Posted 10/16/11

DID GEORGIA EXECUTE AN INNOCENT MAN? PART III – A QUESTION OF CERTAINTY

Controversial recantations and over-reliance on affidavits helped seal Troy Davis' fate

By Julius (Jay) Wachtel. This much is certain. During the early morning hours of August 19, 1989 Sylvester Coles accosted Larry Young. Coles was soon joined by his gangster buddies Troy Davis and Darrell Collins. One of them hit Young, who ran off. Police officer Mark MacPhail soon arrived. Coles and several witnesses would later testify that Davis struck Young and shot officer MacPhail. Bullet evidence and witnesses also linked Davis with the wounding of a passenger in a vehicle some hours earlier. Both incidents were tried jointly. Davis was convicted of everything, sentenced to death and, ultimately, executed. (For details about the trial see Parts I and II of this series.)

Many notable individuals and organizations including former president Jimmy Carter and the NAACP argued on Davis' behalf. Amnesty International held vigils on the eve of his execution and declared October 1, the day of his funeral, as a "Day of Remembrance." Davis' defenders insisted that he was innocent of everything and that Coles was the one who murdered officer MacPhail. Police were blasted for taking Coles at his word and pressuring witnesses to go along, while prosecutors were criticized for biasing the jury by tying the shootings together with shoddy ballistics evidence and refusing to concede that Davis was innocent even as witnesses began to recant.

Facing international pressures, the Supreme Court ordered an extraordinary Habeas hearing. It was conducted in Savannah on June 23 and 24, 2010 by U.S. District Judge William Moore. He delivered his decision two months later. Its first and most important section assessed the evidentiary value of purported recantations by seven witnesses who had testified at Davis' trial. Four appeared at the Habeas hearing; Davis' lawyers submitted affidavits for the others.

Witness recantations (pp. 125-50)

Larry Young. He testified at trial that Coles, who was wearing a yellow shirt, was the man with whom he argued, and that a man in a white shirt struck him. Other witnesses described the incident similarly. Young was on the petitioner's list for the Habeas hearing but he wasn't called to testify. His new version of events – that he actually saw nothing but that police had told him what to say – came in through an affidavit (pp. 147-49.)

Darrell Collins. He testified at the preliminary hearing that he saw Davis shoot at the vehicle. At trial he said that was a lie. However, he did concede that he saw Davis slap Young. But at the Habeas hearing he recanted everything and claimed that officers had coerced him to implicate Davis (pp. 136-39.)

Jeffrey Sapp. A friend of Davis, he testified at trial that Davis told him he shot the officer but didn't fire at the car in an earlier incident. He recanted at the hearing, saying that his statement was coerced by police (pp. 133-36.)

Harriet Murray. Larry Young's girlfriend gave police conflicting identifications of the killer. At the preliminary hearing and trial she settled on Davis as being both the slapper and shooter. She didn't appear at the Habeas application hearing. Instead Davis' lawyers presented an unnotarized affidavit in which she attested that the man who argued with Young, which everyone agrees was Coles, was the one who both slapped him and shot the officer (pp. 139-143.)

Dorothy Ferrell. She identified Davis at trial as the shooter. Although she showed up at the Habeas hearing she wasn't called on to testify. Davis' lawyers instead presented the Court with her affidavit. In the document she stated that her trial testimony had been was coerced and that she didn't see who shot officer MacPhail (pp. 143-46).

Antoine Williams. At trial he testified that the man who struck Larry Young was the shooter, and that he was "sixty percent certain" that this individual was Davis. But at the Habeas hearing he said he wasn't sure who shot the officer, but that police pressured him to identify Davis. Under cross-examination he retracted the part about being pressured (pp. 127-30.)

Kevin McQueen. A jailhouse informer, he testified at trial that Davis confessed. McQueen recanted at the Habeas hearing. He said that he lied to get back at Davis over a fight, or in exchange for consideration on his charges, or both (pp. 130-32.) His was the only recantation that Judge Moore believed.

According to Judge Moore, none of the recantations absolved Davis. Young, Murray and Ferrell's accounts came in through affidavits, a tactic that he criticized for making cross-examination (thus truth-finding) impossible. Every witness but Murray claimed that their accounts had been coerced by police, a notion that seemed implausible and which officers heatedly denied. Two witnesses who had been in the thick of things, Young and one of his assailants, Collins, now knew nothing. Neither, it seems, did Sapp or Williams. Judge Moore reserved special contempt for Sapp, whom he accused of lying to protect Davis, for example, by claiming to not know of his moniker "RAH", which stood for "rough as hell."

Judge Moore had other concerns. He wondered why Murray didn't simply say she misidentified Davis. (For this and other reasons he dismissed her affidavit as "valueless.") He had equally little regard for Ferrell's recantation. Her claim of coercion made little sense as she was the one who first approached officers. And while she was present at the Habeas hearing Davis' lawyers didn't call her testify, suggesting that they feared her recantation wouldn't survive cross-examination.

