CHAPTER TWO

CESAR FIERRO'S COERCED CONFESSION

Everyone agrees that this case presents a due process violation, the knowing use of perjured testimony.

JUDGE CHARLES BAIRD

At 3 in the morning in August 1979, police in Juarez, Mexico, rapped on the door of the house where the mother and stepfather of Cesar Fierro were sleeping. The two were rousted from their beds and driven to police headquarters. Fierro's mother was beaten; his stepfather was shown a *chacharra*, a device resembling an electric cattle prod, and told it would be used on his genitals. Neither was ever charged with a crime. At 7 that evening, the two were released and sent home.

Americans tend to believe that torture does not occur and that anyone who confesses to a crime must have committed it. Both beliefs are mistaken. The frequency of torture is difficult to document, but as the human rights violations at Abu Ghraib in May 2004 shockingly illustrated, its existence is certain. The inci-

dence of false confessions is in fact subject to some quantification. More than one hundred and forty men have been released from prison on the basis of DNA evidence. In other words, DNA evidence has made it clear beyond argument that these men were innocent of the crime for which they were convicted. Of these exonerees, more than 20 percent signed confessions. This is an astonishing statistic that merits a pause: In nearly one-quarter of the cases where we can be scientifically certain that an innocent man was convicted, the wrongfully convicted inmate has confessed to the crime.

Several groups of people, including lawyers, law enforcement officers, and social scientists, understand why men confess to a crime they did not commit. These men are subjected to brutal interrogations and told that they will be convicted regardless of whether they confess. They are told that they can make things easier for themselves and their families if they admit to the crime. They are fed details of the crime by interrogators to make their eventual confessions believable. Interrogations are not videotaped or even tape-recorded in most jurisdictions, so when the inmate later attempts to disavow the confession, insisting that it was coerced, he can point to no hard evidence that would confirm his assertion.

If you are informed that you *will* be convicted of a murder, and if you have no reason, based on your own life experience, to doubt the police officer's certainty, and if you are also told that if you confess you might not get the death penalty, but that if you continue to deny the crime you certainly will, then—if you are a rational realist—it makes good sense to admit to doing something you did not do. People tend to believe confessions because they cannot imagine that they themselves would ever confess to something they did not do.

In February 1979, six months before Fierro's parents were hauled off to the Juarez police station, authorities in Texas found the

body of Nicholas Castanon, a taxicab driver from El Paso, dumped in a city park. Castanon had been shot in the back of the head. Mexican police found his cab across the border in Juarez. The El Paso police soon arrested two men whom they suspected of murdering Castanon. Eyewitnesses had seen these men abandoning Castanon's blood-stained taxi on the same day that the police had found Castanon's body. For whatever reason, these two men were later released, and the investigation lay dormant for several months.

In late July, after the El Paso police had stopped aggressively working the case, a young man by the name of Geraldo Olague came into contact with Juarez police, either because the police suspected him of committing a series of robberies or because he approached them voluntarily. No one knows for sure. To this date, the circumstances of Olague's contact with Juarez police remain a mystery, for neither Olague nor the authorities will shed any illumination. What is clear is this: Olague told the Juarez police that he knew who killed Castanon.

According to Olague, he and Cesar Fierro, a Mexican national, had hatched a plan to rob Castanon. Olague said that he and Fierro had committed a string of robberies, and this would be another. He said that after taking Castanon's money, Fierro suddenly shot and killed him. According to Olague, Fierro's action took him entirely by surprise. They had planned a robbery, not a murder, and suddenly in July, months after the murder, for no apparent reason, Olague said he felt a sudden need to come clean.

Juarez, Mexico, and El Paso, Texas, seem at times like one big city separated by nothing but a narrow strip of the Rio Grande. Drivers on Main Street in El Paso can look to the south and see into the homes built into the hillside in Juarez. Juarez is poorer, but the cities share a common culture. Although Mexico has no death penalty, and its government considers the sanction barbaric, the Juarez police are notorious along the border for flouting the rights of its citizens in a way El Paso authorities could never get

away with. The two police forces are constrained by different sets of laws and mores, and so they sometimes succeed in avoiding these constraints altogether by dividing the labor. The two forces work hand in glove with one another. So when Juarez authorities called the El Paso police and told them of Olague's statement, the El Paso police immediately traveled to Juarez to arrest Fierro.

That August, once in the custody of the El Paso police, Fierro immediately proclaimed his innocence. He admitted knowing Olague, admitted to participating in various robbery sprees with him, but steadfastly denied having murdered Castanon. Nevertheless, during a lengthy interrogation, Fierro eventually signed a confession that he and Olague had robbed Castanon and that he (Fierro) had then shot him.

Authorities charged Fierro with capital murder. Fierro, too poor to retain his own lawyer, had an El Paso criminal defense lawyer appointed to represent him. From the first meeting with his court-appointed lawyer, Fierro insisted that he had not killed Castanon. The confession, Fierro said, was untrue. The only reason he signed it, Fierro told his lawyer, was that while he was being interrogated in El Paso, the detective conducting the interrogation had put him on the phone with authorities in Juarez. Over the phone, the Juarez police told Fierro, he claimed, that his mother and stepfather, who lived in Juarez, were in police custody.

Fierro had lived most of his life in Juarez. He knew the methods of the Juarez police. He knew what a *chacharra* is. He therefore understood what this implied threat meant: Either Fierro would confess to the murder of Castanon, or the Juarez police would torture his parents. It was an easy choice. He confessed. His mother and stepfather were sent home.

