

REPORT No. 60/11¹

PETITIONS P-11.575 - CLARENCE ALLEN LACKEY; P-12.201 - DAVID LEISURE; P-2566-02 - ANTHONY GREEN; P-4538-02 - JAMES BROWN; P-4659-02 - LARRY EUGENE MOON; P-784-03 - EDWARD HARTMAN; P-580-04 - ROBERT KARL HICKS; P-607-04 - TROY ALBERT KUNKLE; P-187-05 - STEPHEN ANTHONY MOBLEY; P-1246-05 - JAIME ELIZALDE, JR.; P-360-06 - ÁNGEL MATURINO RESENDIZ; P-1232-07 - HELIBERTO CHI ACEITUNO; P-873-10 - DAVID POWELL; P-907-10 - RONNIE GARDNER
ADMISSIBILITY
UNITED STATES
March 24, 2011

I. SUMMARY

1. The present report concerns 14 petitions filed on behalf of Clarence Allen Lackey (P-11.575);² David Leisure (P-12.201);³ Anthony Green (P-2566-02);⁴ James Brown (P-4538-02);⁵ Larry Eugene Moon (P-4659-02);⁶ Edward Hartman (P-784-03);⁷ Robert Karl Hicks (P-580-04);⁸ Troy Albert Kunkle (P-607-04);⁹ Stephen Anthony Mobley (P-187-05);¹⁰ Jaime Elizalde Jr. (P-1246-05);¹¹ Ángel Maturino Resendiz (P-360-06);¹² Heliberto Chi Aceituno (P-1232-07);¹³ David Powell (P-873-10),¹⁴ and Ronnie Gardner (P-907-10)¹⁵ [hereinafter “the alleged victims”], in which it is alleged that the United States of America (hereinafter “the United States” or “the State”) violated the rights protected under the American Declaration of the Rights and Duties of Man (hereinafter “the American Declaration” or “the Declaration”). All the petitions addressed in this report refer to persons sentenced to death in six states of the United States (North Carolina, South Carolina, Georgia, Missouri, Texas and Utah) and thereafter executed. All the alleged victims were beneficiaries of precautionary measures requested by the Commission.

2. A significant number of the petitions assert that the alleged victims did not have adequate legal representation; that some had a mental disability; and that they suffered the so-called “death row syndrome”. Likewise, the petitions assert, among other claims, the excessive length of the process; racial discrimination and discrimination based on sexual orientation; failure to comply with the obligation to

¹ In keeping with Article 17(2)(a) of the Commission’s Rules of Procedure, Commissioner Dinah Shelton, a United States citizen, did not participate in either the discussion of or the decision on the present case.

² Presented on January 29, 1996, by attorney Brent E. Newton.

³ Presented on August 25, 1999, by Barry A. Short with the firm of Lewis, Rice & Fingersh, L.C.

⁴ Presented on July 24, 2002, by John Blume.

⁵ Presented on November 18, 2002, by London barrister Hugh Southey and Laura-Hill Patton with the Federal Defender Program.

⁶ Presented on December 24, 2002, by Brian Mendelsohn with the Federal Defender Program.

⁷ Presented on September 15, 2003 by Heather Wells and Edwin West.

⁸ Presented on June 23, 2004, by Robert McGlasson with the Federal Defender Program and Hugh Southey.

⁹ Presented on July 6, 2004, by Robert McGlasson with the Federal Defender Program.

¹⁰ Presented on February 24, 2005, by August F. Siemon.

¹¹ Presented on October 27, 2005, by Karen Parker with the Association of Humanitarian Lawyers.

¹² Presented on April 13, 2006, by Sandra Babcock with the Center for International Human Rights of Northwestern University School of Law.

¹³ Presented on September 21, 2007, by Ramón Abad Custodio López, as National Commissioner of Human Rights in Honduras.

¹⁴ Presented on June 4, 2010 by attorneys S. Adele Shank and John B. Quigley.

¹⁵ Presented on June 17, 2010 by the Center for International Human Rights of Northwestern University School of Law.

notify the consular authorities of the arrest of one of their nationals; jury bias; obstacles preventing the introduction of new evidence, and restrictive laws governing the sentencing phase and the filing of appeals.

3. The State did not present its observations regarding the claims made in seven of the petitions. In the case of the other petitions, its contention was that they had failed to state facts sufficient to characterize violations of the rights established in the American Declaration and/or that the remedies under domestic law had not been exhausted.

4. Without prejudging the merits of the case and after examining the positions of the parties, in compliance with articles 31 to 34 of its Rules of Procedure the Inter-American Commission decides to declare the case admissible for purposes of examining the 14 petitions for the alleged violation of the rights protected in articles I, XVIII, XXV and XXVI of the American Declaration. Furthermore, it also decides to declare petitions P-2566-02 and P-784-03 admissible with respect to the alleged violation of Article II of the American Declaration. Moreover, in keeping with Article 29(1)(d) of its Rules of Procedure, the Commission has decided to join the 14 petitions and process them jointly in the merits phase as case 11.575. The Inter-American Commission also decides to notify the parties, to publish this admissibility report and include it in its Annual Report to the OAS General Assembly.

II. PROCEEDINGS BEFORE THE IACHR

5. Petition P-11.575 (Clarence Allen Lackey) was received on January 29, 1996. On February 1, 1996, the Inter-American Commission forwarded the relevant parts of the petition to the State and, in accordance with the Rules of Procedure then in force, it requested that the State submit its response within 90 days. The State presented its observations on July 8, 1996. On July 30, 1996, Mr. Brent E. Newton reported that he had resigned as the alleged victim's representative and had designated Rita Radostitz as the new representative.¹⁶ Clarence Allen Lackey was executed in Texas on May 20, 1997.¹⁷ As of the date of this report, the Inter-American Commission has received no further communication from either party concerning this petition.

6. Petition P-12.201 (David Leisure) was received on August 25, 1999. On August 27, the Inter-American Commission forwarded the relevant parts of the petition to the State and asked that it submit its response within 90 days. Mr. Leisure was executed in the state of Missouri on September 1, 1999. A communication from the State was received on September 17, 2010.

7. Petition P-2566-02 (Anthony Green) was received on July 24, 2002. The petitioner sent additional information on July 26. On July 29, 2002, the Commission sent the State a copy of the relevant parts of the petition and of the additional communication. By note of August 1, 2002, the State indicated that it would shortly be submitting its response to the petition. However, as of the date of adoption of this report, that response has not been received. On August 23, 2002, the alleged victim was executed in the state of South Carolina.¹⁸

8. Petition P-4538-02 (James Brown) was received on November 18, 2002. That same day, the Inter-American Commission sent the State the relevant parts of the petition and requested that it submit its response within two months. To date, the State has not submitted its observations on this petition. On October 1, 2005, the petitioner reported that the alleged victim had been executed on

¹⁶ On August 2, 1996, the IACHR sent a communication to Ms. Radostitz asking whether she would take over Mr. Lackey's representation vis-à-vis the Commission. The Commission repeated its question on April 9, 2009; that communication came back by return mail marked 'address unknown'. The Commission has no other way of contacting the alleged victim's supposed representative.

¹⁷ Cf. *Texas Department of Criminal Justice*, available at: <http://www.tdcj.state.tx.us/stat/lackeyclarencelast.htm>

¹⁸ Cf. *Death Penalty Information Centre*, available at www.deathpenaltyinfo.org/executions.

November 4, 2003, in the state of Georgia.¹⁹ On September 17, 2010, the Commission received a communication from the State.

