Coles went home and changed his shirt with the assistance of his sister. As for the shorts that were taken from Virginia Davis's house, there was not enough DNA to be tested. Although the shorts originally were said to have blood, an expert report that the Defense submitted as evidence says that the entire shorts showed positive for blood, even though there were no blood states. Small blood spots could be false positives from catalysts such as bleach, which would make sense since the shorts were removed from a washing machine. Ewart also said that the blood test was false because there was no control in the test, and that the blood, if it existed, could have come from Larry Young as he got pistol whipped. In conclusion, he said, the investigation was faulty because it ignored other potential suspects (e.g. Coles), had useless physical evidence, and new evidence from eyewitnesses and the recantations backed this claim up. Even though the hearsay was not admissible, it is still useful, Ewart said. The Defense's hypothesis was that somewhere along the line, Lt. Ramsey and his subordinates mistakenly got the idea that Davis was the shooter, and then did everything possible to insure he was captured and convicted. Ewart's closing statement, while articulate, was also lengthy, and after asking Ewart to wind it down once to apparently no

avail, Judge Moore gave Ewart a two minute ultimatum. Ewart concluded with a question—would a "reasonable jury" (at this point he gestured towards the empty seats where the jury would've sat had this been a trial) have "reasonable doubt" as to Davis's guilt giving all of the evidence presented? The Defense thought so

Attorney Beth Burton gave the State's closing statement. She said that recantations were looked upon with suspicion in courts, and that the evidence supplied by the Defense does not meet the high standard previous cases have set. She also contended that Antoine Williams's testimony was the same both times he testified. She brought up the fact that the Defense did not call up Coles, Young, or Sanders to testify at the hearing, while D.D. Collins had proven himself to be an unreliable witness by changing his story multiple times. The State posited that, with the exception of Benjamin Gordon's testimony, nothing new had been presented at the hearing. Burton said that the police were only trying to find MacPhail's murderer, and that the evidence clearly showed Davis as the shooter. Michael Cooper had said his assailant had black shorts and a batman shirt; that is, a white t-shirt and dark shorts or pants. Antoine Williams said MacPhail's shooter had a white t-shirt; Dorothy Farell said the shooter had a white t-shirt, dark shorts, and was around six feet tall; Benjamin Gordon's original statement and testimony had said the shooter had dark jeans and a white T-shirt; D.D. Collins said a white t-shirt and a dark shorts[15]. Burton admitted there were some discrepancies—some witnesses said shorts, others said pants, some said the shooter was wearing a cap, others said there was no cap and described the shooter's haircut—but she contended that the underlying theme was the same. Coles had worn a yellow T-shirt, and Burton said that in the washing machine in Virginia Davis's house the police had found a child's tank-top and black shorts. She concluded by saying that Troy Davis and his Defense team had not met the high standard of exculpatory evidence mandated by the Supreme Court and previous court cases.

Legal Questions

With the conclusion of the State's closing statement, the main proceedings of the hearing had come to a close. Judge Moore began by thanking both sides for behaving well throughout most of the hearing. He had several legal questions to both the Defense and the State, and advised the audience that if they wanted to leave, now was the time to do so[16]. At this point the accuracy of my notes becomes sketchy. Although I wrote as quickly and as furiously as possible, I simply was not able to write fast enough to get all of the questions and their responses. Even among the questions and responses I did manage to write down, many of the subtleties have been lost, due again to the speed of my writing as well as to my lack of legal knowledge. The accuracy of the responses and even the questions should therefore be taken with a grain of salt; although I did my best to represent the responses accurately, it is quite possible and indeed quite likely that I made several errors and may have misrepresented the response.

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15 I found it amusing that Burton was using D.D. Collins to support her statement that the witnesses had seen the shooter with a white shirt and dark shorts, when just minutes before she had called him an unreliable witness

16 About half the audience remained for the legal questions

Judge Moore's first question was addressed to the Defense. The Defense contends that the Eighth Amendment (prohibiting cruel and unusual punishment) bars the execution of an innocent person, despite having a fair and free trial. Now there is increased use of DNA evidence to show a person is innocent. Is this fact relevant to the case? And why are mere death penalty cases relevant to this claim? Is the Defense suggesting that this claim is only applicable to death penalty cases?

Ewart answered that DNA exonerations are like a "canary in the coal mine" that indicate broader problems with convictions process, and studies show that in all of the DNA exonerations since the early 90s, the main cause for the faulty conviction is because of false eyewitness testimony.

Judge Moore's next question concerned the Supreme Court's history of dealing with claims like the one the Defense is making. For over 15 years, Judge Moore said, the Supreme Court has refused to decide is such a claim exists, and has evaded the issue once again by sending it here, to a lower Federal court. Why should he declare a constitutional right that the Supreme Court has avoided for years?

