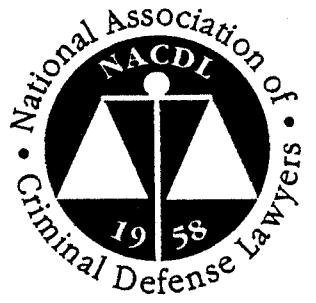

STATEMENT OF

GERALD H. GOLDSTEIN, ESQUIRE

ON BEHALF OF THE

NATIONAL ASSOCIATION
OF CRIMINAL DEFENSE LAWYERS

BEFORE THE

SUBCOMMITTEE ON CRIME
AND CRIMINAL JUSTICE
OF THE
HOUSE JUDICIARY COMMITTEE

REGARDING

HABEAS CORPUS REFORM

JANUARY 19, 1995

The National Association of Criminal Defense Lawyers (NACDL) is the only national bar association devoted exclusively to those who practice criminal law. Founded in 1958, NACDL has over 8,000 members nationwide and is affiliated with 70 state and local criminal defense bar associations representing more than 25,000 criminal defense lawyers. The goals of NACDL include promoting the proper and fair administration of justice; fostering, maintaining and encouraging the integrity, independence and expertise of defense lawyers in criminal cases; preserving, protecting and defending the adversary system of justice and the Constitution; and ensuring justice and due process for persons accused of crimes.

Gerald H. Goldstein

Gerald Harris Goldstein is a native of San Antonio, Texas. He graduated from Tulane University in 1965 then attended the University of Texas School of Law. He graduated in 1968 and has devoted his practice since that time to the representation of those accused of crime. He is admitted to practice before the state courts of Texas and numerous federal district courts, U.S. Courts of Appeals and the United States Supreme Court. He is certified as a criminal law specialist by the State Bar of Texas Board of Legal Specialization. In addition to his practice he serves as an Adjunct Professor of Law at the University of Texas School of Law and lectures frequently on criminal law and procedure at continuing legal education seminars throughout the United States. He has served as appellate counsel in numerous death penalty cases and has been counsel of record for NACDL as *amicus curiae* in several important controversies before the U.S. Supreme Court. His law firm, Goldstein, Goldstein and Hilley, devotes approximately fifteen percent of its time to *pro bono* work. He is currently the President of NACDL.

Mr. Chairman and members of the Subcommittee on Crime and Criminal Justice:

Thank you for affording the National Association of Criminal Defense Lawyers (NACDL) an opportunity to provide some perspective on the historical systemic changes being proposed to the federal law on habeas corpus. This area of law represents one of the fundamental pillars supporting the legitimacy of the legal system of this country. Essentially, it serves as the criminal justice system's "failsafe" mechanism, the last (and in some instances only) meaningful chance to ensure that state convictions and death sentences have been imposed within the limits of the federal Constitution.

Title I of the Taking Back Our Streets Act, H.R. 3 (known as the Effective Death Penalty Act) is designed to prevent those with the greatest need -- the poor, African Americans, and the innocent -- from obtaining review of their state convictions by federal judges whose lifetime tenure insulates them from electoral politics and the seismic fluctuations of public opinion polls.

Habeas corpus "reform" is not the invention of the new Republican majority. Systemic change has been hotly debated during the last several congressional sessions.

The good news is that the discussion has provoked some thoughtful research into the historical role and the modern-day application of the writ, particularly in capital cases. The bad news for the nation is that to the extent the process needs revision, Title I of H.R. 3 exploits public misunderstanding about the Great Writ, exacerbates the procedural morass and does nothing to address the greatest crisis in capital litigation -- the failure of states to appoint qualified, adequately compensated counsel at the trial level.