9. Petition P-4659-02 (Larry Eugene Moon) was received on December 24, 2002. On January 6, 2003, the Commission sent the State the relevant parts of the petition and requested that it submit its response within two months. A response was received from the State on March 17, 2003. Mr. Moon was executed in the state of Georgia²⁰ on March 25, 2003. As of the date of this report, the Commission has received no further observations from the parties.

10. Petition P-784-03 (Edward Hartman) was received on September 15, 2003. On September 30, 2003, the IACHR forwarded a copy of the relevant parts of the petition to the State and asked that it submit its response within two months. By note of December 23, 2003, the State submitted its response to the petition. Since then, neither party has submitted additional information. The alleged victim was executed on October 3, 2003, in the state of North Carolina.²¹

11. Petition P-580-04 (Robert Karl Hicks) was received on June 23, 2004. On June 28, the Inter-American Commission forwarded the relevant parts of the petition to the State, and asked that it submit its response within two months. On June 30, 2004, the Commission received a note from the State. The alleged victim was executed on July 1, 2004, in the state of Georgia. On September 17, 2010, the Commission received a communication from the State.

12. Petition P-607-04 (Troy Albert Kunkle) was received on July 6, 2004. The following day, the Inter-American Commission sent the State the relevant parts of the petition and asked that it submit its response within two months. On August 8, 2004, the Commission received a communication from the State. Mr. Kunkle was executed on January 25, 2005, in the state of Texas.²² As of the date of this report, the Inter-American Commission has received no further communications from either party.

13. Petition P-187-05 (Stephen Anthony Mobley) was received on February 24, 2005. On February 28, the Commission sent the State the relevant parts of the petition and asked that it submit its response within two months. Mr. Mobley was executed on March 1, 2005, in the state of Georgia. The State's response was received on April 28, 2005. As of the date of this report, the Commission has received no further communications from either party.

14. Petition P-1246-05 (Jaime Elizalde Jr.) was received on October 27, 2005. On November 1, 2005, the Commission sent the State the relevant parts of the petition and asked that it submit its response within two months. The following day, the Commission received a communication from the State. On November 5, 2005 and January 17 and 27, 2006, additional information was received from the petitioner. The alleged victim was executed on January 31, 2006, in the state of Texas. On February 6, 2006, another communication was received from the petitioner. Then, on February 27, 2006, the Commission received the State's observations. On July 6, 2006 and June 5, 2007, the State and the petitioner, respectively, sent additional information.

15. Petition P-360-06 (Ángel Maturino Resendiz) was received on April 13, 2006. On May 1, 2006, the Commission forwarded the relevant parts of the petition to the State and asked that it submit its response with two months. On June 26, 2006, the IACHR received a note from the State. Mr. Maturino

¹⁹ In that communication the petitioner stated that he was no longer in contact with the attorneys who had the case in the United States courts, and therefore did not have instructions concerning the present matter. On October 7, 2005, the IACHR asked the petitioner to report within six months as to whether he had managed to obtain instructions and whether he wished to continue to pursue the matter with the Commission. When no reply was forthcoming, the Commission sent the petitioner the same request again on July 13, 2010. Thus far no response has been received.

²⁰ Cf. *Attorney General of Georgia*, available at http://www.georgia.gov/00/press/detail/0.2668.87670814_88948796_88950616.00.html

²¹ Cf. *North Carolina Department of Corrections*, available at www.doc.state.nc.us/dop/deathpenalty/executions_news.htm

²² Cfr. *Texas Department of Criminal Justice*, available at <http://www.tdcj.state.tx.us/stat/executedoffenders.htm>

was executed on June 27, 2006, in the state of Texas. The following day, the Commission put out a press release in which it condemned the alleged victim's execution by the State and its failure to comply with the precautionary measures the Commission had requested. The State's response was received on July 28, 2006. On September 18 of that year, additional information was received from the petitioner.

16. Petition P-1232-07 (Heliberto Chi Aceituno) was received on September 21, 2007. On September 28, 2007, the IACHR received additional information from the petitioner. That same day, the Inter-American Commission sent the State the relevant parts of the petition and the additional information, and asked that it submit its response within two months. The IACHR received communications from the State on October 1 and 5, 2007. The alleged victim was executed on August 7, 2008, in the state of Texas. The following day, the Commission issued a press release condemning the execution. A communication was received from the State on September 17, 2010.

17. Petition P-873-10 (David Powell) was received on June 4, 2010. That same day, the Inter-American Commission forwarded the relevant parts of the petition to the State and asked that it submit its response within two months. The Commission received a note from the State the following day. Mr. Powell was executed in the state of Texas on June 15, 2010. On June 21, 2010, the IACHR issued a press release condemning his execution. A communication was received from the petitioner on July 13, 2010.

18. Petition P-907-10 (Ronnie Gardner) was received on June 17, 2010. That same day, the Inter-American Commission forwarded the relevant parts of the petition to the State and asked that it submit its response within two months. That same day, the Commission received a note from the State. Mr. Gardner was executed on June 18, 2010 in the state of Utah. On June 21, 2010, the IACHR published a press release condemning that execution.

Precautionary measures

19. In each of the 14 petitions examined in this report, the Commission granted precautionary measures on behalf of the respective alleged victims and asked the State to stay the execution until the Commission adopted its report on the merits of the petition.

III. THE POSITION OF THE PARTIES

A. Position of the petitioners

1. Preliminary matters

20. The petitions examined in this report concern 14 cases of persons sentenced to death in the United States. In all these cases, the alleged victims were executed despite the fact that the Commission had requested precautionary measures on their behalf. While the arguments made in the petitions vary and the alleged victims were executed in different states within the United States, the IACHR has identified three claims made in a significant number of the petitions, which will be discussed below prior to and separate from the specific claims made in each individual petition.

2. Most common claims

Ineffective assistance of counsel

21. Eleven of the 14 petitions assert that the alleged victim lacked effective legal representation.²³ The petitioner in P-12.201 (David Leisure) states that the attorney who defended Mr. Leisure had never defended a death penalty case, and was therefore neither qualified nor prepared to properly represent and defend the alleged victim. While the petitioner does not expressly say so, the inference is that Mr. Leisure's defense counsel had been appointed by the State. The petitioner also mentions that the law student who assisted in the defense and served as the *de facto* legal counsel, was under the influence of narcotic drugs, a fact not discovered until after the alleged victim was convicted. According to the petitioner, had this fact come to light at trial, the alleged victim would not have been convicted. He also maintains that if that evidence had been available at the time the original petition of *habeas corpus* was filed, the conviction would have been overturned.

22. According to the documentation available, on March 24, 1992, the Missouri Supreme Court confirmed the District Court's denial of the alleged victim's post-conviction motion,²⁴ in which one of the arguments made was the inadequacy of Mr. Leisure's legal representation. On that point, the Missouri Supreme Court concluded that Mr. Leisure's representation at trial was not ineffectual in his choice of a trial strategy. The petitioner also alleges that in October 1992, Mr. Leisure filed a federal *habeas corpus* petition with the District Court, alleging ineffective assistance of counsel based on the cumulative effect of the defense counsel's errors. That appeal was denied.

23. For their part, the petitioners in P-2566-02 (Anthony Green) also argue the inadequacy of his legal representation, but do not elaborate further and do not say whether the defense lawyer was retained privately or appointed by the State.

24. P-4538-02 (James Brown) states that the defense attorney (the petition does not indicate whether or not defense counsel was appointed by the State) failed to present to the jury all the evidence concerning Mr. Brown's history of mental illness. The petition also states that while the jury was told of the abuse that the alleged victim suffered as a child, the jury did not know how serious the abuse and neglect were. The petition asserts that the lack of proper legal representation is a violation of the right to a fair trial and to due process. The petitioner cites United Nations principles²⁵ and argues that the standard that applies to legal representation in death penalty cases must be higher.

