Remarks at the
SOUTHERN CENTER OR HUMAN RIGHTS'
FREDERICK DOUGLASS AWARDS DINNER
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Anthony G. Amsterdam

Thank you, Lisa. It's a great privilege to be with my friends from the Southern Center and with you all tonight.

Only friendship and its benign biases can account for my receipt of this award. If I can accept the award at all in good conscience, it must be in a representative capacity rather than as an individual. So let me accept it gratefully as a colleague and admiring brother of the hundreds of lawyers and paralegals and investigators and mitigation specialists at organizations like SCHR and in public defender offices and in private practice who are selflessly devoting countless hours to representing persons charged with capital crimes or sentenced to death. Let us understand that this award celebrates the boundless dedication and great accomplishments of that entire community of wonderful people, Then I can accept it not only with gratitude but with the satisfaction that it is deserved.

I want to talk with you about the work that this community of death-penalty-defense litigators does, and why it is so important. In focusing on death-penalty defense, I do not mean to slight the other vitally important work that SCHR and many public-interest lawyers do in non-capital cases, trying to bring some rudimentary decency and justice into the administration of the criminal law in this country. American "criminal justice" – truly, a misnomer – is rotten with prejudice and privilege and unfairness and unreliability at every level, from misconceived misdemeanor probation regimes, to miserly and malfunctioning provisions for felony defense, to atrocious jail and prison conditions that make it a mystery why so many Americans expressed horror about Abu Ghraib while closing their collective eyes and ears to the worse abominations that occur daily in penal institutions and even pretrial custodial facilities in every American State.

The fact is that our criminal justice system, like so much of our social structure, is administered to perpetuate and even to exploit for political purposes the worst aspects of our national character and culture – our deep-rooted legacies of racism, sexism, classism and xenophobia.

Of course, countervailing traits of egalitarianism and generosity and humanitarian spirit are also deep-rooted in this country's history. They have found expression from time to time in a series of brilliant symbols of the American Dream of equality of opportunity – symbols like the self-reliant American farmer with forty acres and a mule, the American factory laborer entitled to decent working conditions and a

decent wage, the civil rights worker and the Peace Corps volunteer. But if you consider how thoroughly today all of these symbols have been superseded in political discourse and in the public imagination by the single, awful symbolic figure of the average American simply as a ***crime victim***, you will appreciate how totally the brighter hemisphere of the American psyche is in eclipse. Our political and legal machines today are obsessed with the symbolic image of the victim – largely portrayed as white, middle-class, mainstream, deserving, and desperately endangered – with the danger portrayed as predatory, parasitic, wilfully jobless, promiscuously multiplying people of color. So, it is little wonder that American governments administer their criminal systems like colonial penal colonies. To challenge the abuses of these systems at every level, in non-capital as well as capital cases, is critically important work.

Still, capital cases are special in the kinds and degrees of injustice that they foster. Partly this is so because the obvious extremity of the punishment of death extends the boundaries of permissible inhumanity so far that every lesser violation of humane values seems inoffensive by comparison, leading us to tolerate inhumanity in non-capital matters relatively easily. But partly, also, it is because capital prosecutions generate a special climate that intensifies all of the worst propensities of criminal procedure and human nature to perform unjustly.

To start with, capital crimes as a class are peculiarly ugly and terror-arousing – often so incomprehensible as to seem monstrous – so that names like Manson and Gacy and Dahmer are our culture's tales of Dracula and Satan. With communities outraged and citizens frightened, the police begin what Justice Jackson once called "the often competitive work of ferreting out crime." The competition is to catch the guy as quickly as possible, in order to assuage the public's fear and restore its sense of security and confidence in its police.