In 1991, Columbia University Law School Professor James S. Liebman, one of the nation's foremost authorities on habeas corpus, and John J. Curtin, Jr., then President of the American Bar Association, testified before the Judiciary Committee of the United States Senate which was considering various proposals for habeas reform. The authors of the Contract with America, and for that matter all Americans, would be well served to revisit this text. The testimony carefully traces the history and the historical import of the Great Writ that "has defined Anglo-American law since the Magna Carta and that remains today the greatest legacy of that law to the world." [1]

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[1] Statement of John J. Curtin, Jr., and James S. Liebman on behalf of the A.B.A. before the Committee on the Judiciary of the

Liebman and Curtin's testimony reminds us that habeas corpus has often been the only remedy available to the federal courts to enforce fundamental civil liberties. To cite but a few examples, the writ has been the means by which prosecutions motivated by the race of the defendant were halted,[2] convictions based on knowing reliance on perjured testimony were overturned,[3] coercion in obtaining confessions and guilty pleas was precluded,[4] systematic exclusion of blacks from juries was ended,[5] and a defendant's right to competent trial counsel was assured.[6]

The writ of habeas corpus is an easy scapegoat. It has come to be synonymous with the simplistic, mistaken refrain that delay in carrying out death sentences is both commonplace and unreasonable. Habeas corpus is primarily identified with capital defendants who, having already been tried and convicted, are seen

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United States Senate concerning Fairness and Efficiency in Habeas Corpus Adjudication, May 7, 1991, p. 6.

[2] See Yick Wo v. Hopkins, 188 U.S. 356 (1886).

[3] See Mooney v. Holohan, 294 U.S. 103 (1935).

[4] See Walker v. Johnston, 312 U.S. 275 (1941); Waley v. Johnston, 316 U.S. 101 (1942); Leyra v. Denno, 347 U.S. 556 (1954); Reck v. Pate, 367 U.S. 433 (1961).

[5] See Brown v. Allen, 344 U.S. 443 (1953).

[6] See Kimmelman v. Morrison, 477 U.S. 365 (1986).

as entitled to no more than the swiftest execution possible. Perhaps too, in this era of anti-immigrant sentiment, those who come to Washington determined to bury habeas corpus, are counting upon legislators to reject anything that carries a foreign-sounding name.

H.R. 3 Does Not Restore Habeas Corpus as a Meaningful Remedy for the Redress of Meritorious Federal Constitutional Claims.

For death row inmates, access to federal habeas relief is now on the other side of a procedural hornet's nest constructed over the last 17 years by the United States Supreme Court. In 1989, following an exhaustive, nation-wide study of the subject, the American Bar Association Criminal Justice Section's Task Force on Death Penalty Habeas issued its report.[7] The study found that the Court's decisions have made an already complex area of practice labyrinthian. They have thrown great confusion into settled areas of the law, created many new issues for the parties to fight over, and erected procedural obstacles that delay and frequently preclude federal courts from reaching the merits of valid constitutional claims.

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[7] 40 American University Law Review 1 (1990).

But a few in what is now a long list of judicially-created restrictions on federal habeas include the following: A prisoner cannot obtain a hearing in federal court on a Fourth Amendment claim where there has been been a "full and fair" hearing in state court, regardless of the correctness of the state court's ruling. Indeed, the Supreme Court has severely limited the opportunity for an evidentiary hearing in federal court on any claim if there has been some sort of hearing on the issue in state court. State procedural rules are rigidly applied to bar an inmate from being heard in federal court, even where the failure to comply with those rules was due to ineptness by his attorney. The Supreme Court has drastically narrowed the application of evolving constitutional law to largely exclude cases reviewed on habeas corpus. No matter how compelling the evidence that comes to light, state prisoners are, for all practical purposes, now limited to one petition for writ of habeas corpus.[8]

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[8] Some of the more significant in what is now a long list of judicially-created restrictions on federal habeas include the following: Where the state has fully and fairly litigated a Fourth Amendment claim, a state prisoner cannot obtain relief in federal court based upon a claimed unconstitutional search and seizure. Stone v. Powell, 428 U.S. 465 (1976). Where the state requires defense counsel object to evidence at the time it is offered by the prosecutor (a "contemporaneous objection" rule), failure to make a timely objection to the introduction of incriminating statements bars federal habeas review, absent a showing of cause for the non-

Stephen Bright, Director of the Southern Center for Human Rights in Atlanta and counsel in dozens of capital cases at the