²³ Petitions: P-12.201; P-2566-02; P-4538-02; P-4659-02; P-784-03; P-580-04; P-607-04; P-187-05; P-1246-05; P-360-06 and P-907-10.

²⁴ Communication from the petitioner received August 26, 1999, Appendix "D" (Leisure v. State, 828 S.W.2d 872 (Mo. 1992), *Supreme Court of Missouri (en banc)*).

²⁵ Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty, E.S.C. res. 1984/50, annex, 1984 U.N. ESCOR Supp. (No. 1) at 33, U.N. Doc. E/1984/84 (1984), cited in paragraph 6(3) of the original petition received on November 18, 2002.

25. The petitioner in P-4659-02 (Larry Eugene Moon) argues that the defense counsel did not investigate the extenuating circumstances favorable to the alleged victim. The petitioner also states that the facts revealed during the post-conviction proceedings show that Mr. Moon was not properly represented during the sentencing phase (the petitioner does not indicate whether or not the defense counsel was appointed by the State). The petitioner observes that on June 30, 1993, a state writ of *habeas corpus* was granted in part based on the alleged lack of efficacy of the defense counsel given its failure to introduce any extenuating circumstances and its failure to investigate unadjudicated offences. When the state filed an appeal with the Georgia Supreme Court, the latter overturned the decision to grant *habeas corpus* relief. On October 31, 1994, the United States Supreme Court denied the petition for a writ of *certiorari*.

26. The petitioners in P-784-03 (Edward Hartman) allege that the legal assistance provided by the State-appointed defense counsel was inadequate. The petitioners do not elaborate on this point.

27. In P-580-04 (Robert Karl Hicks) the petitioners state that Mr. Hicks initially had a defense attorney who had no experience in death penalty cases. While they do not say so outright, the inference from the petition is that defense counsel was designated by the State. They also contend that facts uncovered subsequent to the alleged victim's conviction and the way in which the trial court undermined the ability of Mr. Hicks' defense counsel to put on a proper defense at trial –factors that will be discussed at greater length in the section on specific claims- showed that the alleged victim did not receive adequate representation during the sentencing phase. They assert, *inter alia*, that the quality of Mr. Hicks' defense was adversely affected by the delay in appointing a psychiatrist and by the short amount of time that the psychiatrist had to prepare. They state further that the standards of representation must be higher when a death penalty case is involved. The petitioners cite the United Nations Basic Principles on the Role of Lawyers²⁶ and contend that in the alleged victim's case, the principle that holds that lawyers shall assist clients in every appropriate way and take legal action to protect their interests was not observed.

28. The petitioner in P-607-04 (Troy Albert Kunkle) alleges that Mr. Kunkle's legal counsel (the petitioner does not say whether counsel was court appointed or not) did not present any evidence regarding his schizophrenia or the severe abuse to which he was allegedly subjected as a child. Counsel for the defense allegedly never mentioned the fact that Mr. Kunkle was sent to a special school for emotionally disturbed children, that he abused drugs, that on the night of the crime he was severely intoxicated and that he had no criminal record. The petitioner alleges that while extenuating circumstances were introduced, the defense counsel did not know how to put together the evidence so as to refute the point that the jury examined concerning the future threat to society that Mr. Kunkle might pose.

29. The petitioner also points out that in the *habeas corpus* proceeding, sworn statements from family members and from a psychology expert were introduced. Those statements contained important extenuating facts that defense counsel had completely neglected to present at trial. According to the petitioner, had defense counsel consulted psychiatric experts, the latter could have revealed that Mr. Kunkle was suffering from schizophrenia. However, defense counsel apparently did not request funds to conduct psychological tests. The documentation available shows that on December 9, 2003, the alleged victim filed an appeal with the Fifth Circuit Court of Appeals alleging, *inter alia*, the inadequacy of his legal representation. That petition was denied on December 23, 2002.

30. The petitioner in P-187-05 (Stephen Anthony Mobley) states that Mr. Mobley's defense counsel failed to rigorously investigate possible extenuating circumstances. The petitioner does not elaborate further on this point.

²⁶ Basic Principles on the Role of Lawyers, Eighth United Nations Congress on the Prevention of Crime and Treatment of Offenders, held in Havana (Cuba), August 27 to September 7, 1990, UN Doc. A/CONF.144/28/Rev.1, p. 118 (1990).

31. The petitioner in P-1246-05 (Jaime Elizalde Jr.) asserts that there were problems in the alleged victim's defense, both at trial, during the appeals filed and in the *habeas corpus* proceedings (the petitioner does not indicate whether the alleged victim was represented by a private or court-appointed attorney). The petitioner states that the defense attorney failed to challenge one of the witnesses, despite enormous discrepancies in his testimony; this matter will be discussed at greater length in the section on specific claims. Furthermore, while Mr. Elizalde informed his defense attorneys of the errors in the translation of the witnesses' testimony, the defense attorney opted not to file any objection at trial but to wait for the appeals phase, even though the *jurisprudence constante* of the United States courts is that jury decisions are rarely overturned on appeal. The petitioner further alleges that the defense attorney failed to explore obvious leads; that the defense attorney did not comply with the due diligence standards that apply in death penalty cases; and that the authorities had to have known that the case was not properly investigated and that the defense was inadequate. The petitioner also observes that Texas law does not provide a remedy to challenge the quality of the legal representation in death penalty cases. She points out that this situation, as the Commission has recognized,²⁷ is a serious violation of Article XVIII of the American Declaration.

32. According to the petitioner in P-360-06 (Ángel Maturino Resendiz), the court-appointed attorney was negligent during the sentence review, as he missed an important deadline that prevented him from filing additional appeals. Also, in the state and federal *habeas corpus* appeals, the defense counsel allegedly argued general procedural matters, but nothing concerning the alleged victim's mental health. The petitioner states that because of the public defender's negligence, Mr. Maturino's rights to due process and to an effective remedy were violated. The petitioner states further that under the United States Constitution and the Constitution of the State of Texas, an indigent person sentenced to death is not entitled to legal representation to file post-conviction appeals. The petitioner cites case law on this subject. Concerning the requirement that remedies under domestic law be exhausted, the petitioner is claiming the exception to the rule requiring exhaustion of local remedies since, under the Constitution of the United States and the Constitution of the state of Texas, an indigent person sentenced to death would not be entitled to legal representation to file post-conviction complaints.

33. Finally, the petitioners in P-907-10 (Ronnie Gardner) point out that the defense counsel (they do not say whether counsel was appointed by the State) did not correctly explain to the jury what its options were as to the penalty. The jury allegedly mistakenly considered that a sentence of life imprisonment did not mean that Mr. Gardner would spend the rest of his life in jail, which is why the only possible sentence in the jury's view was the death penalty. The petitioners also assert that the attorney for the defense did not present sufficient arguments concerning the alleged victim's mental health and did not make a reasonable effort to find extenuating circumstances in the sentencing phase. The petitioners state that on July 26, 1991, the District Court partially granted a state petition of *habeas corpus* based on the alleged inadequacy of the legal representation. However, the Utah Supreme Court subsequently overturned that ruling.

Mental disability of the alleged victims

34. Six of the petitions²⁸ allege that the persons executed were suffering from some mental disability or disorder. The petitioner in P-12.201 (David Leisure) states that according to the available evidence, Mr. Leisure's IQ was under 75, which would be the equivalent of a mentally retarded person. According to the tests done by the state of Missouri, his IQ had subsequently dropped to less than 58. A neurological expert presented by the petitioner²⁹ said that there was strong reason to suspect that Mr. Leisure had suffered brain damage, which diminished his central nervous system's functioning, and in turn caused his IQ to drop below the level at which he would be legally competent to be executed.

