US Supreme Court orders new hearing for Georgia death row inmate

Kate Randall
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The US Supreme Court on Monday ordered a federal trial court to consider the case of Troy Davis, a prisoner on death row in Georgia for the 1989 murder of off-duty police officer Mark MacPhail in Savannah, Georgia. The ruling came on a habeas corpus petition filed directly with the Supreme Court on Davis's behalf.

The high court's order was brief and unsigned, instructing the trial court to "receive testimony and make findings of fact" on whether new evidence could establish whether Davis is innocent. Concurring with the decision, Justice John Paul Stevens wrote, "The substantial risk of putting an innocent man to death clearly provides an adequate justification for holding an evidentiary hearing."

The decision provoked an indignant reaction from Justice Antonin Scalia, who wrote that the Court "has *never* held that the Constitution forbids the execution of a convicted defendant who has had a full and fair trial but is later able to convince a habeas corpus court that he is 'actually' innocent" (emphasis in the original).

The overwhelming preponderance of evidence points to Troy Davis's innocence. The prosecution never presented any physical evidence linking Davis to the crime. Seven of the nine witnesses who originally testified against him have recanted their testimony. The state's key remaining witness, Sylvester "Redd" Coles, could face prosecution for the crime if Davis were exonerated.

The campaign for Davis's innocence has garnered international support, with rallies in support of his exoneration and freedom held in cities across the US and Europe. Twenty-seven former prosecutors and judges filed a brief with the high court supporting his petition.

Since his 1991 conviction, Troy Davis has faced execution dates three times, being spared each time at the last moment. On September 23, 2008, the US Supreme Court issued a stay of execution less than two hours before his scheduled lethal injection.

Three weeks later, the high court denied Davis's appeal without comment, opening the way for an execution set for October 27, 2008. (See "US Supreme Court clears way for execution of likely innocent death row inmate")

Ten days later, on October 24, 2008, a federal appeals court in Atlanta, Georgia issued a temporary stay of execution in Davis's case. (See "US federal appeals court stays Troy Davis execution")

Then on April 16, 2009, a three-judge panel of the 11th Circuit Court of Appeals, in a 2-1 ruling, denied Davis's second habeas corpus petition. The dissenting judge in that case, Rosemary Barkett, criticized the 1996 Antiterrorism and Effective Death Penalty Act (AEDPA)—provisions of which have blocked Davis from presenting exculpatory evidence—as "thicket of procedural brambles."

Signed into law under the Clinton administration, AEDPA severely restricts the ability of death row prisoners to pursue appeals based on innocence claims when they are unable to prove constitutional violations at trial. Since its passage, the Supreme Court has routinely denied death row inmates' appeals on this basis.

In its Monday ruling, the Supreme Court broke with this precedent, transferring Troy Davis's writ of habeas corpus to the US District Court for the Southern District of Georgia for "hearing and determination." Justice Stevens was joined in the concurrence by Justices Ruth Bader Ginsburg and Stephen G. Breyer. Newly joined Justice Sonia Sotomayor did not participate in the decision.

In keeping with his past comments in death penalty cases, Justice Scalia's dissent demonstrates both his support for the death penalty and his contempt for the right of death row prisoners to present new evidence to overturn their guilty verdicts. Over five pages, joined by Justice Clarence Thomas, he decries the high court's ruling that "exceptional circumstances ... warrant the

exercise of the Court's discretionary powers."

In vulgar language, he argues that Troy Davis's "claim is a sure loser," and that transferring his petition to the District Court "is a confusing exercise that can serve no purpose except to delay the State's execution of its lawful criminal judgement," i.e., to send Davis to his death while overwhelming evidence points to his innocence.

Scalia argues that the Court has never forbidden the execution of a death row inmate in such a case, writing, "Quite to the contrary, we have repeatedly left that question unresolved, while expressing considerable doubt that any claim based on alleged 'actual innocence' is constitutionally cognizable."

He denounces the ruling's contention that the District Court might find unconstitutional the limitations placed by the AEDPA on federal courts' authority to issue a writ of habeas corpus as applied to actual innocence claims, writing that "Justice Stevens has imagined" this possibility.

He further contends that "the argument that the Constitution requires federal-court screening of all state convictions for constitutional violations is frivolous" and that the high court is sending the District Court "on a fool's errand."

In conclusion, he rejects the Supreme Court's intervention in Troy Davis's case, disparaging a situation where "capital convictions obtained in full compliance with law can never be final, but are always subject to being set aside by federal courts for the reason of 'actual innocence.'"

Stevens's concurrence argues against the dissent, writing that Scalia "assumes as a matter of fact that petitioner Davis is guilty of the murder of Officer MacPhail." Indeed, Scalia's repeated reference to "actual innocence" attests to this.

Stevens adds, "Imagine a petitioner in Davis's situation who possesses new evidence conclusively and definitively proving, beyond any scintilla of doubt, that he is an innocent man. The dissent's reasoning would allow such a petitioner to be put to death nonetheless."

It should be recalled that in an April 2008 ruling upholding the constitutionality of execution by lethal injection, Scalia dismissed the contention that the gruesome procedure could inflict intense pain. He wrote, "Some risk of pain is inherent in any method of execution—no matter how humane.... The Constitution does not demand the avoidance of all risk of pain in carrying out executions."

And when the Court ruled in June 2002 that execution of the mentally retarded violated of the Constitution's Eighth Amendment ban on "cruel and unusual punishment," in a dissenting opinion along with Thomas and then Chief Justice William Rehnquist he stated, "for the believing Christian, death is no big deal." He added, "You want to have a fair death penalty? You kill; you die. That's fair."

The Supreme Court's ruling, breaking with the precedent of past decisions, likely came in part as a response to the preponderance of evidence in Troy Davis's case pointing to his innocence. In coincides as well with growing unease and opposition towards the death penalty, fuelled in part by the belief that innocent people are being sent to their deaths.

While an October 2008 Gallup Poll showed that 64 percent of Americans still support capital punishment, this is down 5 percentage points from 2007 and stands at its lowest level in the last 30 years. At the same time, capital punishment enjoys the near unanimous support of the US political establishment, including President Obama. The continued use of the death penalty stands in sharp contrast to the vast majority of industrialized countries, where the barbaric practice is reviled and has been outlawed.

The dissent of Scalia and Thomas in the Troy Davis case illustrates the thoroughly reactionary character of opinions accepted as legitimate on the nation's highest court. Since the Supreme Court's 1976 ruling reinstating the death penalty, while ruling against certain forms of its application, the Court has consistently upheld its overall constitutionality.

Since its reinstatement, 1,173 condemned men and women—including the mentally impaired, foreign nationals and those convicted of crimes when they were juveniles—have been sent to their deaths, including 37 so far this year.