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compliance and a showing of actual prejudice that resulted to the defendant. Wainwright v. Sykes, 433 U.S. 72 (1977). There is no federal constitutional right requiring the states to appoint counsel for death row inmates seeking post-conviction review in state court. Murray v. Giarratano, 492 U.S. 106 (1989). With two exceptions, new rules of constitutional law do not apply retroactively to cases on habeas review. Teague v. Lane, 109 S.Ct. 1060 (1990). The definition of a "new rule" under Teague is to be construed broadly (Butler v. McKellar, 494 U.S. 407 (1990)) and the two exceptions are to be narrowly applied. Saffle v. Parks, 494 U.S. 484 (1990). No successor petition based on new claims may be heard unless the petitioner can show cause for failure to bring the claim earlier and actual prejudice; this rule effectively limits petitioner to one federal habeas. McCleskey v. Zant, 111 S.Ct. 1454 (1991). The failure of counsel to file timely a state habeas petition does not constitute cause to excuse counsel's omission because there is no constitutional right to a lawyer in these proceedings. Coleman v. Alabama, 111 S.Ct. 2546 (1991). A petitioner is entitled to an evidentiary hearing on federal habeas only upon a showing he had cause for failure to develop a record in a state hearing and suffered actual prejudice as a result. Keeney v. Tamayo-Reyes, 112 S.Ct. 1715 (1992). The "harmless error doctrine" has been relaxed in habeas corpus. Previously, relief was denied only if the error in state court was "harmless beyond a reasonable doubt." Now, relief can be denied unless it is shown that the constitutional error that occurred at trial had a "substantial" effect on the verdict. Brecht v. Abrahamson, 113 S.Ct. 1710 (1993).

For a more comprehensive analysis of the impact of judicially created preclusion doctrines, see Statement of George Kendall, Esq. (Assist. Counsel, NAACDP Legal Defense & Educational Fund, Inc.) before the Subcommittee on Civil & Constitutional Rights of the Committee on the Judiciary of the United States House of Representatives concerning the Reform of Habeas Corpus Review Process, pp. 14-33 (Oct. 22, 1993).

trial and postconviction level reminds us:

> The rights protected by federal habeas corpus -- those set out in the Bill of Rights -- are not a collection of technicalities. . . They are the most precious birthright of every American, rich and poor, to be treated fairly and justly in the courts. . . On the other hand, the procedural barriers to habeas corpus which have been erected by the United States Supreme Court since 1977 **are** technicalities. They are not the work of Jefferson, Madison and Henry, but judicially created rules which often frustrate vindication of the Bill of Rights. . . [9]

Habeas corpus review by the federal courts is essential for enforcement of the Bill of Rights. Wisely, the ABA Task Force recommended chopping down the procedural thicket to ensure that federal courts are able to act expeditiously in reaching the merits of habeas petitions. H.R. 3 discards this sensible and well-researched advice.

Any congressional action should simplify the postconviction review process. Among the measures omitted from Title I of H.R. 3 which Congress should enact are the following:

1. Codify the **de novo** standard of review in federal court. Congress should guarantee that, once a petition is properly before the district court, a federal judge has the duty to make an

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[9] Statement of Stephen B. Bright concerning Habeas Corpus to the Subcommittee on Civil and Constitutional Rights, Committee on the Judiciary, United States House of Representatives, May 20, 1993, p.17.

independent determination of a prisoner's constitutional claims.

2. Restore the former harmless error standard of Chapman v. California, 386 U.S. 18 (1967) replaced in Brecht v. Abrahamson, supra. If a habeas petitioner can prove that his conviction or sentence was obtained in violation of the constitution, the state should not be permitted to benefit from this fundamental violation unless it can show the error was "harmless beyond a reasonable doubt."

3. Overturn the Supreme Court's decision in Teague v. Lane, supra, that has caused such judicial confusion. Return to the unambiguous, traditional, easily applied meaning of "new rule".

4. Reject the decision in Keeney v. Tamayo-Reyes, supra, so that federal courts do not depend upon flawed and unreliable fact-findings made in state court. Establish a rule making it clear that, at least in the original habeas proceeding, the district court may receive evidence to ensure that its decision is fully informed.

5. Declare that a defendant shall not have to pay with his life when his inept lawyer has failed to meet a state procedural law. (See Coleman v. Thompson, supra.) Restore the power of the federal court to excuse a procedural default where the petitioner shows the default was the result of counsel's neglect or

ignorance.[10]

6. Insist that under our system of justice the clock never runs out for those who are factually innocent. Congress should respond to the Supreme Court's decision in Herrera v. Collins[11] by providing a directive to federal courts that where a claim of innocence is sufficiently pleaded and supported, the state must respond and a hearing be held.