During the initial meeting with his lawyer, Fierro claimed that the El Paso detective who had interrogated him, a man by the name of Medrano, knew that the Juarez police had taken Fierro's

family into custody. Fierro said that Medrano had spoken to the Juarez police on the phone before handing the receiver to Fierro. On the basis of this story, Fierro's lawyer sought to suppress the confession. If the confession was coerced, then the judge could preclude the state from relying on it at trial. If the state could not rely on the confession, then it would almost certainly not be able to obtain a conviction, for there was no evidence, other than Olague's statement, linking Fierro to the crime. There was no physical evidence, no other eyewitnesses who could place Fierro in Castanon's cab.

At the suppression hearing, however, Detective Medrano denied Fierro's story. He said he had never spoken to Juarez authorities about whether they had Fierro's family in custody, and so he could never have used this fact—even if it was true—to threaten Fierro. The trial judge believed Medrano and ruled that Fierro's confession was admissible.

Fierro was convicted and sentenced to death. Because no physical evidence connected Fierro to the crime, his conviction and sentence rested entirely on two pieces of evidence: first, the testimony of Olague, and second, the confession. The confession included details provided by Detective Medrano, like the location and date of the crime, the disposal of the body, and the route Fierro had supposedly taken back to El Paso. Oddly, it also included a statement that his mother and stepfather had nothing to do with the crime.

Olague's testimony was needed to confirm the veracity of the confession, to preclude Fierro from disavowing it. His testimony was essential and, in a word, incredible. For example, neither at the trial nor since the trial has Olague ever explained why he waited nearly half a year before implicating Fierro. He originally told authorities he had known Fierro for only a couple of weeks before the murder of Castanon but later testified that he and Fierro had been committing robberies together for six or seven months. He said Fierro had taken a silver watch from Castanon;

the watch was never found. He said he and Fierro had sold the murder weapon to a rancher south of Juarez, but neither the rancher nor the gun was ever located. He said the cab had skidded out of control when Castanon was shot, jumping the curb and landing in someone's front yard, but no one in the neighborhood heard a gunshot or saw or heard the cab go out of control. During one bizarre moment, while Olague was testifying, he accused a member of the jury of having purchased a stolen CB radio from him. He said that he had committed more than forty burglaries and that the police were aware of them, but that he had been charged with only one offense.

Olague is, to put it bluntly, grossly unreliable, erratic, and apparently mentally unstable. Even Fierro's prosecutor has acknowledged that if all he had to go on was Olague's testimony, he would not have prosecuted the case.

Texas law, like the law of many states, renders it impossible to convict someone of a crime solely on the basis of the testimony of a co-conspirator. This sound rule recognizes the inherent unreliability of testimony from co-conspirators: There is always an incentive for one criminal to shift responsibility for the crime onto his partner. For nonsensical reasons, the Texas Court of Criminal Appeals (the highest criminal court in the state) did not treat Olague as Fierro's co-conspirator. It realized that to do so would undermine Fierro's conviction, and so the court stubbornly refused to use the word "co-conspirator" to characterize Olague. That stubborn refusal, however, does not change the fact that Olague's testimony is unreliable for precisely the same reasons that co-conspirator testimony is. We have no reason to believe him and many reasons not to.

The defense did what it could. It pointed out that Fierro had signed the confession—the details of which were provided by the detective conducting the interrogation—only because he knew what would happen to his mother and stepfather if he did not confess. It called his parents, who testified to the brutal treatment

to which they were subjected. It called Fierro's landlord, who swore Fierro was at home on the night of the killing. The defense did what it could, but it could not overcome a confession that the prosecution insisted was voluntary. The "confession" was undoubtedly a crucial piece of evidence at his trial, perhaps *the* crucial piece of evidence. Without it, it is plausible that Fierro would not even have been convicted, and it is almost impossible to believe that he would have been sentenced to death.

Fierro ended up on death row for one reason only: Shortly after his arrest, a state court trial judge believed that Fierro had given his confession freely. Had that judge believed Fierro, who insisted the confession was extracted from him by threats to harm his parents, had the judge concluded that the detective who conducted the interrogation had been lying or not telling the whole truth, then the state of Texas would have been unable to use the confession against him. It would have had nothing more than the testimony of a deeply disturbed and incredible witness. The state probably would not have prosecuted Fierro at all.

Yet the judge did not believe Fierro; he believed the detective, and the reason is pedestrian. In almost all cases where a criminal defendant says one thing and a police officer says another, the judge accepts the police officer's version. In other words, unless the defendant's lawyers can locate hard evidence that contradicts the police officer's version of the truth, that version will become the accepted one. Fierro's lawyers did not have any hard evidence that would belie the police detective's insistence that Fierro's confession had been voluntary. The reason, however, is not that no such evidence existed; the reason is that the evidence was unknown to them.

A single piece of evidence of immense significance was not presented at the suppression hearing (at which Fierro's lawyer attempted to persuade the court not to admit Fierro's confession). The evidence consisted of a document written by Detective

Medrano while Fierro was in custody. The document indicated that Medrano knew that Fierro's family was in the custody of the Juarez police. This report should have been provided to Fierro's defense team in 1979, but it appears not to have been;[1] the document was not discovered by lawyers representing Fierro until 1994. After locating the report, Fierro's lawyers needed to determine which story was true: the one Medrano had testified to at the suppression hearing or the version reflected in what he had written in the newly located police report.

