Duke Center for Criminal Justice and Professional Responsibility

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By Facsimile

Ms. L. Gale Buckner
Chairperson
Georgia State Board of Pardons and Paroles
2 Martin Luther King, Jr. Drive SE
Suite 458, Balcony Level, East Tower
Atlanta, GA 30334-4909

Re: Troy Anthony Davis

Dear Ms. Buckner and Members of the Board:

The Duke Center for Criminal Justice and Professional Responsibility respectfully urges the Georgia State Board of Pardons and Paroles ("Board") to reconsider its September 12, 2008, decision and immediately stay the death sentence of Troy Anthony Davis so that the Board and others can give his case the kind of thoughtful and urgent consideration that fundamental justice requires; such consideration has not been given to the issues he raised in his clemency petition. Based on our review of the facts reflected in the public record and our examination of the filings submitted by the parties, we believe this case presents an unacceptably high risk that a grave and irremediable miscarriage of justice will occur if the Board does not act immediately to prevent it.

Troy Davis was convicted in 1991 of the shooting death of Officer Mark MacPhail. Mr. Davis's conviction appears to have been secured by scientifically implausible and unreliable testimony. Indeed, seven of the nine witnesses who testified against Mr. Davis since have recanted their testimony; all similarly claim that the police coerced them to testify falsely. Of the two witnesses who have not recanted their testimony, one was an alternative suspect who had and still has a personal interest in deflecting suspicion from himself. The other witness who has not recanted initially failed to identify Mr. Davis in a lineup; his subsequent identification of Mr. Davis as the man who killed Officer MacPhail was unreliable. To date, no Georgia official has formally undertaken to determine if these facts are supported by credible evidence. That determination requires more than a quick review of a paper record.

These circumstances, the pretrial use of suggestive identification procedures, and the highly unfavorable conditions at the crime scene, which would have made any eyewitness identification difficult, all indicate that the eyewitness testimony upon which Mr. Davis's conviction and death sentence were based, uncorroborated by any physical evidence, is alarmingly problematic. There is

nothing in this case that assures the public that Mr. Davis's execution would not be a miscarriage of justice.

In sum, the prominence in Mr. Davis's case of factors that we now know with certainty contribute to wrongful convictions undermine our confidence in this conviction and compel more meaningful reflection on the moral propriety of letting Mr. Davis's execution proceed without further examination by the Board and others. As former law enforcement officials, I would be surprised if a majority of you did not share this concern.

Special Interest of the Duke Center for Criminal Justice and Professional Responsibility

The Duke Center for Criminal Justice and Professional Responsibility ("Duke Center") is devoted to the promotion of justice in the criminal justice system and to teaching and training students, lawyers, prosecutors, and judges to identify, remedy, and prevent the wrongful conviction of innocent people. The Duke Center pursues these goals through courses offered to high school, college, and law students; through professional seminars and conferences; through published papers; and through public education. The Duke Center also pursues these goals by intervening in appropriate cases such as this one where it can help draw urgent attention to a possible miscarriage of justice.

In addressing problems in the North Carolina criminal justice system, the Duke Center works through the law school's Wrongful Convictions Clinic and Innocence Project, which investigate credible claims of innocence made by convicted felons in North Carolina. Whenever possible, the Duke Center tries to work jointly with prosecutors and law enforcement officials to determine the validity of such claims. Theresa Newman and I direct the Duke Center. We are members of the Law School faculty, co-teach the Wrongful Convictions Clinic, and advise the student-run Innocence Project. We also serve as board members of the North Carolina Center on Actual Innocence[1] and as members of the North Carolina Chief Justice's Commission on Actual Innocence (now called the Chief Justice's Criminal Justice Study Commission). Professor Newman is president of the Innocence Network.[2]

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[1] The North Carolina Center on Actual Innocence was created by the Innocence Projects at UNC-Chapel Hill and Duke law schools to coordinate the activities of all of the law school-based innocence projects in North Carolina.