H.R. 3 Does Not Address the Root Problem of Inadequate Trial Counsel

Contrary to popular belief that most death penalty cases are not final for a dozen or more years, the ABA Task Force found that the current average time from sentence to execution is less than half that time. After taking testimony from prosecutors and defense attorneys, the Task Force concluded that "much of the delay in carrying out the death sentences occurs at the state level;

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[10] "The [ABA] Task Force found -- with no exceptions -- that procedural defaults are not committed by strategically astute (if unethical) lawyers who intentionally "sandbag" the state courts in service of their clients, but rather by ill-prepared, inexperienced, and ignorant lawyers who inadvertently do so to the great detriment of their clients." Statement of Curtin and Liebman, supra, pp. 48-49.

[11] 224 S.Ct. 853 (1993).

other aspects of the 'delay' are both indispensable and desirable to allow for solemn and studied scrutiny."[12] While the reasons for delay are complex and some are disputed, the Task Force determined that the single, outstanding cause is the states' refusal to train, appoint and adequately compensate trial lawyers who are qualified to represent indigent defendants.

The findings of the Task Force, as summarized in Curtin and Liebman's testimony, bear repeating. They described "a legal process stood on its head."

> Inadequate, often grossly inadequate, resources are devoted to state court trials, appeals, and postconviction review of capital cases. At least six States have a maximum fee of $1500 or less for appointed counsel to try a capital case -- a fee that many lawyers would find insufficient to permit adequate representation in routine drunk-driving cases. Only one or two States provide full compensation. A number of States also cap reimbursable investigative expenses at $100 or $500. Typically, counsel handling state postconviction petitions receive **no** remuneration.
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> Poor compensation almost inevitably means that virtually the only lawyers who are available to handle capital cases are inexperienced and ill-prepared and that the few more competent lawyers who become involved cannot develop any expertise because they are financially unable to handle more than one capital case. Not surprisingly, therefore, the inexperienced and inexpert counsel who handle many of the cases frequently conduct inadequate factual investigations, are unable to keep abreast of the

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12 Statement of John P. Curtin, Jr., and James S. Liebman supra, p. 37.

complex and constantly changing legal doctrines that apply in capital litigation, and mistakenly fail to make timely objections to improper procedures. Indeed, the Task Force heard overwhelming evidence of incompetent representation in death cases -- ignorance of death penalty law, overlooked objections, failure to present mitigating evidence, failure to file briefs on appeal, and similar deficiencies.

What is the result of the States' failure to provide adequate representation in state trial, appellate, and postconviction proceedings? Most importantly, incompetent trial and appellate representation make it necessary to pour massive amounts of resources into federal habeas corpus review conducted by the reasonably compensated counsel that Congress made available in habeas corpus proceedings in the Anti-Drug Abuse Act of 1988. The high level of constitutional error implanted in capital trials and appeals by uncompensated, inexpert, and ill-prepared counsel has required the federal courts to overturn and order retrials of more than 40 percent of the post-1976 death sentences that they have reviewed in habeas corpus proceedings. The expensive and time-consuming proceedings necessary to uncover that astonishing number of constitutional violations and to retry and re-review all those cases are without doubt the single largest cause of delay in capital litigation.[13]

The frequency with which capitally charged defendants go without minimally effective representation, much less adequately funded, vigorous advocacy, is a national scandal. "In six of the seven states where the death penalty is most often imposed --

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[13] Statement of John J. Curtin, Jr., and James S. Liebman supra, pp. 33-34. See also ABA Task Force report, supra, 40 American University L. Rev., pp. 64-92; Statement of Stephen B. Bright, supra; and Statement of George H. Kendall, supra, pp. 2-8, for dozens of specific examples of the inadequacy defender services in those states where the death penalty is most frequently applied.

Alabama, Georgia, Louisiana, Mississippi, Virginia and Texas -- there is no statewide public defender system." [14] A report in The Advocate published by the Kentucky Department of Advocacy revealed that "one-fourth of those under a death sentence in the state at the beginning of 1989 were represented at trial by lawyers who were since disbarred or who resigned rather than face disbarment." [15]

The time limits Title I of H.R. 3 proposes for filing petitions in federal court are unrealistic, unreasonable and unworkable. (28 U.S.C. § 2244 and 2258.) Given the woefully deficient trial representation afforded defendants in most death penalty states, the superimposition of rigid timetables at the federal habeas level promises to lead to more missed deadlines and miscarriages of justice.