When Fierro's lawyers caught up with the detective, Medrano was close to death from cirrhosis of the liver. He signed what might be regarded as a deathbed confession: an affidavit swearing that what he had written in the police report was true. Medrano swore, in other words, that he had known that Fierro's parents were in the custody of Juarez police and that he had communicated this fact to Fierro. Medrano finally admitted that he had lied under oath at Fierro's suppression hearing. In other words, he admitted that Fierro's confession was coerced.

Fierro's lawyers then approached the district attorney who prosecuted Fierro. That lawyer signed an affidavit saying that he would not have used the confession had he known it was coerced. He also subsequently expressed the view that Olague was not a credible witness, and that without the confession he would have been unwilling to rest a case solely on Olague's testimony. Fierro's lawyers took these two pieces of evidence—the evidence establishing that Medrano had lied and the evidence that the prosecution would not have used Fierro's confession—to the Texas Court of Criminal Appeals. That court ordered that an evidentiary hearing be held before a judge to determine how Fierro's case should be resolved.

Fierro's lawyers went to El Paso and, over a period of several days, presented the evidence they had acquired. They demonstrated that Fierro's confession was indeed coerced, that the district attorney would not have prosecuted Fierro had he known of

the coercion, and that there was insufficient evidence of Fierro's guilt to convict him, much less sentence him to death. The judge who conducted the evidentiary hearing concluded that Fierro should receive a new trial, and he recommended to the Court of Criminal Appeals (CCA) that it order a new trial.

Under state law, the decision of the judge who conducted the hearing operated as a recommendation to the CCA, rather than as a legal order. Fierro's lawyers therefore had to persuade the CCA to adopt the lower court judge's recommendation. At the oral argument before that court, lawyers from the El Paso district attorney's office took the position that the trial judge had erred in his conclusion that the confession was coerced, but that even if his conclusion was correct, Fierro should remain on death row because there was no reason to disbelieve Olague.

In a five-to-four decision, the CCA overruled the conclusion of the lower court judge. All nine members of the court agreed that Medrano had lied at the original suppression hearing in 1979. They agreed, in other words, that Fierro's constitutional rights had been violated and that his confession was therefore involuntary. Yet five members of that court also concluded that Fierro would probably have been convicted anyway and that the error pertaining to the coerced confession and Detective Medrano's perjury was therefore all "harmless." The Supreme Court of the United States declined to hear Fierro's appeal.

To understand fully why Fierro remains on death row, we must examine two radical legal developments, one of which arose early in Fierro's legal ordeal, and the other later.

It begins with a crime hundreds of miles away from El Paso, Texas. In September 1982, in Mesa, Arizona, an eleven-year-old girl named Jeneane Michelle Hunt was murdered. When police found her, she had a ligature around her neck and had been shot twice in the head with a large-caliber weapon. Police could not determine whether she had been sexually abused because her

body was too decomposed. Suspicion turned to her stepfather, Oreste Fulminante, who had called the police two days earlier to report that Jeneane was missing. Yet despite inconsistencies in Fulminante's story, police in Arizona did not believe they had sufficient evidence against him, and Arizona did not immediately indict Fulminante for Jeneane's murder.

Fulminante left Arizona and traveled to New Jersey, where he was convicted of felonious possession of a weapon. He wound up at a prison in New York, where he began spending several hours a day with another inmate, Anthony Sarivola, a former police officer who had been convicted and sentenced to prison for extortion. While in prison, Sarivola became an informant for the FBI. He heard rumors that Fulminante had been suspected of the murder of Jeneane Hunt in Arizona, and he asked Fulminante about these rumors a number of times. Fulminante at first denied any knowledge or involvement, but his denials were vague and inconsistent, and they did not quiet Sarivola's suspicions. In the meantime, other inmates had also heard the rumors and were threatening to harm Fulminante—child murderers are not any more popular inside of prison than they are outside. Sarivola told Fulminante that he could protect him from the other inmates, but only if he knew exactly what had happened to young Jeneane. Fulminante confessed to Sarivola. He told him that he had driven Jeneane out into the desert on his motorcycle, strangled her, and sexually assaulted her. He made her beg for her life, then shot her twice in the head. Fulminante was returned to Arizona. On the basis of the statement he gave to Sarivola, as well as a second statement he gave to Sarivola's wife, Fulminante was convicted and sentenced to death.

It is hard to have much sympathy for Fulminante, but in America we do have rules. One rule is the Fifth Amendment to the Constitution, which among other things prohibits the police from coercing a confession. In appealing his conviction, Fulminante argued that his confession had been coerced, and that the

state should therefore not have been permitted to use it against him. In 1991 the case of *Arizona v. Fulminante*[2] reached the Supreme Court. The first question for the Court was whether the confession had in fact been coerced or whether Fulminante had spoken freely and of his own volition. Only if the Court concluded that Fulminante's statement had indeed been coerced would it be required to address the second question, which involved the legal consequences of using a coerced confession.