This puts a tremendous pressure on the investigative and crime-detecting process to produce prompt results, and it drastically accelerates the ordinary police procedure for "solving" any crime, which is to form a working hypothesis about who did it and how and why, based upon partial, imperfect information, and then to seek out confirmatory information. Ordinary human psychology accounts in large part for what happens next: Any investigator working from a hypothesis goes looking for the information which that hypothesis predicts and ignores other possible lines of inquiry. And in evaluating the information found, he or she believes and attaches great significance to any information which confirms the hypothesis, while devaluing any evidence which disconfirms it. The pressure that this process creates to simply ratify the guilt of the first plausible suspect is exacerbated by the reward structure of police departments and prosecutors' offices and is even further exacerbated when the community is upset and scared and screaming for immediate assurance that the perp has been identified and is safely in custody. Under these circumstances, assiduity in proving the suspect's guilt by any means is accounted good police work. Police *never* get points

for being skeptical, for saying, "hey, let's check out this or that reason to doubt the guy did it." That happens in the movies; but in 45 years of capital defense work, I have *never* seen it in real life.

And, if police work is "competitive," prosecutor's work in capital cases is the Beijing Olympics of all prosecution. Even when death cases are not as politicized as they have been in this country for the past quarter-century, DAs and states' attorneys naturally compete to win death sentences and to preserve them against all claims of error, and to get them executed, with the fervor of old Western gunfighters striving to cut notches in their gun butts. If you read the appellate briefs or congressional testimony or press releases of capital prosecutors, you will be staggered by the passion with which these guys say – and apparently believe – that the world will end if they don't get each and every death sentence imposed and affirmed and executed *immediately*.

You may have read Bob Herbert's September 20 column about the *Troy Davis* case. Bob asked the question, "Why the rush to execute this guy before taking the time for deliberate consideration of the serious questions that exist whether he is the innocent victim of a mistaken identification? Seven out of the nine prosecution witnesses against him have recanted; he is confined in a maximum-security prison and will still be there to execute at Georgia's leisure if a thorough hearing of the recanting witnesses fails to undermine confidence in the jury's guilty verdict. So why rush to kill Troy Davis without a hearing? It is true that the United States Supreme Court has now granted a stay to consider reviewing Davis's case. But keep in mind that Georgia's lawyers had vigorously opposed even a one-week postponement of the execution, and that the Georgia Supreme Court had refused to delay the execution a week to allow Mr. Davis to seek U.S. Supreme Court review.

Or perhaps last August you read the dissenting opinions of four Supreme Court Justices decrying the rush to execution in the case of Jose Ernesto Medellín. In that case, the Court denied a stay of execution which would have permitted Congress to consider pending legislation giving Medellín and 50 other death-sentenced Mexican nationals a forum for complaint about the violation of their rights under the Vienna Convention on Consular Relations. The Convention is a multi-national treaty giving citizens of one country who are arrested in another country the right to have their own country's consulate notified of the arrest so that the consul can provide assistance in defending against criminal charges. Mexico, which is staunchly anti- death penalty, has a highly effective program for providing consular assistance to Mexican nationals charged with capital crimes in the United States. Mexico provides attorneys, forensic experts and investigators, who are often indispensable in defending capital prosecutions, for example, when mitigating evidence about a defendant's childhood can be gotten only by Spanish-speaking investigators in isolated Mexican locations. Nevertheless, it is common for police and prosecutors in the U.S. to fail to inform Mexican consulates of the arrest of

Mexican nationals and to fail to inform the arrested Mexican nationals of their right to consular assistance.

This happened in Medellín's case. On behalf of Medellín and 52 other Mexican nationals in the same situation, Mexico sued the United States in the World Court – the International Court of Justice – and obtained a ruling that the United States had violated the treaty rights of 51 of these death-sentenced individuals. The ICJ's judgment required that courts in the United States reconsider the cases of the condemned men and provide appropriate relief if it was found that the treaty violations had prejudiced their defenses. The World Court's jurisdiction in this matter was based on an optional protocol that both the United States and Mexico had signed, submitting international disputes arising under the Convention to binding adjudication by the ICJ. But President Bush was so appalled by the intervention of an international tribunal into the prerogative of American courts to dispense death sentences in violation of international treaty law that he immediately withdrew the United States from the optional protocol to the Vienna Convention altogether – which means, by the way, that if you or your kids are arrested anywhere in the world and if the arresting officials refuse to allow them access to an American consul, the United States no longer has any recourse short of military force.