Title I or H.R. 3 mandates an accelerated track (180 days) for filing of federal petitions by inmates from states which have adopted a system of appointment and compensation of "competent" counsel in state postconviction proceedings. (28 U.S.C. §2256 et

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[14] Debra Cassens Moss, "Death, Habeas and Good Lawyers: Balancing Fairness and Finality", ABA Journal, Dec. 1992, 83-86.

[15] Id. pp. 83-86.

seq.) In other words, indigent death row inmates who are provided attorneys to pursue state habeas relief must file their petitions in federal court within six months after the conclusion of state postconviction proceedings.

First, six months is not enough time for even the most diligent and skilled attorney to complete such a task.[16] The complexity of legal issues and extensive factual investigation involved in capital litigation do not permit the job to be completed in such a short time. [17]

The Effective Death Penalty Act requires only that states opting into these expedited timetables provide a "mechanism for the appointment, compensation and payment of reasonable litigation expenses of competent counsel" in state postconviction proceedings. (28 U.S.C. § 2256.) Its terms offer no guidance, much less the sorely needed directive to the states, that defense attorneys meet specific training and experience standards, be assured expert and

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[16] Vivian Berger, "Justice Delayed or Justice Denied? -- A Comment on Recent Proposals to Reform Death Penalty Habeas Corpus," 90 Colum. L. Rev., 1665, 1696 n. 197 (1990).

[17] Michael Mello and Donna Duffy, "Suspending Justice: The Unconstitutionality of the Proposed Six-Month Time Limit on the Filing of Habeas Corpus Petitions by State Death Row Inamtes, 18 N.Y.U. Rev. L. & Soc. Change 451, 487 n. 6, 490-491, 497 (1990-1991)

investigative services and be fully compensated at an hourly rate of commensurate with the expertise and responsibility inherent in representing capital defendants.[18] Worse still, the bill fails to seize the appointment power from state court judges who are ever-more susceptible to electoral challenge.[19]

Many NACDL members have witnessed first-hand the effects of incompetent, ill-prepared capital defense lawyers on our criminal justice system. The price of correcting these grievous mistakes is tremendous. Not only is resolution delayed and litigation more costly, but the risk that innocent men and women will be executed increases when they are not adequately represented at trial.

At bottom, H.R. 3 does not address the root problem of

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[18] See American Bar Association Guidelines for the Appointment and Performance of Counsel In Death Penalty Cases, adopted 1989.

[19] Justice John Paul Stevens has express his concern that the "'voice of higher authority' to which elected judges too often appear to listen is that of the many voters who generally favor capital punishment but who have far less information about a particular trial than the jurors who have sifted patiently through the details of the relevant and admissible evidence. . ." Walton v. Arizona, 497 U.S. 369, 713 n.4 (1990), Stevens, J. dissenting); See also Statement of Stephen B. Bright, supra, pp. 6-14 and Statement of George H. Kendall, supra, pp. 11-14, both of which detail examples of independent jurists who have been defeated based primarily upon their opponents' exploitation of the death penalty issue.

inadequate state trial and appellate counsel. Speeding up the process by furnishing competent lawyers **after** trial and direct appeal is like trying to stop massive internal bleeding with a butterfly patch.

H.R. 3 Increases the Likelihood that Innocent Persons Will Be Executed

Our nation's historical commitment to equal justice cannot tolerate a system where the life and death determination is more often a product of chance instead of fundamental fairness. Frequently, the deciding factors in a capital case are race, geography, poverty, and inept lawyering, rather than legal or moral culpability.[20]

Not long ago, two Supreme Court justices who once sanctioned capital punishment rejected it. In 1986, Justice Lewis F. Powell Jr. cast the deciding vote in favor of executing Warren McCleskey.[21] That opinion is best remembered as the Supreme Court's acknowledgement that racial bias is "an inevitable part" of the

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[20] See Stephen B. Bright, "Death By Lottery -- Procedural Bar of Constitutional Claims in Capital Cases Due to Inadequate Representation of Indigent Defendants," 92 West Virginia L.Rev. 679 (1990).