[2] The North Carolina Actual Innocence Commission recommended procedures that have been adopted by several police departments in this State to improve the reliability of eyewitness identifications, *see* North Carolina Actual Innocence Commission Recommendations for Eyewitness Identification (October 2003), http://www.ncids.org/News%20&%20Updates/Eyewitness%20ID.pdf, and spearheaded the State's creation of the North Carolina Innocence Inquiry Commission, the country's only agency devoted exclusively to the exoneration of innocent inmates who have been wrongfully convicted, *see* http://www.innocencecommission-nc.gov.

The Duke Center was established in the wake of the Duke University lacrosse rape case in part to combat the types of injustices highlighted in that case. As a result of that experience, and our informed knowledge of other even more serious miscarriages of justice in North Carolina and other states, and our participation in the work of the Chief Justice's Commission on Actual Innocence, we are intimately familiar with the miscarriage of justice that can arise from witnesses who lie and eyewitnesses whose misidentifications of innocent suspects were the products of improper pretrial methods. The Duke Lacrosse case is a reminder to all of how critical it often is for an independent and objective agency, such as the Board, to examine and take seriously all cases of possible wrongful conviction, even when the claim of innocence is dismissed by the public.

Standard for Board Action

Where there is a nonfrivolous doubt whether an innocent person has been sentenced to death, the Board has articulated the only morally appropriate standard for exercise of its authority to grant clemency: the Board "will not allow an execution to proceed in this State unless and until its members are convinced that there is no doubt as to the guilt of the accused."[3] The Duke Center believes that this standard requires the Board in this case to reconsider its decision to deny a commutation of Troy Anthony Davis's death sentence.

The claim of innocence in this case clearly warrants a careful and thorough examination, outside the shadow of an imminent execution. The circumstances of the case and the interests of justice require that the scheduled execution be stayed, at least until the claims of innocence can be appropriately considered. The Board cannot say credibly that there is no doubt whether Mr. Davis killed Officer MacPhail, the standard that the Board set for itself.

Unreliability of Eyewitness Identifications

A review of the public record in this case discloses that Mr. Davis's conviction was the product primarily of the most unreliable evidence: eyewitness identifications. National studies confirm that mistaken eyewitness identifications, although emotionally persuasive to jurors and often made in good faith, are a key factor in the wrongful conviction of innocent people. *See, e.g.*, *U.S. v. Wade*, 388 U.S. 218, 228 (1972) (noting that "the annals of criminal law are rife with instances of mistaken identification."); Gary L. Wells, *Eyewitness Identification: Systemic Reforms*, 2006 WIS. L. REV. 615, 615 (2006); R.C.L. Lindsay, *Expectations of Eyewitness Performance: Jurors' Verdicts Do Not Follow from their Beliefs*, *in* ADULT EYEWITNESS TESTIMONY: CURRENT TRENDS AND DEVELOPMENTS, at 362 (David Frank Ross, J. Don Reid, & Michael P. Toglia, eds., Cambridge University Press 1994); Arye Rattner, *Convicted But Innocent: Wrongful Convictions and the Criminal Justice System*, 12 LAW & HUM. BEHAV. 283,

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[3] Georgia State Board of Pardons & Paroles, Order Suspending the Execution of the Sentence of Death 1 (July 16, 2007) (emphasis added).

289 (1988). In fact, erroneous identifications contributed to over 75% of the more than 210 wrongful convictions in the United States overturned by post-conviction DNA evidence. *See* http://www.innocenceproject.org/content/165.php. The unreliability of eyewitness identification is no longer disputed.

Recent history is rife with stories of individuals convicted on the basis of deceptively certain eyewitness testimony, but later were exonerated by DNA evidence. The story of Kirk Bloodsworth presents a particularly relevant account of the miscarriage of justice that can occur as a result of misplaced reliance on erroneous eyewitness testimony. Mr. Bloodsworth, a commercial fisherman living in Cambridge, Maryland, was convicted for the 1984 rape and murder of a nine year-old girl in Baltimore. However, after nine years of incarceration, including two-years on death row, Mr. Bloodsworth finally was exonerated by DNA evidence. Although five witnesses at two different trials identified Mr. Bloodsworth as the rapist and murderer of the little girl, all of them were wrong.[4]