Turning to the first issue, the Court held that the confession was coerced. Fulminante's slight stature meant that he was unable to defend himself in prison; consequently, the Court believed that his size made him especially vulnerable to threats from other inmates. The Court also observed that Fulminante had been in prison before, which meant that he had firsthand knowledge of the type of violence to which he might be subject. The Court took notice of the highly coercive environment in which Fulminante resided, and it further insisted that Fulminante's low intelligence level rendered him still more susceptible to threats. In view of all these factors, the Court concluded that when Sarivola had offered to protect Fulminante in exchange for Fulminante's sharing of the details of Jeneane Hunt's murder, Sarivola had coerced him into confessing. Fulminante spoke to Sarivola not because he chose to do so freely, but because he was scared.

Having thus answered the coercion question, the Court turned to the second issue. Contrary to popular myth, the mere fact that a constitutional violation has occurred at a trial does not necessarily mean that the prison inmate will have his conviction reversed. The Supreme Court has divided the universe of errors into two categories: structural errors and trial errors. A structural error is thought to undermine the fundamental idea that the trial must be fair. Consequently, if a structural error occurs, the defendant automatically receives a new trial. The universe of structural errors, however, is exceedingly small. Indeed, only two kinds of errors are regarded as structural. First, if the state de-

prives a defendant of a lawyer—that is, if the state physically prevents the defendant's lawyer from attending the trial—then a structural error has occurred, and the defendant is entitled to a new trial. Second, if the judge presiding over the trial is biased, then another structural error has occurred. But aside from these, all errors are said to be trial errors.

The characterization of almost all errors as trial errors has great practical significance; whereas the occurrence of a fundamental error means that the defendant will automatically get a new trial, the occurrence of a trial error does not necessarily lead to a new trial. Instead, when confronted with a trial error, an appellate court performs what is known as harm analysis; the court asks whether the error was harmful, and it answers this question by speculating on whether the jury would have reached the same verdict had the error not occurred.[3]

At the time that Fulminante's case reached the Supreme Court, most courts and commentators—and four justices of the Supreme Court—believed that a coerced confession, like the physical denial of counsel or a biased judge, represented a structural error, meaning that if in fact the police had coerced a confession, the defendant would automatically receive a new trial, at which the coerced confession could not be used as evidence. In the *Fulminante* decision, however, the Supreme Court ruled to the contrary. By a vote of five to four, in a decision authored by Chief Justice Rehnquist, the Court concluded that even coerced confessions fall into the category of trial errors. A defendant who is convicted on the basis of a coerced confession no longer automatically receives a new trial. Rather, when faced with a coerced confession, the role of the appellate court is to review all the other evidence and determine whether the other evidence is sufficient to support the jury's verdict. As Chief Justice Rehnquist concluded, even a defendant who is convicted on the basis of a coerced confession is not entitled to a new trial if the coerced confession was "harmless," where "harmless" means that the ap-

pellate court reviewing the case believes that "the evidence other than the involuntary confession was sufficient to sustain the verdict."[4]

Death penalty cases, like life itself, owe much to the sheer luck of timing. If Fierro's case had arisen ten years earlier, prior to the Supreme Court's decision in *Fulminante,* Fierro would have been entitled to a new trial once he established that his confession had been coerced. As it happened, however, Fierro did not reach the federal courts until after the Supreme Court had decided *Fulminante.* As a result, although he could prove that his confession had been coerced, this, by itself, did not entitle him to a new trial. He also had to prove that without the confession, the state had not presented sufficient evidence to establish his guilt beyond a reasonable doubt. Four judges on the Texas Court of Criminal Appeals thought he had sustained that burden, but five believed that the evidence of Olague was enough to sustain Fierro's conviction and sentence. Not a single significant claim in Olague's testimony could be corroborated, but the highest state court nonetheless regarded that testimony as sufficient to lead to an execution. But the state courts do not have the final say; the federal courts do. This is where a second radical legal development becomes central to understanding Fierro's case.

Fierro's case is not the only one that has been affected by this legal development. It is fair to say that virtually every death penalty case in America has felt it. As I have pointed out, between 1976, when the death penalty was reinstated, and 1995, federal courts reversed either a conviction or a sentence in nearly one out of every two death penalty cases.[5] This is obviously a stunning statistic. It means that a constitutional error that could not be characterized as harmless has occurred in nearly half of all death penalty cases.

There has long been a basic conflict in federal habeas corpus

review. On one hand, the federal courts have a powerful interest in vindicating federal constitutional protections. On the other hand, states have an interest in what is known as finality. Defenders of the value of finality claim that there comes a point at which a convicted defendant should no longer be permitted to compel the state to expend resources in defending the legality of his conviction or sentence. Out of obeisance to the value of finality, the Supreme Court, beginning in the early 1980s, began to restrict the cluster of claims that could be raised in habeas corpus proceedings. The Court placed substantive limits on the types of claims that could be raised by inmates (for example, claims that evidence was obtained without a proper warrant cannot be brought in federal habeas corpus proceedings), as well as procedural restrictions on how and when certain claims must be raised. Finally, during the Clinton administration, Congress moved to codify these restrictions.

In 1996 Congress enacted the ominously and appropriately entitled Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). For purposes of federal habeas corpus—appeals brought by death row inmates who were convicted in state court (as opposed to federal death row inmates, like Timothy McVeigh)—the statute contains two critical provisions, both of which have played central roles in Fierro's ordeal. (The sections are included in their entirety in the notes.)

