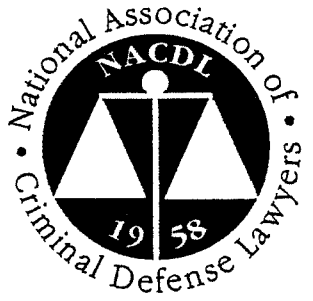

STATEMENT OF

GERALD H. GOLDSTEIN

ON BEHALF OF THE

NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

BEFORE THE

JUDICIARY COMMITTEE OF
THE UNITED STATES SENATE

REGARDING

HABEAS CORPUS REFORM

MARCH 28, 1995

NACDL is a specialized bar association representing the nation's criminal defense lawyers. Its 8,700 direct members and 70 state and local affiliates include private criminal defense lawyers, public defenders, and law professors. The 36-year old association is devoted to ensuring justice and due process for persons accused of crime; fostering the integrity, independence, and expertise of the criminal defense profession; and promoting the proper and fair administration of criminal justice.

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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 Committee:

Thank you for affording the National Association of Criminal Defense Lawyers (NACDL) an opportunity to provide its members' collective, real world perspective on the historical systemic changes that are now being proposed to the federal law on habeas corpus. NACDL represents this Nation's criminal defense lawyers -- and in turn, People accused of having committed a crime. Our bar association's 8,700 direct members and over 20,000 affiliated members of 70 state and local affiliates include private criminal defense lawyers, public defenders, and law professors who have devoted their lives to ensuring that others do not wrongfully lose theirs. Among the standing committees within our organization are the following: continuing legal education; death penalty; ethics advisory; freeing the innocent; indigent defense; postconviction and sentencing; rules of procedure; and state constitutional rights. NACDL respectfully submits that lawyers who have devoted their lives to protecting the integrity of the Nation's criminal justice system and the constitutional rights and liberties of the People (especially in death cases), possess and can provide the Committee with a uniquely realistic perspective about the continuing importance of the Great Writ that prosecutors, full-time academics, and those who devote but part of their primarily civil

and corporate law careers to this cause simply cannot.

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 "fail-safe" 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. Indeed, the Writ of habeas corpus has defined Anglo-American law since the Magna Carta. And for over one hundred years in the country, since the Habeas Corpus Act of 1867, the federal courts have been authorized to independently and meaningfully review the incarceration of state prisoners to determine if the prisoners' sentences (by whatever *means* they may have been obtained) offend the one, preeminent law of this unified Nation -- the United States Constitution.

Sections 508-510 of S.3; S. 623 (the Specter/Hatch habeas bill introduced last Friday, March 24, 1995); *and* H.R. 729; each would prevent those in the greatest need -- the poor, African Americans, and the innocent -- from obtaining meaningful 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 Great Writ, particularly in capital cases. The bad news for the Nation is that to the extent the habeas corpus process needs revision, currently popular proposals exploit public misunderstanding about the Writ, actually exacerbate the procedural morass the proposals purport to tame, and do nothing to address the *greatest crisis in capital litigation* -- the consistent 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 this Committee, which was then considering various proposals for habeas reform. 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]

In short, 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; that is, the fundamental law of this one, unified Nation -- the United States Constitution.

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]

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[1] Statement of John J. Curtin, Jr., and James S. Liebman on behalf of the American Bar Association (ABA), before the Committee on the Judiciary of the United States Senate, concerning Fairness and Efficiency in Habeas Corpus Adjudication, May 7, 1991, at 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).

The Writ of habeas corpus has become an easy scapegoat. It has become 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 often seen as entitled to no more than the swiftest execution possible. Such simplicity ignores, however, the fact that the Writ is actually the best and only sufficient defense of the People's personal freedoms. It secures all of the various rights and liberties promised us in our Constitution. And indeed, a significant percentage of capital habeas petitions are granted when they *are* reviewed on the merits.

Current Proposals Do 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 labyrinthine. 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.

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 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

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[7] *Reprinted in* 40 Am. U. L. Rev. 1 (1990).

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 or 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-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 "*Teague*" 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, which effectively limits petitioner to one federal habeas (*McCleskey v. Zant*, 111 S.Ct. 1454 (1991)); the failure of counsel to timely file 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 that he or she 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 -- so that, where previously, relief was denied only if the error in state court was "harmless beyond a reasonable doubt," now, relief is denied unless it is shown that the constitutional

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

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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 (Assist. Counsel, NAACDP Legal Defense & Educational Fund, Inc.) before the Subcommittee on Civil & Constitutional Rights of e 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).