Despite the overwhelming evidence of the unreliability of eyewitness testimony, it is given great weight by jurors in criminal trials. According to former Supreme Court Justice William Brennan, there is "nothing more convincing [to a jury] than a live human being who takes the stand, points a finger at the defendant, and says 'That's the one!'"[5] *Watkins v. Souders*, 449 U.S. 341, 352 (1982) (Brennan, J., dissenting). Indeed, only three years ago, the Supreme Court of Georgia, held that it could "no longer endorse an instruction authorizing jurors to consider the witness's certainty in his/her identification as a factor to be used in deciding the reliability of that identification[,]" and advised trial courts to refrain from giving the "level of certainty" instruction to jurors. *Brodes v. State*, 279 Ga. 435, 442 (2005). In so holding, the Court noted that "the idea that a witness's certainty in his or her identification of a person as a perpetrator reflected the witness's accuracy has been 'flatly contradicted by well-respected and essentially unchallenged empirical studies.'" *Id.* at 440 (citation omitted).

The identification of Mr. Davis as the killer in this case, even by multiple witnesses, is unreliable for several reasons.

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[4] *See generally*, TIM JUNKIN, BLOODSWORTH: THE TRUE STORY OF THE FIRST DEATH ROW INMATE EXONERATED BY DNA (Algonquin Books of Chapel Hill 2004).

[5] Historically, other members of the United States Supreme Court have echoed Justice Brennan's criticism of the inherent hazards of eyewitness testimony. For instance, Justice Thurgood Marshall articulated a similar admonishment in *Manson v. Brathwaite*, 432 U.S. 98 (1977) (Marshall, J., dissenting), in which he noted the "unusual threat to the truth-seeking process posed by the frequent untrustworthiness of eyewitness identification testimony" which "[j]urics seem ... not inclined to discredit." *Id.* at 119-120.

1. The Conditions Under Which Individuals Witnessed the Crime.

The circumstances of the crime raise substantial doubt whether any eyewitness physically could have seen the person who killed Officer MacPhail well enough to make a reliable identification. First, the murder took place late in the evening in a dimly-lit parking lot. Such conditions would have made it extremely difficult for a witness to have seen the killer clearly. Second, witnesses to the assault were inevitably under duress caused by their proximity to the gun assault on the police officer. The duress and stress of witnessing such an attack decrease the reliability of subsequent identifications because witnesses in those circumstances focus on their own survival and are unable to think clearly about anything else. Indeed, the mere presence of a weapon diminishes the ability of witnesses to concentrate on their surroundings, which in turn decreases the accuracy of their memory of the event. *See, e.g.*, Elizabeth Loftus et al., *Some Facts About Weapon Focus*, 11 L. & HUM. BEHAV. 55 (1987). Both of these factors create doubt about whether any witness could have reliably reconstructed what happened in this case. Without some independent corroborating evidence that the person identified was the perpetrator, the identification alone is unreliable.

In addition to scientific evidence, relevant anecdotal evidence also demonstrates the unreliability of an identification under these circumstances. One such North Carolina case involved Jennifer Thompson, who was attacked and brutally raped in 1984, when she was a 22-year-old college student. In a June 18, 2000, op-ed in the New York Times, Ms. Thompson wrote that in the course of the attack, she "studied every single detail on the rapist's face . . . looked at his hairline . . . looked for scars, for tattoos, for anything that would help [her] identify him." Despite Ms. Thompson's determination and attention to detail, in two separate trials she wrongfully identified Ronald Cotton as her attacker. In the second trial she also denied that the person who actually raped her was the perpetrator. Over a decade later, however, DNA evidence exonerated Mr. Cotton. In reflecting on her erroneous identification and the consequent 11-year imprisonment of an innocent man, Ms. Thompson wrote, "I was certain, but I was wrong."

2. The Suggestive Identification Processes Used to Obtain the Identification

The record in this case indicates that the witnesses who identified Mr. Davis as the killer of Officer MacPhail did so under circumstances that made the identification unreliable and unfair. The identification of Mr. Davis was tainted by the widespread dissemination of Mr. Davis's image on a "Wanted" poster prior to the identifications. This significantly increased the risk that the witnesses who identified him may have substituted their familiarity with the image on the "Wanted" poster for an actual memory of what the perpetrator looked like. This risk was greatly increased by the fact that the photograph in the lineup was the same photograph used in the "Wanted" poster. Moreover, the mere existence of the "Wanted" poster bearing Mr. Davis's photograph would have been highly suggestive to any witness to the murder of Officer MacPhail that Mr. Davis was the killer, simply because he was the person whom the police thought was responsible. It is not disputed that such suggestive identification procedures increase the risk of memory source confusion, leading to misidentification. *See, e.g.*, Brandon L. Garrett, *Judging Innocence*, 108 COLUM. L. REV. 55, 80 (2008) (quoting *Manson*, 422 U.S. at 119).