One section of AEDPA, called section 2244,[6] deals with what are known as second or successive habeas petitions—that is, a habeas petition that an inmate files after already having filed one. Under this provision, the federal court must dismiss all successive petitions without addressing the issues they raise unless one of two criteria is satisfied. These criteria are known as gateways because they act as a conduit that permits a death row inmate who has already been to federal court once to return to federal court. Unless the prisoner can satisfy these gatekeeping provi-

sions, he cannot get into federal court; anything he files will be dismissed, and the federal courts will not address the merits of his case.

The first exception that allows a death row inmate to file a successive habeas petition arises when the Supreme Court articulates what is known as a new rule and also holds that this new rule is retroactive to cases that had already been decided at the time the rule was articulated. Owing principally to the value that the federal courts place on finality, most rules are not retroactive. Consequently, timing plays an important role in many cases. If a principle is not articulated until after an inmate is convicted and sentenced to death, then, in most cases, it is too late for that inmate to take advantage of it. In general, only "watershed" rules are retroactive; the epitome of a watershed rule is the Supreme Court's 1963 decision in *Gideon v. Wainwright*,[7] which held that indigent criminal defendants are entitled to counsel. Because this rule was retroactive, it meant that even an inmate who had already filed a habeas petition at the time *Gideon* was decided could file a second petition, seeking relief on the basis of *Gideon*. But there are very few retroactive new rules. For example, in 1989 the Supreme Court decided the case of *Penry v. Lynaugh*.[8] The Court ruled that Texas law did not give juries in death penalty cases the necessary leeway to decide whether someone who is retarded should be spared from death. At the same time, the Court declined to characterize its decision as a new rule. Consequently, the many death row inmates whose trials had been affected by the same error that plagued Penry's were not entitled to relief. Penry himself got a new trial; others in his same position whose cases had arisen several years earlier were executed.

Because the Court articulates very few retroactively applicable new rules, the second criterion is the more pertinent one for most inmates who wish to file a second habeas petition. The second gateway provision requires that a death row inmate who de-

sires to file a second habeas petition establish three conditions: (i) that a constitutional violation has occurred; (ii) that the violation could not have been discovered previously; and (iii) that had the violation not occurred, no reasonable juror would have voted to convict the inmate (or sentence him to death).

This second gateway provision was Fierro's best hope for relief. He had established a violation—namely, a coerced confession. He had shown why it could not have been discovered earlier. And he insisted that no reasonable juror would have voted to convict him solely on the basis of Olague's testimony.

But Fierro still had his work cut out for him. Under a different provision of AEDPA (28 U.S.C. section 2254),[9] a federal court must show great deference to the conclusions of state court tribunals. Section 2254(d) prevents a federal court from granting relief to a death row inmate who has been denied relief by the state court unless the state court's decision (i) "was contrary to, or involved an unreasonable application of, clearly established Federal law," or (ii) "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." The word "unreasonable" does all the work in these two provisions. In interpreting AEDPA, the Supreme Court has held that a state court decision can be wrong, yet it can still not be unreasonable. In other words, it is not enough for a death row inmate to persuade a federal court that the state court got the wrong answer; the inmate must also prove that the state court's answer was not even close to correct—that it was so far wrong as to be deemed unreasonable. If a state court concludes that two plus two equals five, the state court got the wrong answer, but not by a large enough margin to warrant intervention by a federal court. For Fierro's purposes, there could be no escape from death row simply by proving that no reasonable juror could have found him guilty solely on the basis of Olague's testimony. He also had to prove that the state court's conclusion to the contrary was unreasonable; he had to show that when the state court added two plus

two, it came up with ten—with an answer that was not even close to correct.

Fierro had a second problem as well. Prior to the enactment of AEDPA, there was no statute of limitations in federal habeas corpus proceedings. An inmate could bring his claim at any time. To serve the value of finality, however, Congress included a one-year statute of limitations in AEDPA. The statute begins to run from a variety of dates, depending on which is applicable in a particular case.[10] In Fierro's case, the statute began running from "the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence." However, Fierro's case was in the midst of litigation at the very moment that AEDPA was being enacted, so it was far from clear how the statute would affect his particular case. As we will see, it did affect it directly.

Whether Fierro is innocent is something we do not and cannot know. What we do know is that police used a form of torture to extract a confession from him and then lied about it under oath. We know that the police detective who lied later admitted he had lied. We know that the district attorney who prosecuted Fierro said he would not have used Fierro's confession had he known all the facts. We know that the only evidence against Fierro came from a witness whom even the prosecutor did not believe and whose testimony could not be corroborated in even a single salient respect. And finally we know that the courts, in spite of all this, declined to disturb Fierro's conviction or sentence. One question, obviously, is whether Fierro is innocent of murder; but there is a second, less obvious yet equally compelling matter, which is how our justice system could have produced this result.

The answer to this question has two components. The first deals with the proceedings in the state courts. The second has to do with the increasing unwillingness and inability of the federal courts to disturb the conclusions reached by state tribunals.