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

merits of habeas petitions. The blanket "full and fair," "arbitrary or unreasonable," and "unreasonable," "clearly established law" proposals currently under consideration would establish a regime of "rough justice-only," "beat the clock" rules in an area of the law plagued by incompetence and inaccuracy, and yet carrying the ultimate societal sanction -- death. These proposals now under consideration ignore the sensible and well-researched advice of the ABA Task Force.

Any congressional action should simplify the postconviction review process. Among the measures omitted from the current proposals, but 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 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* (see *supra* n.8). 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" (i.e., "win" a conviction) 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* (see *supra* n.8), 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* (see *supra* n.8), 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 or negligent lawyer has failed to meet a state procedural law (e.g., a filing deadline; see *Coleman v. Thompson*, 111 S.Ct. 2546 (1991)). 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

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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* n.1, pp. 48-49.

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 must be held.

Current Proposals Do Not Address the Root Systemic Problem: 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: "much of the delay in carrying out the death sentences occurs at the *state level*; 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 mutli-member (multi-viewed) Task Force nonetheless determined that the single, outstanding cause of "delay" is the *states' refusal* to train,

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

[12] Statement of John B. Curtin, Jr., and James S. Leibman, *supra* n.1, p. 37 (emphasis added).

appoint and adequately compensate trial lawyers who are *qualified* to represent indigent defendants.

The findings of the Task Force, as summarized in the testimony of Mr. Curtin and Professor Liebman, 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 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.
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> 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. For example, "[i]n six of the seven states where the death penalty is most often imposed -- 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,

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[13] Statement of John J. Curtin, Jr., and James S. Liebman *supra* n.1, pp. 33-34 (emphasis added). See also ABA Task Force Report (*supra* n.7, *in* 40 Am. U. L. Rev., pp. 64-92). See also Statement of Stephen B. Bright, *supra* n.9, and Statement of George H. Kendall, *supra* n.8, pp. 2-8, for dozens of specific examples of the inadequate defender services in those very states where the death penalty is *most frequently applied*.

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

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 proposed by the bills now being considered by the Committee for the filing of habeas petitions in federal court (not to mention the unfunded temporal mandates imposed upon the independent, federal Judiciary) are unrealistic, unreasonable and unworkable. 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,[16] more miscarriages of justice and wrongful deaths.

The bills mandate an accelerated track (e.g., 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 brought by indigent prisoners (and, yet, "[t]he ineffectiveness or incompetence of counsel during State or Federal post-conviction proceedings in a

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[15] See *id.* (citing The Advocate's report).

[16] See e.g., *Coleman v. Thompson*, 111 S.Ct. 2546 (1991).

capital case shall not be ground for relief in a proceeding arising under section 2254."). Six months from the conclusion of state postconviction proceedings is not enough time for even the most diligent and skilled attorney to complete the task of filing a federal habeas petition.[17] The complexity of legal issues and extensive factual investigation involved in capital litigation simply do not permit the job to be completed in such a short time.[18]

The current habeas corpus "reform" proposals require 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 post-conviction proceedings." These terms offer no guidance, much less the sorely needed directive to the states, to ensure that defense attorneys meet specific training and experience standards, be assured expert and investigative services, and be fully compensated at an hourly rate commensurate with the expertise and responsibility inherent in

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[17] See generally 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).

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

representing capital defendants.[19] Worse still, the current bills fail to foreclose the attorney-appointment power from state court judges, who are generally quite susceptible to electoral challenge.[20]

Many NACDL members have witnessed first-hand the effects incompetent, ill-prepared capital defense lawyers have upon our country's 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 gravely increases when they are not adequately represented at trial. At bottom, current habeas proposals do not address the root problem of inadequate state trial

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

[20] Justice John Paul Stevens has wisely expressed 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* n.9, pp. 6-14; and Statement of George H. Kendall, supra n.8, pp. 11-14 -- both of which detail examples of independent jurists who have been defeated at the polls based primarily upon their opponents' exploitation of "the death penalty issue."

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.

Current Habeas "Reform" Proposals Increase the Likelihood that Innocent Persons Will Be Executed

Our Nation's historical commitment to equal justice simply cannot tolerate a system where the official determination of who lives and who dies at the hand of the government is more often a product of chance rather than reason, and certainly 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.[21]

Indeed, recently 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.[22] That opinion is most notoriously remembered as the Supreme Court's acknowledgment that *racial bias is "an inevitable*

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[21] See e.g., Bright, *Death By Lottery -- Procedural Bar of Constitutional Claims in Capital Cases Due to Inadequate Representation of Indigent Defendants*, 92 W. Vir. L. Rev. 679 (1990).