However, even President Bush recognized that he could not withdraw the United States from the jurisdiction of the World Court retroactively, so as to avoid the force of a judgment already rendered in a litigation that the United States had defended on the merits and lost. So he declared that the U.S. would comply with the world court's judgment by having the state courts which had sentenced the 51 Mexican nationals to death reconsider their cases and determine whether the Vienna Convention violations were sufficiently prejudicial to call for relief. The Texas Court of Criminal Appeals in Medellín's case refused to do this, holding that it was beyond the constitutional power of the President of the United States to require a state court to perform the country's international obligations pursuant to the binding judgment of an international tribunal. And the Supreme Court of the United States agreed, holding that at least in the absence of Congressional legislation, the President cannot tell a state court to reconsider a death sentence that puts this country into undisputed violation of its treaty obligations to a foreign nation.

I'll forgo commentary on this much of the story, despite the opportunity it offers to demonstrate how radically our country's basic constitutional structure and its capacity for effective participation in the community of nations have been subverted in order to eliminate inconvenient legal obstacles to the execution of capital sentences. My point has to do with what happened *next* in the Medellín affair. Because the U.S. Supreme Court had said that Congress, as distinguished from the President, might have the power to compel state courts to comply with this country's treaty obligations, a bill to that effect was introduced in Congress. At the same time, Mexico returned to the World

Court, requesting a declaration that the United States would be disobeying the World Court's decree if it allowed Medellín to be executed without further legal process. The U.S. Government replied that it recognized that it was obliged to make further efforts to implement the World Court's judgment, and said that it would "continue to work to give that Judgment full effect, including in the case of Mr. Medellín." There was no time for Congress to act on the pending bill before Medellín's execution, so his lawyers asked the Texas courts, the Governor of Texas, and the Supreme Court successively to stay the execution, to allow Congress to consider the bill. The state courts, the Governor, and the Supreme Court all refused to postpone the execution. Four Supreme Court Justices dissented, saying that they would grant a stay, either to give Congress time to act or at least until the Court could request and receive a clarification from the U.S. Government as to what its lawyers meant by promising the World Court that they would continue to work to implement its judgment in Mr. Medellín's case. With that question still unanswered, Jose Ernesto Medellín was executed last August 6.

Now, to those of you who, like Bob Herbert, have a perspective on life and death that has not been warped all out of shape by daily exposure to the documents that State's lawyers file in capital cases, proceedings like those in Troy Davis's case and Medellín's may seem bizarre, inexplicable. Why, you may ask, are we even *debating* whether an execution should be delayed for a few weeks or months until significant questions can be resolved that may prove the death judgment to be factually or legally erroneous? How can lawyers for any American government that has a Due Process clause in its constitution *contest* a stay in such a case? But if you read this stuff day-in-day-out, you would lose your sense of wonder and accept it as a given that the assistant attorneys general and district attorneys of at least 25 States are constantly filing papers which assert in all seriousness that the Ostrogoths and Visigoths will cross the Potomac and that all law and order and civilization south of our Nation's capitol (and perhaps even north of it) would crumble under the onslaught of barbarians if their State were delayed for a few days in carrying out a single death sentence. And since this paranoid ideation is not laughed out of court, prosecutors and State's lawyers almost everywhere have actually come to believe it themselves.

With attitudes like these, you will not be surprised that prosecutors in death cases frequently secure convictions and death sentences by using means that make the rational intellect boggle and the gorge rise. I am not talking simply about a disregard or even concealment of exculpatory evidence – although that sort of thing, as in the *Curtis Lee Kyles* case in Louisiana and the *Lloyd Schlup* case in Missouri, and the *Clarence Brandley* and *Delma Banks* cases in Texas, and the *Rolando Cruz* case in Illinois, is appallingly common. I am not talking simply about cases like the *Reginald Clemons* case in Missouri, where the prosecutor disregarded a specific order of the trial judge not to use the name of Charles Manson (which was utterly irrelevant) in arguing to the jury. (The Missouri Supreme Court later held that a $500 contempt sanction imposed on the prosecutor by the trial judge was a sufficient remedy for the Manson argument, and that

Clemons' death sentence should be upheld despite that and a half dozen other certifiable instances of deliberate and flagrant prosecutorial misconduct.)