Ewart's response went along the lines of the evolving standards of decency. The Defense believed that a situation like this is an impending constitutional violation that would soon be recognized by the Supreme Court. They have already taken a step in that direction by prohibiting the execution of juveniles and the mentally retarded.

At this point my notes get a bit sketchy, but Judge Moore's question revolved around the Supreme Court's prior assertion that a federal habeas court was not there to correct errors of fact.

Ewart responded saying that in this case the issues addressed were of fact as well as underlying constitutional issues.

Judge Moore now shifted the questioning over to the State. The State contends, he said, that because there are State avenues to process innocence, there can be no federal pathway. His question was whether the State was saying a federal court has no right to infringe on this right if there is a State court, even if the State made a mistake?

The State's response was that it disagrees with the Defense's claim that a federal court can look at extraordinary writs. My notes once again get a bit hazy here, but it seems Burton said something along the line of the Eight Amendment requiring the claim for the federal court to look at extraordinary writs would imply a lack of confidence in a jury trial. The State disagreed with this because of the case *Barefoot v. Texas*. Burton said that the court should not let an exception to the rule become the rule, as this can lead down a slippery slope.

Judge Moore's next question to the State concerned the standard the Defense was required to meet. The State said that the Defense must meet a very high standard, higher than in the *Sawyer*

case. Instead of meeting a standard as low as *Sawyer* or standard as high as the State is suggesting, could the court not find some intermediate standard?

The State's response was that *Sawyer* did not deal with an innocence claim. *Sawyer* was more in the vein of someone saying, "I did it, but I don't like the sentencing." As such, it should not be used to set the burden for an innocence claim.

The next question was for the Defense. Judge Moore noted that in their brief, the Defense had mentioned "clear probability", and he asked Ewart to elaborate on what that meant.

Ewart responded that "clear probability" meant, given the level of evidence, what is the clear probability of reasonable doubt? That is, what is the probability of a reasonable jury having reasonable doubt? It's difficult to come up with an exact answer of what clear probability is. 50%? Probably not. 60%? Possibly.

Judge Moore then asked why he should rely on Justice White's lone concurrence on the burden of proof in *Herrera.* After all, if the standard is "Reasonable Doubt", then doing this disenfranchises the jury system by substitution a Judge's opinion for a jury. Unfortunately, I did not get Ewart's response to his question.

Judge Moore's next question was to the State. The State did not consider applying an intermediate standard between "rational juror" and "more likely than not" as the burden of proof. Why should the court not apply an intermediate burden like "clear and convincing" evidence?

The State's response was that such an intermediate standard is only acceptable in cases where scientific evidence is used. With recantations that occurred a long time after the original crime, a higher standard should be used because of the general skepticism of recantations by the courts.

The next question was to the Defense. Judge Moore stated that in relation to the 1996 Antiterrorism and Effective Death Penalty Act (AEDPA), the Defense argued three things: 1) The court is not bound by the bars section 2254D because they merely inform, rather than bind, the court's decision; 2) The Troy Davis case satisfies the exception by showing that the State court's determination of his innocence was "unreasonable", in which case the federal court need not defer to the Georgia Supreme Court, because there was no evidentiary hearing; 3) The rule may be applied to this petition, while the State argues that the petitioner seeks a new ruling, which is barred under 2254D, and should defer to Georgia Supreme Court Decisions. In essence, the Defense argues that no deference should be given to the decisions of Georgia State courts because there was never an evidentiary hearing. Judge Moore's question was, How does the Defense explain Congress's actions if they didn't imply deference to State Courts?

The Defense's response was that logic behind 2254D2 is that the GA Supreme Court is not in the same situation as the federal court is in, and that its decision is not entitled to as much weight because there was never any evidentiary hearing. The language in 2254D2 undercut

"unreasonable" State court decisions and in this situation the Defense interpreted an "unreasonable" decision as one being made without an evidentiary hearing.

As a follow-up question, Judge Moore asked the Defense that if they cannot proceed under 2254D2, do they then concede that the court cannot provide any relief to the petitioner?

The Defense responded no, because proceeding under the US Supreme Court, the AEDPA applies only when the Supreme Court says it applies. The Supreme Court reserves the power to say what applies and what doesn't.

Judge Moore had a few remaining questions for the State. He first noted that the State argues that because Davis's case does not satisfy 2254D1, he can't petition for any relief from the court. If he is able to meet 2254D2, does he even need to satisfy 2254D1?

My notes are again sketchy for the response, but the answer was that Davis's case needs to meet both 2254D1 and 2254D2.