²⁷ In the communication received January 17, 2006 (p. 9), the petitioner cites the IACHR's decision in the *Moreno Ramos Case* (IACHR, Report No. 61/03, Petition 4446/02, Admissibility, Roberto Moreno Ramos, United States, October 10, 2003).

²⁸ Petitions: P-12.201; P-4538-02; P-580-04; P-607-04; P-1246-05 and P-360-06.

²⁹ Communication from the petitioner, received August 26, 1999, appendix "T".

According to the available documents, on March 24, 1992, the Missouri Supreme Court upheld the District Court's refusal to grant the post-conviction motion filed by the alleged victim³⁰ which claimed, *inter alia*, that the alleged victim was mentally retarded. The Court concluded that the argument had already been made on direct appeal.

35. In P-4538-02 (James Brown), the petitioner alleges that Mr. Brown was a paranoid schizophrenic, a condition that was diagnosed and well documented and that the state of Georgia knew of the alleged victim's mental disorder. The petitioner states that Mr. Brown had spent 70% of the period between 1968 and the trial in 1981 confined to psychiatric hospitals. According to the petitioner, all the physicians and experts who evaluated him between 1975 and 1981 diagnosed him as being paranoid schizophrenic, and suffering from acute psychotic episodes. The petitioner states that when the alleged victim was initially admitted to the Central State Hospital subsequent to his arrest, he was suffering from visual and audio hallucinations. Further, the state physicians who examined Mr. Brown between 1980 and 1981 prior to the trial, were of the view that the alleged victim was psychotic and that he was having hallucinations. Their diagnosis was paranoid schizophrenia.

36. According to the petitioners in P-580-04 (Robert Karl Hicks), studies done by experts concluded that the alleged victim was suffering from a neurological disorder. They point out that subsequent to the alleged victim's conviction, the head of the neurology department at Georgetown University Hospital did a preliminary physical exam of the alleged victim and concluded that he had a microcephaly with frontal lobe dysfunction. The expert reportedly indicated that while he was unable to use his medical instruments because of Mr. Hicks' confinement, he was able to conclude, beyond any doubt, that the alleged victim was suffering from a neurological disorder. He also recommended a number of neurological and psychiatric tests. The petitioners point out that the application for funds to conduct those tests was denied.

37. In P-607-04 (Troy Albert Kunkle) it is alleged that Mr. Kunkle was schizophrenic. The petitioner in P-1246-05 (Jaime Elizalde Jr.) asserts that the alleged victim was mentally retarded and should not, therefore, be executed.

38. Lastly, the petitioner in P-360-06 (Ángel Maturino Resendiz) asserts that Mr. Maturino was sentenced to death despite the fact that he suffered from a severe mental illness, a fact supported by ample evidence. The petitioner states that the alleged victim had been suffering from schizophrenia since he was young and that the prosecution did not challenge his mental illness at trial. She states further that the alleged victim's condition significantly deteriorated in the seven years he spent on death row. During that period, Mr. Maturino had been taken to a psychiatric hospital eight times, and had mutilated himself at least 28 times, using a razor blade to cut himself on various parts of his body. He had also been given antipsychotic drugs to control his hallucinations.

39. The petitioner states that despite a United States Supreme Court ruling to the effect that executing a mentally retarded person constitutes cruel and unusual punishment, the states have used a very narrow definition of "incompetence". In the case of Mr. Maturino, the expert appointed by the State during trial had reportedly acknowledged that the alleged victim was suffering from a mental illness, but testified that in his view his situation did not fit the legal definition of incompetence. Furthermore, the petitioner argues that the proceeding used in the state of Texas to prove incompetence would not rise to the standard of due process required in death penalty cases.

40. On April 12, 2006, the attorney for Mr. Maturino filed an appeal claiming that he was not mentally competent to be executed. In June of that year, two days of hearings were held in which five experts testified. According to the petitioner, three of the experts concluded that the alleged victim was not mentally competent to be executed (unlike these three experts, the other two did not interview Mr. Maturino in Spanish; they used only English). The petitioner states that even so, on June 22, 2006, the

³⁰ Communication from the petitioner, received August 26, 1999, Appendix "D" (Leisure v. State, 828 S.W.2d 872 (Mo. 1992), *Supreme Court of Missouri (en banc)*).

Court denied the appeal. The following day, the petitioner filed a federal *habeas corpus* petition based on the precautionary measures granted by the IACHR. The Texas Court of Criminal Appeals dismissed the petition and the United States Supreme Court declined the request to review the Texas court's decision on the *habeas corpus* petition. On June 26, 2006, a petition was filed with the Texas Board of Pardons and Paroles, which was also denied.

Death row syndrome

41. Six petitions³¹ claim that the alleged victims suffered from the so-called "death row syndrome" because of the excessively long period of time spent incarcerated on death row, waiting for the sentence to be carried out.

42. In the case of P-11.575 (Clarence Allen Lackey), the petitioner alleges that Mr. Lackey's execution came almost twenty years after his conviction, which constitutes cruel or unusual punishment. The petitioner asserts that a number of international courts have held that the ban on any form of cruel, inhuman or degrading punishment or treatment prohibits a State from keeping a person on death row for an excessive period of time and subjecting the condemned person to ever-shifting date of execution.³² The petitioner also observes that the United States Supreme Court had ruled that the death penalty serves two principal social purposes: retribution and deterrence of capital crimes.³³ According to the petitioner, the alleged victim's execution would not serve either of these two purposes, since the alleged victim had already spent nearly two decades in prison and the deterrence factor was undermined by the excessive delay between sentencing and execution. The petitioner asserted that the alleged victim was forced to prepare himself for his imminent execution on five different occasions; two of his executions were stayed just hours before execution time. Based on the foregoing, the petitioner alleges that the State violated the alleged victim's right not to receive cruel, infamous or unusual punishment, recognized in Article XXVI of the American Declaration.

43. The petitioners in P-2566-02 (Anthony Green) assert that the alleged victim was on death row for 14 years, which constitutes cruel, infamous or unusual punishment.

44. At the time that petition P-580-04 (Robert Karl Hicks) was filed, the alleged victim had been on death row for 18 years. The petitioners contend that having to suffer so long on death row awaiting execution is itself an inhuman punishment. They cite the case law of the Privy Council³⁴ in London and the European Court of Human Rights.³⁵

45. The petitioner in P-607-04 (Troy Albert Kunkle) also argues that the alleged victim's 19 years on death row constitutes cruel, inhuman and degrading treatment, as recognized in national and international law. Here, the petitioner points to what the European Court of Human Rights referred to as the "death row phenomenon."³⁶

46. The petitioners in P-873-10 (David Powell) assert that the State's ineptitude was such that Mr. Powell was tried three times and spent over 30 years on death row. They assert that the delay was due to trial errors for which the State was to blame, and that the excessive delay constitutes inhuman and degrading punishment.

³¹ Petitions: P-11.575; P-2566-02; P-580-04; P-607-04; P-873-10 and P-907-10.

³² The petitioner makes reference to the cases of *Pratt & Morgan v. Attorney General of Jamaica*, 2 A.C.1, 4 All E.R. 769 (British Privy Council 1993); and *Soering v. United Kingdom*, 11 E.H.R.R. 429, 161 Eur. Ct. H.R. (Ser.A) (Eur. Ct. Hum. Rts. 1989).

³³ The petitioner cites *Gregg v. Georgia*, 428 U.S. 153, 183 (1976).

³⁴ *Pratt and Morgan v. Jamaica* (1994).

³⁵ *Soering v. UK* (1989).

³⁶ The petitioner cites *Soering v. United Kingdom* (1989) 11 ECHRR 439.