Forget these egregious extremes. I am talking simply about the very frequent prosecutorial practices of getting capital convictions and sentences on the basis of evidence that no self-respecting lawyer with the least experience could imagine to be credible: – junk science; expert testimony from so-called experts who are known hired guns for the prosecution and have not formed an objective, knowledgeable or independent professional judgment in decades; or the testimony of jailhouse snitches, whose use in capital prosecutions has now reached epidemic proportions. (In the *Tommie Thompson* case in California, for example, almost the only evidence of Thompson's guilt of the rape-murder for which he was put to death was the testimony of two snitches that Thompson admitted a rape to them in jail. The first snitch was one that both state and federal law enforcement agencies had been cautioned to stop using because nothing he said could be believed; and the second snitch was one who had been branded a pathological liar by his own family as well as all law enforcement agencies who knew him. Oh, yes, there was one other piece of evidence of rape in the *Thompson* case: a pathologist's testimony about injuries to the victim that was inconsistent with his own examination report and scientifically inconceivable.)

You'd think that state courts confronted with cases in which evidence of these sorts went unchallenged at trial because of a defense lawyer's incompetent investigation would feel enough of a need to keep up appearances – if not enough concern for justice – to inquire into the facts and provide relief against erroneous executions if persuasive post-trial information indicated that the defendant was wrongly condemned. But the courts usually brush off evidence of errors – as in the *Thompson* case, for example, where the California courts simply refused to hear Thompson's postconviction claims at all. Why?

Well, we're facing the fact that the death penalty has become the most scrambled-for fumbled football on the American political scene today. And state judges are elected in all but a half dozen of the thirty-seven states that have the death penalty. When California voters recalled their state Supreme Court Chief Justice Rose Bird and two of her colleagues because of their supposed softness on capital appeals, the California Supreme Court flipped over instantaneously from a 95% reversal rate to a 97% affirmance rate in death cases. Can you believe that that that turn-around happened because hundreds of California trial judges and prosecutors all of a sudden stopped committing any legal errors in capital prosecutions? Does it seem more likely to you that California's post-recall capital affirmance rate of 97% is principled jurisprudence or political pandering?

Ah, but what about the federal courts and the supposed promises of federal constitutional law? Sadly, I have got to tell you that if ever a body of law has proved to

be an exercise in gross hypocrisy and self-deluding smugness, today's federal constitutional jurisprudence of death is precisely that.

To be sure, the Supreme Court invalidated all old-fashioned death-penalty statutes in 1972 because they had proved incapable of evenhanded, rational, and non-discriminatory application. But then the Court in 1976 approved a new model of capital punishment statute – so-called "guided discretion" statutes – because (the Court was promised, and promised itself, and promised us) these statutes would fix the problems of arbitrariness and discrimination in meting out life and death. Of course, they have not done so, and nobody with the slightest knowledge of the law or the facts could suppose they have.

Let's start with the law. In the 1976 cases, the Court said that the guided discretion statutes would assure fair and equal, non-arbitrary capital sentencing because of all the safeguards they gave to the capital defendant. The statutes were supposed to narrow and regularize the dispensation of death by limiting capital punishment to cases in which aggravating circumstances were found; they were supposed to provide a fair sentencing hearing in which evidence in mitigation could be considered; and they were supposed to assure that the results were not arbitrary or discriminatory by providing for careful appellate review of death sentences. Since 1976, the Supreme Court has systematically dismantled every one of these supposed protections, diluting some to utter insipidity and disregarding others, until there's nothing left of any of them.