[22] See *McCleskey v. Kemp*, 481 U.S. 2979 (1986).

part" of the capital punishment scheme (our Nation's constitutional democracy notwithstanding), and its astounding, compounding conclusion that *unrefuted evidence of systemic prejudice* does not warrant overturning a sentence of death. Mr. 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 while he served on the Court, it was *McCleskey*. And Justice Powell went further: "'I would vote the other way in any capital case . . . I have come to think that capital punishment should be abolished.'"[23]

Similarly, 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 or 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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[23] *Quoted in* Jeffries, "A Crisis of Moral Confidence," New York Times, June 23, 1994.

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

death penalty, the Supreme Court in *Herrera v. Collins* managed to hold that, standing alone, a claim of factual innocence "is not a constitutional claim."[25] That 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, 1995, by a vote of 6 to 3, the United States Supreme Court denied a stay of execution for Dewayne Jacobs, who was convicted of kidnaping 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 Mr. Jacobs and "winning" his conviction, the *same prosecutor put Mr. Jacobs' sister on trial.* The prosecutor argued to the jury that he now believed the sister had been the killer, and that Mr. Jacobs had not even known she had a gun, let alone the intent to kill. Mr. Jacobs'' sister was also convicted. Calling the decision "a denial of due process under law,"[28] and accordingly dissenting from the denial of stay, Justice Stevens wrote:

. . .[I]t is fundamentally unfair for the State of Texas

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[25] 224 S.Ct. 853, 862 (1993).

[26] *Id.* at 884 (Blackmun, J., dissenting).

[27] *Jacob v. Scott*, 115 S.Ct. 711.

[28] *Id.* (Stevens, J. dissenting).

> to go forward with the execution of Jesse Dewayne Jacobs. 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.

Indeed, consistent with what the High Court's decisions occasionally (but increasingly) evidence: Professors Hugo Adam Bedau and Michael I. Radelet have published the results of their research demonstrating that capital punishment in the United States entails an intolerable risk of wrongfully executing those who are factually innocent (despite their convictions). The Bedau and Radelet study documents at least 23 executions of the innocent in the United States during this century.[30] And 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] Even more disturbing, greater than 25 percent of these 400 convictions were shown to have been "won" by

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[29] *Id.*

[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).

the deliberate participation of prosecutors or law enforcement officers in such "tactics" as coerced confessions, perjured testimony by informants and the suppression of exculpatory 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 toward explaining why it takes many years before the truth is (if ever) uncovered and presented.

The National Association of Criminal Defense Lawyers respectfully submits that it should be axiomatic in a free, law-oriented, society that the more terrible the crime, the more careful society should be about convicting and sentencing people (especially sentencing them to die) for having committed it. As members of Congress are pressed to establish "rough State justice-only" rules and set "beat the clock" deadlines for the filing and adjudication of Great Writ petitions, a careful 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 in order:

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 *11 years* of work without pay to secure his release in 1991. His lawyers proved that in order to "win" Mr.

Nelson's 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 was able to grant his habeas petition. The federal appeals court determined that the prosecution in Mr. Brown's case had deliberately concealed key evidence from the jury in his guilt/innocence trial. At one point, Mr. Brown came within 15 hours of execution. After the federal court ordered a new trial to be conducted as to Mr. Brown's guilt, the prosecutor decided Mr. Brown's case was not worth reprosecuting according to the fair rules of procedure imposed by the federal court, and Mr. Brown was accordingly finally released back to his full citizenship -- to his life, his liberty, and his pursuit of happiness.

Randall Dale Adams' wrongful conviction and sentence is one of the few ones about which many people have become aware. His conviction for the murder of a Dallas, Texas police officer inspired the creation of the critically-acclaimed, eye-opening documentary film, *The Thin Blue Line*. Just a few days before Mr. Adams was scheduled by the State of Texas to die, the United States Supreme Court stayed his execution. His sentence was then overturned because the procedures by which the State of Texas

imposed the death penalty -- *while they might have seemed "reasonable"* -- were nonetheless unconstitutional. Subsequent to this determination about the Texas death penalty system in general, and its impact upon Mr. Adams in particular, "new evidence" about the death of the local officer that the "out-of-towner" Mr. Adams was convicted of killing emerged; and this "new evidence" was presented to the courts. This "new evidence" included proof that the prosecution had in fact coerced an eyewitness to the murder to identify the "transient" Mr. Adams in a line-up as the killer of the officer, despite the fact that this eyewitness had already identified another man (a Texas) as the killer. A new trial was ordered, but Texas declined to reprosecute Adams by the light of the "new evidence" of Mr. Adams' innocence. Mr. Adams was finally released, given his life back after having been forced by the State to forfeit *12 years* of it on the State's death row for a crime he did not commit.