In about forty states, including Texas, judges are elected (either when they first become judges or subsequently, in so-called retention elections). All nine members of the Texas Court of Criminal Appeals are elected officials. Not only must they run for office, but they even run in partisan elections. One consequence of electing judges is that they lose their independence and become beholden to interest groups, in the same way that politicians are. In California in the mid-1980s, the state supreme court's chief justice was voted out of office after her court ruled in almost every death penalty case it confronted that the execution could not be carried out because there had been constitutional violations.[11] Similarly, in Texas in the early 1990s, a trial judge made a ruling that resulted in the release of a man who had murdered a police officer, and although the legal soundness of the judge's ruling was never really in question, the judge's decision so outraged the police and the district attorney's office—not to mention the voters—that a candidate was recruited to run against the judge and the judge was overwhelmingly defeated in the subsequent election.[12]

Support for the death penalty ebbs and flows. For an entire generation, however, support for capital punishment has not fallen below 60 percent and has occasionally approached 90 percent.[13] When so much of the population supports the death penalty, judges will care more about making sure death penalties are implemented than about safeguarding a criminal's constitutional rights. Moreover, even in a system where judges are appointed, the person who appoints them must be wary: A governor or a president who appoints judges or justices who are viewed as soft on criminals will almost certainly not be in a position to appoint many more.

All nine judges on the CCA who heard Fierro's appeal agreed that the police had lied and that the consequence of the lie was that Fierro's confession had been coerced. Had Fierro's appeal

reached the CCA prior to the Supreme Court's decision in the *Fulminante* case, then the mere fact that his confession was manifestly coerced would have resulted in a new trial. Yet *Fulminante* was already the law of the land, meaning that Fierro had to prove that the coerced confession had not been harmless, that it had been essential to the state's ability to procure a conviction. Five of the state court judges concluded that he did not meet his burden, that Olague's testimony was enough. Of the four judges who concluded that Fierro was entitled to a new trial, three had already determined that they would not run for reelection when their current terms expired. All five judges who voted against Fierro ran for reelection in the election cycle following their decision in his case, and all were handily reelected.

Part of the answer to the question of how the Fierro case could have happened, therefore, is that state court judges are elected, and elected officials—unless they are on their way out of office (as Governor Ryan was, for example)—can issue rulings that are favorable to condemned killers only at the risk of their political futures. But there is a second part of the answer to the question, and it has to do with the demise of the federal courts as the protectors of federal constitutional values.

As I have mentioned, prior to the enactment of AEDPA, federal courts concluded in nearly half of all death penalty cases that the defendant was entitled to a new trial or to be removed from death row. Nearly half of all capital murder trials involved constitutional violations that were deemed not to be harmless. Death row inmates typically prevailed in federal court, rather than state court, for the mirror-image reason that state court judges are loath to rule in favor of death row inmates. Unlike their state-court counterparts, federal judges are appointed for life. They cannot be removed from office by an electorate angry because they are issuing rulings that benefit convicted murderers. Unlike

state-court judges, who must run for election or retention, federal judges do not feel political pressure. They are free to be faithful to the rule of law, and for a generation, they were.

But two events happened. The federal courts, including the Supreme Court, grew exasperated by death penalty appeals. (Examples of this exasperation are discussed in chapter 7.) The Supreme Court gradually but steadily shrank the category of claims that death row inmates could raise in federal court, and first the Supreme Court and then Congress implemented procedural rules that made it extremely difficult for death row inmates to obtain judicial relief even when they could identify a constitutional violation. Since the enactment of AEDPA, there has been no systematic analysis of how many death row inmates prevail in the federal appeals and either win a new trial or are released from death row. The anecdotal evidence, however, suggests that the number is no more than 1 in 10, and perhaps as low as 5 or 6 in 100. There are two explanations for this plummeting success rate, and neither has anything to do with the magical transformation of death penalty trials. They are still characterized by the same sorts of constitutional problems—including coerced confessions—that were common before 1995. What has changed is the enactment of AEDPA and the characterization of nearly all constitutional errors as subject to harm analysis. It is no longer enough to prove a constitutional violation. It is no longer enough to prove that the state court got the wrong answer or that the death row inmate was harmed by the constitutional violation. To obtain relief, the death row inmate must show that there was a mistake, that the mistake was harmful, and that the state court's conclusion to the contrary was not only wrong but objectively unreasonable. Few death row inmates prevail in their appeals, not because their trials were fair or free from constitutional infirmity, but because proving that an error was harmful is difficult or impossible.

Criminal trials are not laboratory experiments where it can

easily be shown that altering a single fact will change the outcome. Consequently, requiring death row inmates to show that the error they are complaining about *caused* the conviction imposes a legal standard that is higher than any other standard—and is perhaps impossibly high. Thus, in one extraordinary case in 1996, the Supreme Court held that the state can lie to the defendant about the nature of the evidence it intends to introduce at the punishment phase of the defendant's trial as long as the defendant cannot prove he did not commit the crime (the case was *Gray v. Netherland*).[14] And in a perhaps even more extraordinary case, in 1993 the Supreme Court held that the question of whether a death row inmate is innocent is simply not of constitutional magnitude *(Herrera v. Collins)*.[15] Put differently, and without exaggeration, even if a death row inmate can conclusively and unmistakably prove that he did not commit the crime for which he was convicted and sentenced to death, this, standing alone, will not matter. Being innocent, in short, is not enough to get a convicted murderer off death row.