- The Court has held (in *Lowenfield v. Phelps*) that a death sentence can be imposed on the basis of aggravating circumstances that are nothing more than the elements of the crime of capital murder, so that they cannot conceivably serve to distinguish cases in which people are sentenced to death from those in which they are not.

- The Court has sustained aggravating circumstances so vague as to be meaningless and provide no sentencing guidance at all, such as that the "defendant exhibited utter disregard for human life," a phrase defined as the state of mind of "the cold-blooded pitiless slayer." (*Arave v. Creech*.)

- The Court has held that a State can make the imposition of the death penalty turn on factors as vague as "the circumstances of the crime of which the defendant was convicted" and "the age of the defendant" – despite a showing that in different cases, prosecutors had conceded that the same age was mitigating or neutral, or argued that it was aggravating. (*Tuilaepa v. California.*)

- The Court has held that even when a state legislature passes a statute identifying mitigating factors for the jury to consider, a state supreme court

can forbid trial judges to charge these factors to the jury or say anything at all to the jury about mitigation in its penalty instructions. Specifically (in *Buchanan v. Angelone*), the United States Supreme Court held the following penalty-phase instruction sufficient to guide the jury's sentencing discretion:

> "If you find from the evidence that the Commonwealth has proved [one aggravating circumstance] beyond a reasonable doubt . . . , then you may fix the punishment of the Defendant at death or if you believe from all the evidence that the death penalty is not justified, then you shall fix the punishment of the Defendant at life imprisonment."

(You're waiting for more? There ain't no more. That was the whole instruction – and represents the whole fulfilment of the Supreme Court's celebrated, self-righteous assurance of meaningful "guided discretion" in capital sentencing.)

- And after emphasizing in 1976 that appellate review to assure regularity was a major safeguard against arbitrary capital sentencing, the Court turned around in 1984 (in *Pulley v. Harris*) and held that appellate review of capital sentencing for proportionality or regularity isn't constitutionally required at all.

In short, the procedural safeguards that are supposed to assure fairness and even-handedness in capital sentencing are as gross a version of the Big Lie as constitutional jurisprudence or even politics anywhere exhibits.

But that is the least of it. Because *all* – repeat, *all* – of the putative constitutional safeguards and the statutory safeguards that are supposed to surround the capital defendant at trial are waived, forfeited and forever lost unless the defendant's lawyer invokes them at trial; and in most cases in most States, defense counsel are grossly ill-equipped or handicapped, or simply too incompetent to make any real use of the defendant's theoretical rights.

I won't regale you with the horror stories that appear in any collection of capital case reports, about defense lawyers sleeping in the courtroom, drunk throughout their client's trial for his or her life, utterly ignorant of the law, utterly uninformed about the facts, appointed to defend a death case with no previous trial experience, and so forth. These cases happen, but the more ordinary situation is conscripted lawyers paid so little for their services that they would be receiving less than the federal minimum wage if they devoted to their capital cases anything remotely approaching the number of hours that the case requires – and they would consequently cripple their practices and impoverish

themselves for the dubious satisfaction of attracting local hostility as the defender of some notorious, obnoxious public enemy. Or else, public defender offices so overburdened by caseload pressure and strained budgets that they cannot conceivably mount a viable defense to capital charges. Here is how a report supporting the ABA's proposed moratorium on capital punishment puts it:

> ". . . Many death penalty states have no working public defender systems whose resources might parallel those of the district attorneys' offices. Some states simply assign lawyers at random from a general list. The result, more often than not, is that a capital defendant's life is entrusted to an underqualified and overburdened lawyer, who may or may not have any experience with criminal cases. Some jurisdictions use 'contract' systems, which typically channel indigent defense business to attorneys who agree to handle all the indigent defense work in a particular area for a flat fee. Contracts are often awarded to the . . . lowest [bidder]. . . . Also, any money spent on investigation and experts reduces the fee that the contract attorneys earn. Still other states use public defender systems, which often employ remarkably dedicated attorneys who specialize in criminal law. Although in theory public defender systems may appear equipped to provide quality representation for indigent clients, overwhelming caseloads and inadequate funding frequently make effective representation impossible."