Judge Moore's next question had something to do with whether this kind of case is a matter of a State court proceeding, or a State habeas court proceeding. Unfortunately, I was not able to get the exact question, and I was unable to get the response either.

With the response to the final question, the evidentiary hearing was over. Judge Moore had additional legal questions that would be given to both sides, and he wanted the responses by July 7th, 2010 at 5:00 PM. He specified that the responses should be to the questions directly, rather than rebuttals of the other side's responses. He also said that although he could not give an exact time frame of when he would make a decision, he would make one within a "reasonable amount of time." He eventually did make a decision on August 24, exactly two months after the hearing's conclusion (see epilogue).

Concluding Thoughts

My overall impression of the hearing is mixed. On one hand, Benjamin Gordon's testimony was a crucial piece of evidence supporting Davis's claim that Coles was the shooter. And although I did not get to hear a few of the other recanting witnesses speak (as they were in the pre-lunch period of day one of the hearing, when I was not present), I can imagine that admitting you lied under oath under trial and that you were coerced or intimidated by the police should count for something. On the other hand, there is the question of credibility. Recanting witnesses are, by default, seen as less credible by virtue of their recantation. Moreover, in a battle of credibility the State's witnesses surely win. Most of the State's witnesses were police officers or government prosecutors. In comparison, some of the Defense's witnesses were convicted felons. But the biggest blow to the Defense's argument was their monumental blunder not to subpoena Coles and several other witnesses. First, by not subpoenaing Coles, they eliminated any possibility of the admission of any of their hearsay evidence. During that part of the hearing, Judge Moore

blasted the Defense for not calling him in, saying it was clear that they did not do so because whatever he would say would weaken their case. They responded by saying that there was no point of calling Coles in, since he would obviously not admit to shooting Officer MacPhail. The Defense made a similar error by not calling in more of their witnesses whose affidavits they wanted to submit. Although this may seem like a minor detail, both of these combined make for a potentially fatal—and I mean that in a literal as well as figurative sense—mistake. It embarrassed the Defense and barred the admission of potentially useful evidence.

One of the key issues here appeared to be the clothes. From the entire hearing, it was clear that many statements (several of which were recanted anyways) already contained inconsistencies describing the clothing of the assailant. Some said shorts, others said pants. Some mentioned a haircut, while others mentioned a hat. There were also several mentions of a "Batman" logo on the shirt of the Cloverdale shooter, but no similar mention of the logo on either Davis or Coles by any of the witnesses at the MacPhail shooting. The photo lineup used as evidence in the initial trial, where Davis was pictured but Collins and Coles were not, also seemed problematic.

As for the quality of the legal team, there were mixed reactions about how good Davis's attorneys were. Davis had a fairly large team of lawyers (four sitting at the table with him, and seven right behind him in the first row of the courthouse benches), though only five of them spoke. My friends and I were more or less unanimous in agreement that attorney Phillip Horton was not too effective. I found that he seemed to often go irrelevant lines of questioning, and most of us thought he was not aggressive enough. I was impressed with Defense attorney Ewart's ability to articulate his thoughts almost on the spot during the questioning after the main part of the hearing was over, and many times he did so without having the time to consult with his legal team. Some friends of mine criticized Ewart for not being aggressive enough, and while this was partially true, I felt Ewart still did manage to find a balance between being overaggressive and too passive. Two of the other lawyers were very effective, and I have no opinion for or against the fifth one. One thing I did notice during the hearing was that the State was objecting quite frequently (usually with success) and it seemed like the Defense missed several opportunities to object. There seemed to be an underlying problem of passivity among the Defense team. Another important note to mention is that Arnold and Porter, the firm providing Davis's defense, does not specialize in death penalty cases, and is in fact better known for business and corporate law.

However, one thing that needs to be mentioned was the complete disintegration of the State's claim that the Defense had somehow coerced their witnesses or tampered with them. Spencer Lawton had suggested before that the Defense may have coerced some of the witnesses from the original trial to recant their statements or that the witnesses had been tampered with. While cross-examining the Defense's witnesses, the State repeatedly asked them whether they were contacted directly by Davis's legal team and how many times they had met with the Defense team prior to the hearing. In all cases that I was present for, the witness had contacted the Defense team first, and the witness had only met with the team once, twice, or three times at most. Most of these meetings were under 30 minutes long. There was also no evidence that the

Defense team instructed the witnesses on what to say. The State's failure to go anywhere with this point was shown by the fact that there was no reference at all to it in their closing statement. From the beginning I don't think there was ever any substance behind their claim of witness tampering/coercion, and the State eventually realized that as the hearing went on.