47. Lastly, the petitioners in P-907-10 (Ronnie Gardner) contend that the fact that Mr. Gardner was on death row for almost 25 years would constitute cruel, infamous and unusual punishment.

3. Specific claims

Clarence Allen Lackey (P-11.575)

48. The petitioner states that in 1978, the Tom Green County Court in Texas convicted Mr. Lackey of the crime of murder and sentenced him to the death penalty. The petitioner states that the mandatory appeal was pending with the Texas Court of Criminal Appeals for four and a half years. On September 15, 1982, the Court overturned the conviction and the case was sent back to the trial court of Midland, Texas, which again convicted the alleged victim and sentenced him to death in April 1983. The petitioner asserts that eight years later, and with four judges dissenting, the Court of Appeals upheld the lower court's ruling, which became *res judicata* in late 1991. The petitioner alleges that it took the state of Texas more than 14 years to deliver a final judgment. He states that because an appeal is mandatory, the reason why the criminal case lasted from 1977 to 1991 is entirely the fault of the State. The petitioner also observes that the court took a number of months to set the date of execution, and his execution, originally set for July 17, 1992, was stayed five times.

49. According to the petitioner, starting in mid 1992 the alleged victim filed a number of appeals. He states that on January 9, 1995, the United States Supreme Court denied a federal *habeas certiorari* petition. In February 1995, Mr. Lackey filed a second *habeas corpus* petition with the Texas courts alleging that after 17 years under a death sentence, his execution would constitute cruel and inhuman punishment under the Eighth Amendment of the United States Constitution. The petition was denied on March 1, 1995. On March 27 of that year, the Supreme Court refused to grant a writ of *certiorari*. The petitioner states that the following day, the alleged victim filed a second federal *habeas corpus* petition by virtue of which the District Court ordered a stay of execution and that a hearing be convened. The state of Texas appealed that decision with the Court of Appeals, which overturned the ruling on April 27, 1995.

50. The petitioner states that on the eve of the fifth execution date, the alleged victim filed a petition for a writ of *certiorari* with the United States Supreme Court in which he requested a stay of his execution. The Supreme Court reversed the Court of Appeals order and remanded the case to the district court. The petitioner states that the district court denied the petition of *habeas corpus*, whereupon the alleged victim filed a notice of appeal to the Court of Appeals. At the time the petition was filed with the IACHR, that petition was still pending. The petitioner alleged that he was turning to the IACHR before the decision on that appeal was delivered given the urgent nature of the case and because in the state of Texas, persons sentenced to death tend to be executed within 30 days after the appeals are exhausted and that to wait until the last minute would have had irreparable consequences.

David Leisure (P-12.201)

51. The petitioner points out that on April 7, 1987, Mr. Leisure was convicted of murder. On May 22 of that year, the Circuit Court for the City of St. Louis sentenced him to death. On June 2, 1987, Mr. Leisure filed a direct appeal with the Missouri Supreme Court, which on April 19, 1988 affirmed his conviction and sentence.³⁷ On October 13, 1992, the United States Supreme Court refused to grant a writ of *certiorari*.³⁸

52. The petitioner's principal arguments are: (i) a lack of access to judicial remedies for introducing new evidence; and (ii) allowing the introduction of prejudicial evidence in the penalty phase

³⁷ Communication from the petitioner, received August 26, 1999, Appendix "E" (State v. Leisure, 749 S.W.2d 366, (Mo. 1998), *Supreme Court of Missouri (en banc)*).

³⁸ Communication from the petitioner, received August 26, 1999, Appendix "N" (State of Missouri vs. David Leisure, No. 69470, *Supreme Court of Missouri (en banc)*).

that was not related to the crime for which Mr. Leisure was standing trial but that was calculated to inflame the jury and provoke a disproportionate sentence.

53. As for the first specific claim, according to the petitioner, from the time the Eastern District Court refused the first petition of *habeas corpus*, every court –state and federal alike- summarily dismissed his requests for permission to appeal. The petitioner points that no state or federal court granted Mr. Leisure's right to appeal the denial of his first petitions of *habeas corpus*, thereby denying him his right to introduce new evidence regarding the inadequacy of his trial counsel. He further contends that on July 26, 1999, the District Court denied an application for a certificate of appealability filed by Mr. Leisure based on procedural grounds. This, in the petitioner's view, is why the Court never examined the merits of the case. He concludes that the repeated denials constitute a violation of the alleged victim's right to due process.

54. The petitioner highlights the fact that in the opinion of two dissenting judges of the Missouri Supreme Court, Mr. Leisure's criminal trial amounted to a "legalized lynching" due to the constitutional errors that resulted in the death penalty. From the reading of the sentence, Judge Blackmar stated that the finding of guilt was without error; nevertheless, he asserted that the case should have been remanded for retrial of the penalty phase because the photograph of the Faheen murder (a fact that will be mentioned below) was admitted into evidence.

55. As for the second argument, the petitioner points out that a photograph was admitted into evidence that showed the remains of a victim of a murder with which Mr. Leisure had not been charged. The petitioner contends that the sole purpose of introducing that photograph was to ensure the death penalty, which is why the petitioner argues that the sentence was based on prejudicial evidence but not on the facts proven in the case. The petitioner observes that the photograph was not introduced during the trial of the two co-defendants. According to the petitioner, although more culpable, Mr. Leisure's co-defendants were sentenced to life in prison. The petitioner contends that the sentence given to the alleged victim was, in that sense, disproportionate. The petitioner maintains that in October 1992, Mr. Leisure filed a federal petition of *habeas corpus* with the District Court in which he challenged the admission of that photograph as evidence. On January 13, 1998, the District Court refused the request. On March 9 of that year, Mr. Leisure filed a petition with that same Court seeking review of its decision. That petition was also denied.

56. According to the petitioner, on May 26, 1998, the United States Circuit Court for the Eight Circuit summarily denied Mr. Leisure's request for a certificate of appealability. On March 29, 1999, The United States Supreme Court refused to grant a writ of *certiorari*. For all the foregoing reasons the petitioner alleges that the State violated the rights recognized in articles I, II, XVIII and XXVI of the American Declaration, to the detriment of Mr. Leisure.

Anthony Green (P-2566-02)

57. The petitioners in this case point out that the alleged victim, a person of African descent, was given the death penalty in October 1988 for the robbery and murder of Susan Babitch, a white woman. The crime occurred in 1987, in Charleston County, South Carolina. According to the petitioners, the South Carolina Supreme Court affirmed the sentence in March 1990. That same year, the United States Supreme Court refused to grant a writ of *certiorari*. The petitioners state further that the United States District Court denied a federal petition of *habeas corpus* and its decision was affirmed by the Fourth Circuit Court of Appeals. Finally, the petitioners contend that the alleged victim filed a petition of *habeas corpus* with the South Carolina Supreme Court, which was denied in May 2002.

58. According to the petitioners, during the sentencing phase the prosecutor made extensive reference to the charges in cases not being adjudicated against the alleged victim, all for the purpose of establishing an aggravating circumstance of future danger and to ensure that the alleged victim received the death penalty.

59. The petitioners further contend that there is racial bias in South Carolina's application of the death penalty. With regard to the contention that the alleged victim's right to equality before the law was violated because of his race, the petitioners present statistics which they argue prove that race is a significant factor in determining which defendants will ultimately be given the death penalty. The petitioners allege that in South Carolina, an African American charged with killing a white person is three times as likely to receive the death penalty; in Charleston County, the prosecution is 20 times as likely to seek the death penalty against an African American defendant if the victim of the crime is white.

60. In conclusion, the petitioners contend that the State is responsible for violations of articles I, II, XVIII and XXVI of the American Declaration in the criminal proceedings conducted against the alleged victim.