Other evidence (pp. 150-164)

Firearms. Concerns were raised at the Habeas hearing about questionable forensic evidence that the state presented at trial linking the same gun to both shootings. This issue, which we discussed at length in Part II, was pondered at length by Judge Moore, who ultimately decided that even if the evidence was mistaken it didn't weigh against Davis' guilt in the murder because there was abundant testimonial evidence that he killed officer MacPhail (decision p. 164.) Curiously, Judge Moore didn't address what we thought was the obvious issue, that prosecutors attributed the earlier shooting to Davis so as to bias the jury against him.

Sylvester Coles as the shooter. Several individuals submitted affidavits linking Coles and firearms, which the judge found unsurprising insofar as many on the night of the shooting seemed to be packing a gun. (Coles had already conceded that he was carrying a gun that evening.) But perhaps the most startling new evidence were eyewitness accounts by two persons who said they saw Coles murder the officer, and by several who said that he confessed.

One man, **Benjamin Gordon**, tried to cover both bases. In 2008 he signed an affidavit in which he said that Coles told him "I shouldn't 'a did that shit." At the Habeas hearing he testified for the first time that he saw Coles pull the trigger. Why didn't he say so earlier? He was afraid of Coles. Judge Moore found him not credible (p. 158.)

A second witness, **Joseph Washington**, said through an affidavit that he saw Coles kill the officer. Washington, who testified to that effect at Davis' trial (he was then in jail for armed robbery) was also thought not credible. According to Judge Moore his trial testimony had been "badly impeached" by evidence that he had been elsewhere when the shooting took place. Judge Moore surmised that Davis' lawyers didn't summon Washington to the Habeas hearing to avoid having him impeached once more.

Several witnesses said that Coles incriminated himself. One, **Anthony Hargrove**, testified that Coles told him that he was the killer. Three others submitted affidavits to the same effect. Judge Moore gave it all little credence, particularly as Coles didn't testify.

Concluding comments (pp. 164-end)

Judge Moore found Davis' "new evidence" unpersuasive. Nearly all the recantations were deeply flawed. Other than for the jailhouse informer, whose trial testimony Judge Moore called unbelievable in the first instance, the witnesses were simply not credible. Three "appeared" through affidavits and thus couldn't be questioned. Coles' alleged confessions, which came in as hearsay, were equally untestable, as Coles wasn't there. Judge Moore was clearly peeved at Davis' lawyers. Instead of asking the Court to have marshals serve Coles, defense attorneys waited until "the eleventh hour" to try (unsuccessfully) to serve him themselves. Judge Moore thought this was an obvious ploy to avoid having him appear at all, as there was nothing Coles was likely to say that would help Davis (decision p. 170.)

Judge Moore's patience had worn thin:

> Ultimately, while Mr. Davis's new evidence casts some additional, minimal doubt on his conviction, it is largely smoke and mirrors. The vast majority of the evidence at trial remains intact, and the new evidence is largely not credible or lacking in probative value. After careful consideration, the Court finds that Mr. Davis has failed to make a showing of actual innocence that would entitle him to habeas relief in federal court. Accordingly, the Petition for a Writ of Habeas Corpus is DENIED.

Judge Moore undoubtedly called it as he saw it. Still, it was obvious that given the witnesses' new slant on things, it would have been impossible to convict Davis had he been granted a new trial. All the pro-Davis publicity had had a devastating effect on the state's case. Here's what one of the trial jurors who originally found Davis guilty and voted for death now had to say:

> I feel, emphatically, that Mr. Davis cannot be executed under these circumstances. To execute Mr. Davis in light of this evidence and testimony would be an injustice to the victim's family [and] to the jury who sentenced Mr. Davis.

Set Davis aside. It's the sheer difficulty of retrying cases, let alone those twenty years old, that makes judges such as William Moore jealous about the finality of jury decisions. Yet when the state intends to kill, the moral if not legal calculus *is* different. To date *seventeen* death-row prisoners have been exonerated through DNA. It's also widely accepted (though not by Texas) that one who wasn't, Cameron Willingham, was wrongfully executed in 2004.

When a judge says "I thought it was a verdict that could go either way," as one did after a recent conviction, he's only stating the obvious: that some jury verdicts *are* close calls. Most citizens would probably agree that in such cases the death penalty is inappropriate. As former New York Governor Mario Cuomo, an opponent of capital punishment recently pointed out, in the real world of criminal justice there is no such thing as absolute certainty. That's one reason why he favors the alternative of life imprisonment "with no possibility of parole under any circumstances."

Would that penalty have satisfied the citizens of Savannah? Probably not. Indeed, many seem more convinced than ever that Davis got what he deserved. For example, check out this editorial in the Savannah News. And when you're done be sure to peruse this self-serving but nonetheless fascinating commentary by Spencer Lawton, the prosecutor whose efforts may or may not have sent the right man to death.

As for your blogger, he thinks the same as two years ago, that it's "more likely than not that Davis is guilty." Of course, "more likely than not" isn't enough to convict someone of jaywalking.