Before Fierro's lawyers located the evidence that proved that Detective Medrano had been lying, Fierro had already filed a habeas petition. By the time he was able to file a new petition, AEDPA had been enacted. The Supreme Court then ruled that AEDPA applies to petitions that are filed after the statute became effective, even if the death row inmate's conviction occurred prior to the statute's enactment.[16] Fierro therefore had to pass through the gateway in section 2244, which identifies the narrow category of claims that can be raised in a second habeas petition, and he also had to comply with AEDPA's statute of limitations provision. Shortly after the Texas Court of Criminal Appeals, by a vote of five to four, ruled that Fierro had not proved that the coerced confession had caused him any harm, the state of Texas set an execution date. Prior to the enactment of AEDPA, lawyers for a death row inmate who wanted to obtain a stay of execution would ask

the federal district court to issue a stay. Following the enactment of AEDPA, however, the district courts are required to dismiss any action brought by a death row inmate who has already had a federal habeas petition. Consequently, Fierro's lawyers asked the United States Court of Appeals for the Fifth Circuit—the court that hears appeals from the federal courts in Texas, Louisiana, and Mississippi—to authorize him to file an additional habeas petition. Fierro's lawyers filed this so-called motion for authorization in the Court of Appeals on October 20, 1997. The motion laid out the argument that the El Paso police had coerced Fierro's confession by having him talk to the Juarez police, who threatened to harm Fierro's parents unless he confessed, and the motion concluded that without the coerced confession, Fierro would not have been convicted, and indeed would not even have been prosecuted. The Court of Appeals granted the motion on November 11, 1997.

When a court of appeals grants a motion for authorization under AEDPA, a death row inmate has received permission to file a new habeas petition raising the issues that were addressed in the motion for authorization. Fierro's motion, of course, dealt entirely with the legal issues associated with the coerced confession and the fact that the El Paso police had lied at the suppression hearing in 1989 when they denied any knowledge of coercion. Having obtained permission from the court of appeals to file a new habeas petition, the case returned to the federal district court in El Paso, where the petition would be filed and ruled upon. The federal district judge entered what is known as a scheduling order, which directs when various motions and responses and replies must be filed. Neither Fierro nor the state of Texas objected to the scheduling order put in place by the federal judge. Then, as required by that order, Fierro filed his habeas petition in federal court on February 27, 1998—some three months after the court of appeals had authorized his new petition.

The state of Texas then took the position that Fierro had

waited too long and that the federal district court therefore had to dismiss the petition without addressing its merits. The state argued that the one-year statute of limitations had started running on November 28, 1996, the date on which the state court (the CCA) had ruled against Fierro. Fierro made three arguments in response. First, the clock did not start running until some time later. Second, even if it had started running on November 28, his motion for authorization, which fully delineated the nature of his claims, had been filed in October 1997, well within the one-year statutory period. Finally, the state had waived the statute of limitations by agreeing to the scheduling order that the federal judge had entered; if the state was going to invoke a statute of limitations, it should have done so as soon as the trial judge directed that Fierro's petition be filed in February.

Fierro lost. The federal district court—the same court that had entered a scheduling order telling Fierro when to file the habeas petition—ruled that the statute of limitations began to run on November 28, 1996, that the filing of a motion for authorization did not count for purposes of satisfying the statute, and that Fierro had therefore waited three months too long. The court did not address the merits of the petition. Instead, it simply dismissed the petition as untimely. The Court of Appeals agreed. It ruled that Fierro had waited too long, and that none of the reasons he proffered for having waited warranted extending the one-year statute. The same Court of Appeals that had authorized Fierro to file an additional habeas petition in view of his powerful evidence of innocence and the uncontested fact of a coerced confession ultimately disposed of the case on procedural grounds. The Supreme Court then declined to review the case.

Fierro may never be executed. The International Court of Justice (ICJ) in The Hague has heard an appeal from Mexico involving scores of Mexican nationals on death row in the United States. In violation of a treaty to which the United States is a signatory, many of these Mexican citizens, including Fierro, were

not permitted to speak to consular officials immediately after their arrest. The ICJ ruled that many of these Mexican citizens, including Cesar Fierro, are entitled to new trials. There is a great deal of uncertainty as to how this judgment will be implemented in the United States, but it is quite possible that if Fierro avoids lethal injection, it will be because an international tribunal has intervened, and not because an American court has enforced federal law.

I began representing Fierro in 1989. Soon after the federal court appointed me to his case, the judge presiding over the first habeas appeal convened a hearing in El Paso. At that hearing, I met Fierro's family: his daughter and former wife, his mother and his niece. Several of them spoke very little English and had no idea what the lawyers and the judge were talking about during the hearing. After the hearing I explained to them how I thought the case would proceed. I told them that I thought it would be over in two or three years. I did not tell them that I thought Fierro would be my first client to get off death row, and indeed to walk out of prison altogether, because I did not want to inflate their hopes. But I did think that would happen, and that is what I told the other lawyers working with me on the case. I was obviously wrong.

Years later, Fierro was still in prison, and he began to develop illusions. He started returning my letters unopened, and when I would go to the prison to see him, he would refuse to see me. Soon he stopped communicating with any of his other lawyers as well. He accused us of working with the state to try to have him executed. He was going insane.

By 2004, it was imperative that one of his lawyers tell him what had happened in the ICJ litigation. In addition, I had heard rumors from several inmates about Fierro's condition. They told me that he would spread feces on himself and the walls of his cell, that he would refuse to shower for six months or longer, that his

hair had grown long and wild, that he mumbled to himself while pacing in his cell at all hours of the night, that he would scream gibberish and beat his head against the walls, and that the guards would have to gas him and forcibly extract him from his cell whenever they wanted to search it. The reports I received made it clear, in short, that Fierro was mad. The Constitution prevents the states from executing the insane,[17] and I had to see Fierro to see if he was in fact insane.