Kirk Bloodsworth, a United States Marine, had no prior criminal record when he was arrested in Maryland in 1984 for the rape and murder of a 19 year old -- based on an anonymous "tip" and an at-best "questionable" photo identification. Given this "evidence," the jury rejected Mr. Bloodsworth's alibi evidence, convicted him of the awful offenses and sentenced him to die for

having committed them. Mr. Bloodsworth's conviction was reversed. Still, the government doggedly reprosecuted him, and it was again "successful" in getting a jury to convict him. Yet, ultimately, the evidence of hard science -- DNA evidence -- exonerated him, in the process proving that two juries had convicted the wrong man for a death penalty offense.[32]

James Richardson was wrongfully convicted and sentenced to die by the State of Florida before the Supreme Court decided the 1972 *Furman* case, which invalidated capital punishment. He was released in 1989, after "serving" *21 years* on death row. Volunteer legal counsel proved that the prosecutors of Mr. Richardson's case had knowingly introduced false "evidence" of Mr. Richardson's guilt while withholding actual evidence demonstrating his innocence.

Clarence Brandley, a black Texas death row inmate, was released in 1990 -- *a decade* after his murder conviction -- when

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[32] Even where a wrongful conviction and sentence is not the caused by 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. For example, 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 penetrators.

two white prosecution witnesses finally admitted that a white man had committed the crime for which Mr. Brandley had been convicted and for which he was set to die.

Walter McMillian 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 in question. The Alabama jury presented with this "evidence" convicted Mr. McMillian and sentenced him to spend his life in prison. But the judge who heard his case decided to instead impose the death penalty upon Mr. Brandley. Although the other suspect later confessed he had framed McMillian, and the prosecution knew of this perjury from other sources, the government nonetheless concealed the evidence that would have exonerated McMillian. It took *six years* of tireless lawyering by attorneys with the Alabama Resource Center to free Mr. McMillian. In order to free Mr. McMillian against the enormous power and obstinance of the State, the Resource Center and Mr. McMillian were put through "the paces" of *4 rounds* of habeas appeals before the State of Alabama admitted it had wrongfully convicted Mr. McMillian and sentenced him to die for a crime he did not commit. If the "effective" habeas "reform" proposals now under consideration had been in effect at the time, Mr. McMillian would long ago have been put to death for the crime he did not commit

(while the real killer breathed, if not roamed, free).

As the above review of real life (and death) cases reflects, the cost of tireless efforts to free the innocent are indeed considerable. The monetary costs borne by dedicated lawyers, investigators and other conscientious persons are almost never recouped by these volunteers. In one case, for example, for example, Centurion Ministries spent more than $500,000 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 2 ½ years of pro bono legal services valued at over $500,000.

The ruling in *Herrera* gave federal district courts little guidance as to how to proceed when presented with a claim of innocence.[33] The "rough State justice-only" and "beat the clock" rules now under consideration by this Committee may save some tax dollars -- and even the time and money of those lawyers and other persons of conscience who commit themselves to saving the wrongfully accused and convicted from conviction, prison and death. But at what price? Such congressionally-decreed rules would greatly increase the likelihood that even greater numbers of

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[33] *Herrera v. Collins*, 224 S.Ct. 853 (1993).

individuals (including taxpayers) who have been officially victimized by wrongful convictions and wrongful sentences will be wrongfully killed.[34] And such mandates would result in much more significant, real costs to the People, in the form of the government-forced forfeiture of our precious National inheritance: the constitutional rights and freedoms for which we and our ancestors have on many fields fought and died.

Gerald H. Goldstein

President

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[34] Indeed, the current proposals appear to overturn some of the few Court-recognized safeguards against official wrongful killings of the innocent -- by "overruling" *Schlup v. Delo*, 115 S.Ct. 851 (1995) (by setting a higher standard than that recognized by the Court in that case, relative to proof of "newly" discovered evidence of actual innocence); and *McFarland v. Scott*, 114 S.Ct. 2568 (1994) (by "overruling" the Court-recognized right to a stay of execution in State death cases in states *not* opting to provide mechanisms for "competent" postconviction counsel, while a federal habeas petition is being prepared (the limited right to a stay of execution contemplated by H.R. 729 and S. 623 would only apply to cases from states that have *opted* to provide competent compensated post-conviction counsel; while significant death penalty states like Texas have no such provisions)).