James Brown (P-4538-02)

61. According to the petitioner, Mr. Brown was arrested on May 15, 1975, for the murder of Brenda Watson. The petitioner states that the alleged victim, although initially declared legally incompetent to stand trial, was declared competent to stand trial on April 8, 1981. The petitioner points out that the direct appeal filed with the Georgia Supreme Court confirmed the death sentence. The petitioner states that on September 30, 1988, Mr. Brown was granted a writ of federal *habeas corpus* on the grounds that the competency hearing in which Mr. Brown was declared competent to stand trial did not meet the minimum standards necessary. The alleged victim was retried and again convicted and sentenced to death in 1990. The petitioner states that on February 21, 1991, in a direct appeal filed with the Georgia Supreme Court, the latter confirmed the sentence. Then, on December 9, 1991, the United States Supreme Court refused to grant a writ of *certiorari*.

62. The petitioner mentions a series of appeals and motions filed thereafter, both in state and federal courts, all of were denied. Finally, the petitioner states that on March 19, 2002, the United States Court of Appeals for the Eleventh Circuit denied a request for a rehearing and, on October 21, 2002, the United States Supreme Court denied a petition seeking a writ of *certiorari*.

63. Concerning the specific claims, the petitioner contends that Mr. Brown was the victim of physical abuse by police prior to his trial. He points out that on May 15, 1975, the date of his arrest, the alleged victim made no statement whatever; however, on the following day he allegedly confessed to the crime to the Gwinnett County authorities and police officers. According to the petitioner, Mr. Davis, the Fulton County Assistant District Attorney, went to visit the alleged victim on May 20, 1975, and noticed that Mr. Brown's back looked as if it had been hit with a chair. The alleged victim purportedly indicated he had been beaten by a police officer. Mr. Davis had reportedly immediately contacted the Gwinnett County District Attorney to inform him of what had happened. The petitioner observes that while the police did not deny having beaten the alleged victim, they maintained that the confession was valid because the beating took place after he made the confession.

64. The petitioner also points out that the alleged victim claimed to be innocent and that the defense attorney inexplicably did not present the jury with all the evidence of Mr. Brown's history of mental illness. As noted in the section that discusses the most common claims in all the petitions, according to the petitioner the jury had no knowledge of the records indicating that the alleged victim suffered from a convulsive disorder, conversive hysteria, a psychoneurotic disorder with dissociative reactions and paranoid schizophrenia. The petitioner states further that although the jury was told of the abuse the alleged victim suffered as a child, the jury was unaware of the degree of the abuse and neglect.

65. The petitioner concludes that the violation of due process in a death penalty case also constitutes a violation of the right to life recognized in Article I of the American Declaration. He also states that the physical abuse of Mr. Brown while in the custody of the State violates his rights under articles I, XVIII, XXV and XXVI of the American Declaration.

Larry Eugene Moon (P-4659-02)

66. According to the petitioner, Mr. Moon was convicted of murder and armed robbery in the state of Georgia and was sentenced to death on January 21, 1988. The petitioner observes that the Georgia Supreme Court denied the direct appeal. As for the *certiorari* petition filed with the United States Supreme Court, which was pending at the time the petition was filed, the petitioner's argument is that the Inter-American Commission ought not to require exhaustion of local remedies since, under Georgia law, Mr. Moon could be executed within ten days of the date on which his appeal was denied.

67. The petitioner contends that in the sentencing phase of the case against Mr. Moon, evidence was introduced relating to two murders with which he was not originally charged. This, the petitioner argues, was a violation of his right to a fair trial and to due process. The petitioner also argues that in the *habeas corpus* proceedings, it was established that officials in other jurisdictions had withheld exculpatory evidence that would have proved that Mr. Moon was innocent of those crimes. He also states that the evidence relating to those murders was examined by the same jury that had convicted Mr. Moon of the murder with which he was charged, which is why his trial was not impartial.³⁹

68. The petitioner states that on July 30, 1993, a state writ of *habeas corpus* was granted based on the fact that the prosecution had failed to reveal exculpatory evidence related to the crimes not charged. When the State filed an appeal, the Georgia Supreme Court overturned the decision to grant a writ of *habeas corpus*. On December 31, 1994, the United States Supreme Court refused to grant a writ of *certiorari*. The petitioner states that two more appeals were filed in federal courts, which were denied in August 1999 and March 2002. The petitioner states that Mr. Moon filed a *certiorari* petition with the United States Supreme Court on October 5, 2002. Based on the facts alleged, the petitioner contends that the State violated the rights recognized in articles I, XVIII, and XXVI of the American Declaration, to the detriment of Mr. Moon.

Edward Hartman (P-784-03)

69. The petitioners state that the alleged victim was convicted of the June 1993 murder of Herman Smith, and was sentenced to death in 1994 in the state of North Carolina. According to the petitioners, all the post-conviction appeals and petitions of *habeas corpus* filed by the alleged victims with the federal and state courts were denied. They indicate that the appeal filed with the North Carolina Supreme Court was denied in 1996; the United States District Court for the Eastern District of North Carolina denied a federal petition of *habeas corpus*, a decision upheld by the Fourth Circuit Court of Appeals in 2002; the United States Supreme Court refused to grant a writ of *certiorari* on January 13, 2003. The petitioner's final appeal was a petition of *habeas corpus* filed with the state courts, but that, too, was denied on August 22, 2003.

70. According to the petitioners, the alleged victim was a homosexual and the victim of severe sexual abuse during his childhood by his uncle and another relative. The petitioners state that the defense introduced this argument during the sentencing phase, as a mitigating circumstance. Nevertheless, according to the petitioners, the prosecution made repeated reference to the alleged victim's sexual orientation to discard it as a mitigating circumstance, and to inflame any biases among the members of the jury and win the death penalty that way. According to the petitioners, the prosecutor's bias against homosexuals was obvious. They specifically point out that the prosecution maintained that the sexual abuse that the alleged victim suffered when he was eight years old was nothing serious and was not sufficient to be counted as a mitigating circumstance in determining the sentence, since the prisoner in question was homosexual. During a post-conviction hearing, the prosecutor had publicly admitted that his goal was to convince the jury that sexual abuse in childhood did not matter because the alleged victim was gay.

³⁹ Here, the petitioner cites the IACHR's position in Report No. 52/01, Case 12.243, Merits, Juan Raúl Garza, United States, April 4, 2001, paragraphs 107 and 108.

71. The petitioners contend that the prosecutor's repeated discriminatory conduct violated the alleged victim's right to due process, to equality before the law, and to protection against cruel, infamous or unusual punishment. In conclusion, the petitioners maintain that the State is responsible for violations of articles I, II and XXVI of the American Declaration in the criminal proceedings conducted against the alleged victim.

Robert Karl Hicks (P-580-04)

72. According to the available documentation, Mr. Hicks was tried for murder⁴⁰ by the Spalding County Superior Court in Georgia. He was convicted on January 16, 1986, and sentenced to death the following day. The petitioners contend that when the direct appeal was filed with the Georgia Supreme Court, the latter upheld the conviction and sentence. A number of state and federal petitions of *habeas corpus* were filed thereafter, all of which were denied.

73. According to the petitioners, on October 3, 1985, Dr. Donald Grigsby, psychologist for the State, told the Court that Mr. Hicks was competent to stand trial and to be held criminally responsible. At the defense's request, attorney Tamara Jacobs, who had experience in death penalty cases,⁴¹ was appointed as co-counsel for the defense. They state that attorney Jacobs requested an independent psychiatric evaluation.