I went to the prison with a lawyer, who is also a social worker from Mexico and speaks perfect Spanish (my own is far from perfect). I had been in contact with lawyers for the prison, because if Fierro was not going to come out to see me, I was going to have to go to his cell to see him. The prison lawyers assured me that he would come out, and I suspect that he did so because they did not tell him the truth about who wanted to talk to him.

Fierro entered the visiting cage and squinted at me without blinking for close to a minute. In Spanish he asked who I was, and I told him my name. He repeated the question. I told him that I was his lawyer. He screamed that he did not have a lawyer and repeated the question again. I told him that I was a professor. He repeated the question, and I did not know what to say. We were talking in Spanish, and I thought that perhaps I had missed some nuance in his question. I looked at the lawyer I was with. She shrugged. The problem was not linguistic, then. Fierro looked at her as well and asked her the same question. None of her answers satisfied him. He was becoming visibly upset. He started to scream and then banged the phone against the Plexiglas separating him from us. Suddenly he became quiet and started to grin. He said he was on a hunger strike and he patted his stomach. When I had last seen him ten years earlier, he had been fleshy and soft and weighed close to 200 pounds. Now he weighed perhaps 120. He repeated that he was on a hunger strike and then asked us to get him food. The lawyer who was with me went to the vend-

ing machines to buy him a soda and sunflower seeds. While she was gone, he asked me again, in Spanish, who I was. I told him I wanted to tell him about what was happening to his case. He repeated the question. I said nothing. Fierro shifted to English and asked me who sent me. I told him in English what I had already told him in Spanish. He again grew agitated, screaming that he had no lawyer, that he needed no lawyer. He asked me if I knew his wife. When I said yes, he asked me how much she weighed. I thought I had perhaps misunderstood him—Fierro had not seen his former wife for twenty years and probably had no idea how much she weighed—and during the pause Fierro assumed that I did not understand his question. He asked derisively whether I wanted to switch to French. I do not speak French. Neither does he. The guard tried to pass the food we had bought for him through the slot in the door, but when Fierro started to snatch it violently, the guard recoiled, dropped the food, and slammed shut the slot. Fierro banged on the door, dropped the phone, and turned sideways in the cage. He was finished talking to us. He found a piece of paper, about the size of a pea, and started to bounce it off the wall, over and over again, refusing to look at us anymore. He would occasionally bang on the door or scream something I could not make out. I told the guard that we were through with him, but I sat in front of him until they took him back to his cell. When the guards came to get him, they were laughing.

I used to think Fierro would walk out of prison because I thought it was quite likely that he is innocent. Now I hope he is not. I hope I was wrong and that he committed the murder, because the alternative is that he has spent the last twenty-five years of his life going insane in a sixty-square-foot cell for a crime he had nothing to do with. His mother has died. His daughter no longer visits. He thinks his lawyers are trying to injure him. He is incapable of having friends and carrying on a conversation. The

guards taunt him and laugh at him. Yet if Fierro dies in prison, it will not be because Texas proved that he killed Nicolas Catanon. It will be because Fierro did not convince the state court that he did not, and because no federal court will even let him try. If Fierro is executed, it will be because a technicality allowed the authorities to coerce a confession from him and then get away with it.

NOTE TO THE READER

"César Fierro's Coerced Confession" is part of a book called "*Executed on a Technicality, Lethal Injustice on America's Death Row"* by David R. Dow. The article is being reproduced, here, with permission of its author.

These pages provide a very accurate explanation of César Fierro's case, a sadly common example of how legal technicalities in American death-penalty litigation usually allow procedure to trump innocence. Dow's article was, however, published in 2005; so it does not present an up-to-date version of the case. Below are some important developments that happened after its publication:

1. By intervention of César's defense team and the Mexican Consulate in Houston, César Fierro started to receive psychiatric treatment around 2009, and slowly began to recover from the period of mental illness that he had suffered for the past 10 years. César is now fully recovered and has excellent mental health. He is an independent person, perfectly capable of making his own decisions.

2. In 2014, a Mexican documentary film was released about César's case: "*Los Años de Fierro" ("The Years of Fierro")*. Both, the film and the filmmaker, became an important support in César's life.

3. In 2014, Debevoise and Plimpton, a New York-based law firm, joined the Texas-based team that had been representing César Fierro for a number of years. Debevoise's direct involvement in the case led to a fresh examination of the facts and a review of changes in the law.

4. In 2018, César filed a subsequent application for a writ of habeas corpus in the Texas Court of Criminal Appeals (TCCA) arguing that forensic analysis and other evidence demonstrated that the state unknowingly relied on the false testimony of Olague during César's trial, and that the jury instructions had not allowed for proper consideration by the jury of all mitigating evidence.

5. In December 2019, the TCCA vacated Cesar's death sentence and remanded the case to the trial court for resentencing.

6. In January 2020, César was resentenced to life in prison with immediate eligibility for parole. The Texas Parole Board quickly granted parole, and César was released and deported to Mexico on May 14, 2020.

7. César is now living in Mexico City in an independent studio provided by one of his friends. He is being supported by donations from people around the world who have been his pen-friends for many years and his lawyers. He is getting excellent care (including mental health care), and is developing the skills to live again in the free world. César wants to stay in México City until he feels safe and ready to move permanently to Ciudad Juárez, the city where he was born and lived until his arrest.