3. The False Testimony of Key Witnesses

In addition to the factors that, without independent corroborating evidence, made any identification of Mr. Davis inherently unreliable, seven of the nine witnesses who testified against Mr. Davis at trial have recanted their testimony in sworn affidavits. All of the recanting witnesses claim they were coerced into signing statements written for them by police officers who used threats and intimidation. Similar coercive tactics were used in the course of the investigation in the Duke lacrosse case to force witnesses to change their recollection of events. One particular instance widely cited by the news media, involved Moezeldin Elmostafa, a taxi driver who signed a sworn statement corroborating the alibi of one of the defendants. When pressured, Mr. Elmostafa refused to change his story; as a result, police investigators arrested Mr. Elmostafa under an old warrant and the State tried him for allegedly shoplifting from a local mall.[6]

Even if the Board believes that Mr. Davis has not at this point convincingly shown that the witnesses who have recanted are likely telling the truth, we nonetheless believe the recantations under oath preclude the Board from finding "that there is no doubt" as to the incredulity of the recanted testimony. Where, as here, recanted testimony gives rise to at least some doubt whether the witnesses reliably identified Mr. Davis as the killer, his execution should not proceed unless all doubt is removed. That requires a careful independent review of the recantations and an assessment of their credibility, something Mr. Davis's claims have not received..

Conclusion

Under the standard of the Georgia State Board of Pardons and Paroles for acting on a request to commute a death sentence, that it will "not allow an execution to proceed in this State unless and until its members are convinced that there is no doubt as to the guilt of the accused," we submit that the Board has no choice but to halt Mr. Davis's execution.

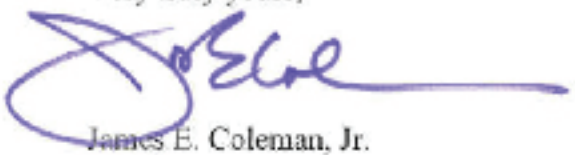
What the Duke lacrosse case demonstrated is that when a key witness lies about the facts of an alleged crime and subsequently is able to identify an innocent defendant under procedures that preclude the State or others from testing the reliability of the identification, there is a substantial risk that a miscarriage of justice will occur. Such a miscarriage of justice was averted in that case only because the Attorney General of North Carolina and the North Carolina Bar took

[6] The jury acquitted Mr. Elmostafa, whom lawyers for the students called a hero for refusing to succumb to the police pressure. *See* STUART TAYLOR, UNTIL PROVEN INNOCENT: POLITICAL CORRECTNESS AND THE SHAMEFUL INJUSTICES OF THE DUKE LACROSSE RAPE CASE 271-74.

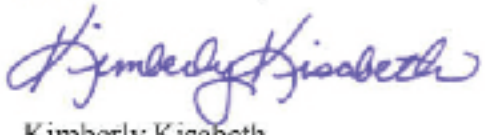
the unprecedented step of intervening while the case was pending.[7] Their action was the only responsible thing to do; every public official in the criminal justice system has a moral responsibility to act when there is any chance that an innocent person might be wrongly convicted of a crime. When there is a chance that an innocent person may be executed for a crime he did not commit, the moral imperative to act is even greater.

We urge the Board to reconsider and take whatever steps are necessary to ensure that an innocent man will not be executed by the State of Georgia.

Very truly yours,



James E. Coleman, Jr.



Kimberly Kisabeth

[7] After a thorough, independent examination of the facts and circumstances of the case, North Carolina Attorney General Roy Cooper pronounced the three students actually innocent of wrongdoing. Subsequently, the former district attorney assigned to the case was disbarred and convicted of criminal contempt for his mishandling of the case.