74. The petitioners point out that at the hearing held on November 15, 1985, the judge said that he would appoint a psychiatrist from a state hospital, in order to keep costs down. The petitioners state that two weeks later, the Court appointed a state psychiatrist, who ultimately declined to serve as the psychiatric expert. The Court then authorized the defense to find a psychiatric expert, but on condition that the fees and any other costs would be settled up front. On January 11, 1985, two days before trial was to start, Dr. Bradford, the psychiatric expert named by the defense, said that a neurological examination would be needed to evaluate the alleged victim. The judge allegedly refused to grant the additional funds to finance that study and also denied the defense's request for a continuance.

75. The petitioners state that in the direct appeal filed with the Georgia Supreme Court, the latter denied the defense's claim that the trial court had violated rights recognized in *Ake v. Oklahoma*⁴² by denying the defense the funds needed for the neurological examination and denying the request for a continuance. According to the documents available, on April 24, 1997, the attorneys filed a federal petition of *habeas corpus* with the District Court, which was denied on September 5, 2000.⁴³ The District Court had allegedly acknowledged that the delay in the appointment of a psychiatric expert and the denial of the request for a continuance once the expert was appointed constituted a violation of every indigent person's right to be provided with an expert. It had also allegedly pointed out that the Georgia Supreme Court's conclusion that the appointment of an expert only a few days short of trial satisfied the standards required under *Ake* was an unreasonable application of the precedent clearly established by the Supreme Court. Nevertheless, the District Court had denied the petition on the grounds that the District Court's violation was harmless. According to the petitioners, the decision was upheld on appeal. Finally, the petitioners state that the United States Supreme Court refused to grant a writ of *certiorari* on June 14, 2004.

⁴⁰ The petitioners' original petition received on June 23, 2004, Annex (appeal filed with the United States' Eleventh Circuit Court of Appeals on February 9, 2004). This is the only document supplied by the petitioners.

⁴¹ As indicated in the section on common claims, the petitioners contend that the attorney originally appointed by the court did not have experience in death penalty cases.

⁴² In *Ake v. Oklahoma* 470 U.S. 68 (1985) the United States Supreme Court held that any indigent person charged with a crime has the right to have the State provide a psychiatric examination if he or she needs it.

⁴³ Original petition received on June 23, 2004, Annex (appeal filed with the Eleventh Circuit Court of Appeals, February 9, 2004), pp. 3 and 4.

76. Furthermore, the petitioners contend that at trial Dr. Grigsby stated that his study had been approved by the clinical director of West Central, who was a certified psychiatrist and neurologist. However, they claim that this physician, according to information from the American Board of Psychiatry and Neurology, was Board certified only in psychiatry, not neurology as Dr. Grigsby had claimed. They also point out that in the state *habeas corpus* proceedings, the representatives of the alleged victim introduced that evidence of Dr. Grigsby's perjury, but the petitions were denied.

77. The petitioners conclude that in death penalty cases the right to a fair trial must be strictly observed, since its violation constitutes not just a violation of due process but also a violation of the right to life. The petitioners state that the facts of the present case demonstrate that the trial court was led to an erroneous conclusion regarding the alleged victim's mental health because of the false testimony given by an expert appearing for the State. They point out that the death penalty thus becomes arbitrary and is the equivalent of a violation of the right to life. On these grounds, the petitioners contend that the State violated the rights recognized in articles I, XVIII and XXVI of the American Declaration, to the detriment of Mr. Hicks.

Troy Albert Kunkle (P-607-04)

78. According to the petitioner, Mr. Kunkle was convicted of murder and sentenced to death on February 26, 1986, in the state of Texas. He further states that the alleged victim exhausted the internal remedies available inasmuch as the direct appeal and the petitions of *habeas corpus* filed thereafter were denied.

79. The petitioner observes that Mr. Kunkle's right to due process was violated because of the restrictive nature of the Texas laws in effect at that time. He points out that, under those laws, when deciding whether to recommend the death penalty, a jury is asked to answer two questions: whether the conduct was deliberate and whether the convicted person would pose some future danger. The petitioner states that as a result, any evidence relative to the alleged victim's troubled childhood, his psychological problems and his history of drug abuse were not factors considered when deciding the penalty.

80. The petitioner also contends that the state courts denied Mr. Kunkle a hearing to discuss his claims of constitutional violations, which meant that he was denied the opportunity to prove the factual basis of his claims. The petitioner also observes that in death penalty cases, the right to a fair trial must be strictly observed, since its violation constitutes not just a violation of due process but also a violation of the right to life. The petitioner concludes by asserting that the State violated the rights recognized in articles I, XVIII, XXV and XXVI of the American Declaration, to Mr. Kunkle's detriment.

Stephen Anthony Mobley (P-187-05)

81. According to the petitioner, on February 16, 1996, Mr. Mobley was sentenced to death in Hall County, Georgia. According to the public records available, on August 16, 2004, the alleged victim filed a request for a writ of *certiorari* with the United States Supreme Court, which the latter refused on January 18, 2005.⁴⁴

82. The petitioner states that at trial the defense introduced evidence to prove that the alleged victim tried to plead guilty in order to obtain a sentence of life imprisonment and that Andrew Fuller, the district attorney at the start of the prosecution, denied his request. The petitioner states that the former prosecutor and judge of the Superior Court of the Northeastern Judicial District at the time of the trial, was called upon to testify as to why he had denied Mr. Mobley's request to plead guilty. The witness allegedly stated that his refusal was due to the alleged victim's personality, his lack of remorse and the fact that the victim's family supported the death penalty.

⁴⁴ Cf. *Prosecuting Attorney*, available at: <http://www.clarkprosecutor.org/html/death/US/mobley950.htm>.

83. The petitioner states that Mr. Mobley filed an initial round of state and federal petitions of *habeas corpus*. One of his arguments was that the Georgia state prosecutor had given false testimony in order to make certain that the alleged victim would get the death penalty. All the petitions filed were denied. After exhausting the remedies available under domestic law and a few weeks shy of the scheduled date of execution, the petitioner states that new evidence was discovered concerning Judge Fuller's alleged false testimony. According to the petitioner, the then prosecutor led the relatives of the victim astray by telling them that there was no such thing as a life sentence without the possibility of parole. In July 2002, the mother of the person that Mr. Mobley was convicted of killing told him that had it not been for the assertion by then prosecutor Fuller that life without parole was not an option; she and her family would not have supported application of the death penalty. The petitioner claims that the instruction the jury received had caused an error on a critical point, which undermined the credibility of the judicial proceeding.

84. The petitioner contends that according to the applicable domestic standards, the State cannot prove, beyond a reasonable doubt, that the false testimony had no impact at all on the jury's decision.⁴⁵ They also point out that rigorous compliance with those standards is essential in death penalty cases.⁴⁶ According to the petitioner, if in a death penalty case the right to a fair trial is not strictly respected, then the right to life is also violated. The petitioner also points out that the fact that the prosecutor based his charge on false evidence undermined the quality of the alleged victim's defense, thereby violating his right to an effective defense. The petitioner concludes that the State violated the rights recognized in articles I, XVIII and XXVI of the American Declaration.

Jaime Elizalde Jr. (P-1246-05)

85. Mr. Elizalde was convicted of killing two people in Houston, Texas in 1997. From the documentation provided and the petitioner's claims, it appears that the Court of Appeals denied the direct appeal. When a number of petitions of *habeas corpus* filed thereafter were all denied, in June 2004 the representatives of the alleged victim filed a petition with the United States Supreme Court seeking a writ of *certiorari*. In October 2005, they filed an application for pardon with the Governor of the State of Texas and the Board of Pardons and Parole. All the petitions were denied.