I found it difficult to make an accurate assessment of where exactly Judge Moore would fall in his judgment. On one hand, he was certainly chastising and admonishing the Defense much more harshly than he was the State. However, some of the people I was with thought that during the questioning after the hearing, he had structured the questions so as to assist the Defense in coming up with the correct answers. Furthermore, when he was thanking both sides for "behaving well," I was told that he was looking directly at the Defense during the time he said that (I wasn't really paying too much attention to his body language). From this point of view, his chastisement could instead be seen as a way to try and help the Defense cover any loopholes in their argument. Another potentially positive factor was that Judge Moore was a Clinton appointee, which means chances are that he is more amenable to a favorable ruling in this particular case. Then again, it was under Clinton's tenure that the AEDPA, which has caused Davis so many problems, came into effect. All in all, however, I felt that Judge Moore seemed inclined against the Defense. The fact that this case is so unprecedented, combined with so many murky legal questions involved, really leaves the resolution in the air.

One of the aspects of the hearing that really stood out in my mind was the legality of executing an innocent person. Is it constitutional to execute a person who has proven their innocence, as long as that person had received a fair trial? While this question obviously sounds absurd, it was in fact a legitimate legal question in the hearing, and Judge Moore noted that the Supreme Court has repeatedly deflected such questions over the past two decades. In his decision, Judge Moore did finally rule on this question (see epilogue).

As I walked out of the cool courthouse into the hot and humid Savannah afternoon, I saw Davis's legal team packing up their materials in various boxes. I approached Ewart and said, "You guys did a good job." As I walked away after hearing him thank me, I thought about the hearing. It was true, Davis's legal team had made some big mistakes. But as I walked towards the crowd of Troy Davis supporters and the news teams standing outside the courthouse, I reflected on how this legal team had taken up an extraordinarily difficult case *pro bono*, and had given it their all to insure that Troy Davis, a person who I am honored to call my friend, would not be executed for a crime I believe he did not commit. And for that, they'll always have my respect.

Epilogue

On August 24, 2010, exactly two months after the hearing's conclusion, Judge Moore made his decision. He ruled against Davis, stating in his opinion that "while Mr. Davis's new evidence casts some additional, minimal doubt on his conviction, it is largely smoke and mirrors." I strongly disagree with this statement. Having several key eyewitnesses testify in front of the

court that they lied under oath, as well as having one of the original witnesses testify to seeing Sylvester Coles shoot officer MacPhail, casts more than just a "minimal doubt". This evidence does not apparently meet the "extraordinarily high" bar set for proving innocence; after all, Davis was found guilty in a jury trial, meaning that at this evidentiary hearing he was presumed guilty until proven innocent. The question remains, however, as to whether or not there was any scenario where it would have even been possible to meet that high bar. No DNA evidence was ever collected, and no other physical evidence (i.e., a gun) was ever found. Davis was convicted solely on eyewitness testimony, which means the only way for Davis to prove his innocence , barring the miraculous discovery of DNA evidence or a penitent Sylvester Coles admitting his guilt, would be for the witnesses to recant. However, as Judge Moore noted in his opinion, recantation evidence is view upon by the courts with suspicion. What this means is that, in essence, the outcome of the hearing was a foregone conclusion long before it even began. Because of the nature of the evidence used against him, Davis could only prove his innocence through witness recantations, which would never be sufficient to meet the high bar of exculpatory evidence required.

Then of course there is the matter of the innocence of executing an innocent person as long as that person had received a fair trial. I suppose it is of much relief that after a mere 222 years after the ratification of the U.S. Constitution, we have learned that "executing an innocent person would violate the Eighth Amendment of the United States Constitution." However, this ruling does not apply to Davis because, as Judge Moore categorically states in his ruling, "Mr. Davis is not innocent."

Further Reading

http://savannahnow.com/news/2010-08-13/troy-davis-bid-re-open-hearing-new-evidence-rejected Judge Moore's decision to reject the Defense's attempt to reopen evidence.

http://savannahnow.com/troydavis A compilation of all articles the Savannah Morning News has written about the case.

http://www.scribd.com/doc/34042982/Troy-Davis-Petitioner-s-Brief The legal brief filed in response to Judge Moore's questions at the conclusion of the hearing. I was unable to locate the State's brief.

http://www2.wsav.com/news/2010/aug/24/13/judge-troy-davis-failed-prove-innocence-ar-743621/ Judge Moore's ruling against Troy Davis.

http://scotusblog.com/wp-content/uploads/2010/08/Troy-Davis-ruling-DCt-Part-I-8-24-10.pdf Part 1 of Judge Moore's ruling on the hearing.

http://scotusblog.com/wp-content/uploads/2010/08/Troy-Davis-ruling-DCt-Part-II-8-24-10.pdf Part 2 of Judge Moore's ruling on the hearing.