Yet the Supreme Court has consistently held that the constitutional standard for effective assistance of counsel is so lax that any law school graduate with an I.Q. twenty points higher than his blood alcohol level can pass it, and has repeatedly held that capital defendants represented by lawyers who knew no law, investigated no facts, and had trouble recognizing their client at trial because they had only met him once before, had succeeded in forfeiting all of the client's legal and factual claims by failing to present and preserve them at trial.

Little wonder, then, that the unfair and inequitable administration of the death penalty has continued unabated – and, indeed, gotten worse – despite the Supreme Court's confidence and promise in 1976 that that was all ancient history. Little wonder that capital sentences continue to be meted out almost exclusively to the poor and deprived, social outcasts and pariahs, the products of ghetto schools that did not teach and of reform schools that did not reform, and of all of the other failings of our affluent society which can spend millions for capital prosecution but begrudges pennies for adequate childcare or nutrition or mental-health care or decent schooling for today's children of poverty who will be tomorrow's death row inmates. Little wonder, either, that the racially discriminatory patterns of capital sentencing that we proved in Georgia in the *McCleskey* case in 1987 have since been found again in detailed and sophisticated studies of murder prosecutions in Philadelphia, Pennsylvania – and in Maryland, Missouri, Kentucky, and other States – and have been corroborated by nationwide data analyses conducted by the country's leading criminal justice researchers and approved by the General Accounting Office. And little wonder, last of all, that the Supreme Court wilfully closed its eyes to this evidence of post-1976 racial discrimination in the *McCleskey* case, saying that, yes, the statistical evidence did suggest that race was a determinative factor in sentencing convicted murderers to life or death, but, no, that can't be held to violate the Equal Protection Clause of the Constitution unless a defendant proves that his or her own particular prosecutor or jurors acted with subjective, invidious, racial animus. Said Justice Powell, speaking for the Court: *We have already given these folks so many wonderful procedural protections; how dare they come back to us now and offer to prove that the protections don't work? Equal Protection, indeed! Let them eat Due Process!*

It is against the monstrous blindness and complacent injustice of the capital punishment machine that the SCHR's lawyers and their comrades in the death-penalty-defense community contend daily. They do this in the hope and in the faith that at least our children's children will see a time when the criminal justice systems of America need no longer invent hypocrisies to absolve themselves of practicing abominations.

But is this hope well founded? What, you may ask, has the work of these lawyers achieved, since we have plainly lost considerable ground in the overall struggle during the past 30 years? Sure, the zeal of these lawyers is commendable, but what reason do we have to applaud the results of their efforts? Let me close with three good reasons to be proud of what they are doing.

First, we are still winning some cases despite it all. And in every case we win, some human being – some rich and complex reservoir of life and of capacity to grow – remains alive a little longer. He or she is usually no saintly figure, but neither is s/he the Satan figure that the prosecution has concocted on the basis of the worst moments of the defendant's life. All of us who have had clients spared from execution know how much that means – whether these men and women are ultimately released from prison or are merely allowed to live in prison until some more infallible Divinity than prosecutors and jurors and Supreme Court Justices by a vote of five-to-four say they should live no longer. One life is only one life, certainly, but it is nothing less than yours or mine.

Second, even when we lose cases, we have tried to thwart injustice and have given at least a little meaning to the aspiration for justice. Often we have been the only person in our client's life who did not sell him out, or sell him short, or betray him. We have failed to save him from extermination, but we have made a genuine effort, as no one else in this society has done. He is owed, I think, at least that much.

Finally, let me repeat that it **is** hypocrisy that we are fighting in the last analysis. It is wilful blindness to injustice; and we abet that blindness more by refusing to expose it than by exposing it in vain. Every factually and legally sound claim that we put forward on behalf of a condemned inmate and that the courts reject will continue to speak in the court of history long after our client is dead. And the court of history will have much less toleration for hypocrisy than today's ephemeral courts, elected or appointed.

Thank you very much.