[21] McCleskey v. Kemp, 481 U.S. 2979 (1986).

capital punishment scheme and its astounding conclusion that unrefuted evidence of systemic prejudice does not warrant overturning a sentence of death.[22] McCleskey was executed in Georgia's electric chair on September 25, 1991. After his retirement, Justice Powell announced that if there was any case in which he wished he had voted differently it was McCleskey. Justice Powell went further and said, "'I would vote the other way in any capital case . . . I have come to think that capital punishment should be abolished.'" [23]

Shortly before his retirement in 1994, Justice Blackmun -- who, in 1976, joined in the decision reinstating capital punishment -- wrote:

> . . . [N]o combination of procedural rules of substantive regulations ever can save the death penalty from its inherent constitutional deficiencies. . . The problem is that the inevitability of factual, legal, and moral error gives us a system that we know must wrongly kill some defendants, a system that fails to deliver the fair, consistent, and reliable sentences of death required by the Constitution. [24]

The year before Justice Blackmun's stinging repudiation of the

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[22] Id. p. 312.

[23] Prof. John C. Jeffries, Jr., "A Crisis of Moral Confidence," New York Times, June 23, 1994.

[24] Blackmun, J., dissenting, Callins v. Collins, 114 S.Ct. 1127, 1130 (1994).

death penalty, the Supreme Court in Herrera v. Collins decided that, standing alone, a claim of factual innocence "is not a constitutional claim."[25] The opinion prompted Justice Blackmun to respond, "[T]he execution of an innocent person who can show that he is innocent comes perilously close to simple murder."[26]

On January 2, by a vote of 6 to 3, the United States Supreme Court denied a stay of execution for Dewayne Jacobs who was convicted of kidnapping and murder in Texas in 1987.[27] Mr. Jacobs originally confessed to the killing, but later recanted and said his sister carried out the murder. After trying Jacobs and winning his conviction, the same prosecutor put Jacobs' sister on trial. The prosecutor argued to the jury that he now believed the sister had been the killer and Jacobs had not even known she had a gun, let alone the intent to kill. Jacobs' sister was also convicted. Justice Stevens called the decision "a denial of due process under law."[28] Dissenting from the denial of stay, Justice Stevens wrote:

> . . .[I]t is fundamentally unfair for the State of Texas to go forward with the execution of Jesse Dewayne Jacobs.

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25 224 S.Ct. at 862.

26 Blackmun, J., dissenting, Id. p. 884.

27 Jacobs v. Scott, No. 94-7010.

28 Jacobs. v. Scott, No. 94-17010, 1995 U.S. Lexis 1.

> The principal evidence supporting his conviction was a confession that was expressly and unequivocally disavowed, at a subsequent trial, by the same prosecutor who presented the case against Jacobs. That same prosecutor's office now insists that the State may constitutionally go forward and execute Jacobs. The injustice, in my view, is self-evident. [29]

Dewayne Jacobs was executed in Texas on January 4, 1995.

In 1987, Professors Hugo Adam Bedau and Michael I. Radelet published the results of their research demonstrating that capital punishment necessarily entails an intolerable risk of wrongfully executing those who are factually innocent despite their convictions. Their study documents at least 23 executions of the innocent in the United States during this century.[30] In their updated findings, In Spite of Innocence, they describe more than 400 potential capital cases in which innocent people were shown to have been wrongfully convicted.[31] More than 25 percent of these 400 convictions were obtained by the deliberate participation of prosecutors or law enforcement in coerced confessions, perjured testimony by informants and the suppression of exculpatory

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[29] Ibid.

[30] Bedau and Radelet, "Miscarriages of Justice in Potentially Capital Cases, 40 Stan.L.Rev. 21 (1987).

[31] Bedau, Radelet and Putnam, In Spite of Innocence, (Northeastern University Press 1992).

evidence. Coupled with the lack of resources available to most capital defendants at the trial and post-conviction stages, this staggering record of governmental collusion in gaining wrongful convictions goes a long way to explaining why it takes many years before the truth is uncovered and presented.

As members of Congress are pressed to set deadlines for filing petitions and deciding habeas claims, a review of just how long it has taken to free some of the innocent and how perilously close even they have come to execution is necessary:

In 1978, Gary Nelson was convicted of the rape and murder of a 6-year old girl in Georgia and sentenced to die. It took his appellate lawyers eleven years of work without pay to secure his release in 1991. They succeeded in proving that to win his conviction, the government had used perjured testimony and suppressed evidence of Nelson's innocence.

Joseph Green Brown spent 14 years on Florida's death row before a federal appeals court granted his habeas petition, having determined that the prosecution deliberately concealed key evidence from the trial jury. At one point, Brown came within fifteen hours of execution. After the federal court ordered a new trial, the prosecutor declined to retry him and he was released.

Randall Dale Adams' wrongful conviction, also based on

perjured testimony, for killing a Dallas police officer inspired the film The Thin Blue Line. Just days before he was scheduled to die, the Supreme Court of the United States stayed his execution. Adams' sentence was overturned because the Texas death penalty was declared unconstitutional. Subsequently, new evidence was presented, including proof that the prosecution had coerced an eyewitness to identify Adams in a line-up after the witness had initially identified another man. A new trial was ordered, but the state declined to prosecute Adams again. He was released after spending twelve years on death row for a crime he did not commit.

A United States Marine, Kirk Bloodsworth had no prior criminal record when he was arrested in Maryland in 1984 for the rape-murder of a 19-year old based on an anonymous tip and a questionable photo identification. The jury rejected his alibi evidence, convicted him and sentenced him to death. Bloodworth's conviction was reversed, but he was convicted a second time on a retrial. Ultimately DNA evidence exonerated him, proving that two juries had convicted the wrong man.

Even where wrongful conviction is not the product of governmental misconduct, the requisite scientific evidence that could exonerate the defendant is not always available at trial. The trials of most inmates whose release was later won by DNA

analysis concluded many years before the technology was fully developed. The FBI now estimates that in the last several years, since the acceptance of DNA testing, approximately 30 to 35 percent of the more than 4,000 sexual assault suspects subjected to this genetic analysis were excluded as the perpetrators.

James Richardson was sentenced to die in Florida before the Supreme Court decision in Furman invalidated capital punishment in 1972, was released in 1989 after serving 21 years on death row. Volunteer legal counsel proved the prosecution had knowingly introduced false evidence and withheld evidence that would have resulted in Richardson's acquittal.

Clarence Brandley, a black Texas death row inmate, was released in 1990, a decade after his murder conviction, when two white prosecution witnesses admitted that a white man had committed the crime.

Walter McMillian was placed on death row before he was ever tried. He was convicted in 1986 of murder based upon the perjured testimony of two prison inmates and a third individual who was himself a suspect in the killing. The jury sentenced him to life, but the Alabama judge who heard his case imposed a death sentence. Although the other suspect later confessed he had framed McMillian and the prosecution knew of the perjury from other sources, the

government concealed the evidence that would have exonerated McMillian. It took six years of work by attorneys at the Alabama Resource Center to free Mr. McMiillian. If the provisions of the Effective Death Penalty Act had been in place, Walter McMillan, whom the State of Alabama admitted it had wrongly convicted, would have been executed because Mr. Millian had four rounds of habeas appeal before Alabama conceded his innocence.

Clarence Chance and Benny Powell were released in 1992 after spending 17 years in prison for the murder of a deputy sheriff they did not commit. The judge who ordered them freed described their ordeal as a "gross injustice" perpetrated by the Los Angeles Police Department's "reprehensible" behavior in its use of an informant and the unlawful suppression of evidence. California did not have the death penalty in 1975 when Chance and Powell were convicted. Had they been tried before 1972 or after 1977 when capital punishment was reinstated in California, these two men may very well have been executed before being exonerated.

The cost of tireless efforts to free the innocent are enormous and almost never recouped by the volunteer counsel and investigators. In the Chance and Powell case, for example, Centurion Ministries spent more than a half million dollars in unreimbursed fees and expenses during its four and a half year

investigation. Lawyers from two private firms, including a co-chair of NACDL's Committee to Free the Innocent Imprisoned, donated two and a half years of pro bono legal services valued at over a half million dollars.

The ruling in Herrera gave federal district courts little guidance as to how to proceed when presented with a claim of innocence.[32] The habeas provisions of H.R. 3, which are designed to see that executions are carried out by the clock, greatly increase the likelihood that even greater numbers of individuals who have been wrongfully convicted will be killed.

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[32] Herrera, 224 S.Ct. 853.