86. Concerning the specific claims, the petitioner states that important mistakes were made in the translation of the witnesses' testimony, and that the weapons test produced conflicting results. She points out that the only evidence against the alleged victim was the testimony of two witnesses who spoke a "dialect" of Spanish. She points out that because of the particular language of the witnesses, the quality of the translation was very poor and the Spanish version of the testimony was not taped, which prevented an appeal on these grounds. She states that because of the high standard of scrutiny applicable in death penalty cases, the judge should have, on his own initiative, ordered the testimony taped. On the other hand, there were also contradictions concerning the caliber of the bullets found in the victims' bodies, a problem compounded by the fact that the murder weapon was never found. Thus, the nexus between Mr. Elizalde and the murder weapon cannot be established. Based on the foregoing, the petitioner alleges that the United States violated the rights recognized in articles I, II, XVIII and XVIII of the American Declaration, to Mr. Elizalde's detriment.

Ángel Maturino Resendiz (P-360-06)

87. According to the petitioner, on May 18, 2000, Mr. Maturino, a Mexican national, was convicted in Harris County, Texas, for the crime of murder and sentenced to death on May 22 of that year. According to the petitioner, with the help of a court-appointed attorney, the alleged victim filed federal and state writs of *habeas corpus*. She observes that on May 21, 2003, the Court of Appeals affirmed the verdict on direct appeal. The state and federal petitions of *habeas corpus* were also denied.

⁴⁵ Original petition received from the petitioner on February 24, 2005, citing the decision in *Napue v. Illinois*, 360 U.S. 264 (1959) and *Kyles v. Whitley*, 514 U.S. 419 (1995), p. 3.

⁴⁶ Original petition received from the petitioner on February 24, 2005, citing the decision in *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976), p. 3.

88. The petitioner makes four specific claims: (i) excessive and avoidable suffering caused by the method of execution used in the state of Texas (lethal injection); (ii) a failure to comply with the minimum standards of due process in the Texas clemency proceeding; (iii) detention conditions on death row; and (iv) the unlawfulness of the use of the death penalty in the case of a person who is not legally incompetent but who suffers from severe mental illness. She states that internal remedies were exhausted with respect to the first two claims; as for the second two claims, she argues the exception to the rule requiring exhaustion of domestic remedies for the reasons explained below.

89. The petitioner states that the manner in which lethal injection is used in the state of Texas carries an unacceptable risk of pain and cruel suffering. She points out that the combination of drugs used generates an unacceptable risk of extreme and needless suffering. The petitioner also contends that Mr. Maturino was not given a real opportunity to present his case before the Texas Board of Pardons and Paroles, since that proceeding did not meet the minimum procedural requirements established by the Inter-American Commission and the Inter-American Court of Human Rights. According to the petitioner, no hearing is held, which means that the convicted person does not have access to the evidence presented against him and there is no real opportunity to appeal the Board's decision.

90. The petitioner asserts that the prison conditions on death row at Polunsky Prison, where the alleged victim was incarcerated, constitute cruel, inhuman and degrading punishment. She points out that those sentenced to death are confined in cells measuring approximately 60 square feet (5.57m²) and are completely segregated from the other inmates. They are denied any physical contact with relatives, friends and attorneys, even in the days and hours leading up to their execution. Inmates with disciplinary problems - most inmates with mental conditions have disciplinary problems - are allowed outside of their cells only three to four hours per week, and only in what amounts to small "cages". She points out that, based on the documentary evidence, the alleged victim suffered psychological torment and that the prison psychiatrists did not prescribe anti-psychotics for him for two years, during which time Mr. Maturino mutilated himself 28 times. She also observes that conditions on death row in Texas are harsher than in many of the maximum-security prisons elsewhere in the country. Finally, in her observations on the State's response,⁴⁷ the petitioner observes that the State misread this argument, as its interpretation of the petitioner's argument concerning the alleged violation of the right to humane treatment was that it was based entirely on the length of time that the alleged victim spent on death row, and not on the conditions there.

91. Furthermore, the petitioner alleges that by imposing the death penalty on a person with a severe mental disorder but not legally incompetent, the United States Government violated the alleged victim's human rights. She points out that no domestic remedies were filed to challenge this point or the prison conditions, because they were deemed to have little chance of prospering. She also points out that both the state and federal laws prevented Mr. Maturino from making these arguments because of the draconian restrictions placed on successive post-conviction petitions.

92. In this regard, the petitioner asserts that the alleged victim was prevented from filing claims in state courts because of the strict requirements contained in Article 11071, Section 5(a)(1) of the Texas Code of Criminal Procedure.⁴⁸ She points out that the Texas Criminal Appeals Court has a very narrow interpretation of this provision; for example, the provision precludes a state court from considering the merits of claims presented in a successive habeas application that alleges facts not previously introduced owing to the ineffectual or incompetent legal representation. Furthermore, she alleges that federal law also imposes insurmountable obstacles. She points out that under the Anti-Terrorism and Effective Death Penalty Act, a petition can be filed only when new evidence exists demonstrating the convicted person's innocence or if a new clause in the Constitution can be applied retroactively.

⁴⁷ Communication received on September 18, 2006.

⁴⁸ That provision provides, *inter alia*, that if a petition of *habeas corpus* is filed subsequent to an initial petition, the court can deny it unless it contains sufficient and specific facts showing that the claims were not and could not be introduced in the original petition because, for reasons of fact and of law, they were not available at the time the previous petition was filed..

Therefore, inasmuch as it is useless to file a petition that the courts are precluded from hearing because of procedural obstacles, the petitioner asserts that the exception to the rule requiring exhaustion of domestic remedies applies with respect to the last two claims.

93. The petitioner concludes that the alleged violations are a breach of the rights recognized in articles I, XVIII, XXV and XXVI of the American Declaration.

Heliberto Chi Aceituno (P-1232-07)

94. According to the petitioner, Mr. Chi Aceituno, a Honduran citizen, was arrested in California for a murder committed on March 24, 2001, and convicted and sentenced to death in Austin, Texas. The date originally set for his execution was October 3, 2007.

95. The petitioner states that the alleged victim's right to communicate with and be assisted by the consular authorities of his country was not respected, in violation of the State's obligation to notify the consular authorities of the arrest, detention or imprisonment of one of their foreign nationals, as provided in Article 36 of the Vienna Convention on Consular Relations. The petitioner also contends that by this omission, the State also violated the alleged victim's right to due process. Mr. Chi Aceituno had questioned the State's compliance from the early stages of the proceedings, but to no avail. According to the documentation provided, the alleged victim also raised this issue in the petition of *habeas corpus*; the Fifth Circuit Court of Appeals rejected the claim on the grounds that it was not raised on direct appeal. On September 26, 2007, the United States Supreme Court refused to grant the writ of *certiorari* filed by the alleged victim to appeal the decision of the Court of Appeals. When his appeal challenging the constitutionality of the lethal injection protocol in Texas was denied, Mr. Chi Aceituno was executed on August 7, 2008.

David Powell (P-873-10)

96. According to the petitioners, Mr. Powell was convicted and sentenced to death in Austin, Texas, in September 1978 for the killing of a police officer. In 1987, the conviction was affirmed on direct appeal. The United States Supreme Court reversed the judgment of the Court of Criminal Appeals and sent the case back to the court based on the judgment in *Satterwhite v. Texas*, 486 U.S. 249 (1988).⁴⁹ The petitioners point out that at the end of the second trial, Mr. Powell was convicted and sentenced to death in November 1991. The petitioners state that in the direct appeal, the Court of Appeals confirmed the conviction, but ordered the case be retried to determine the sentence, inasmuch as the jury had not been properly instructed. In 1999, Mr. Powell was convicted again and sentenced to death. The Court of Appeals confirmed the sentence and, in 2002, the United States Supreme Court denied a petition to grant a writ of *certiorari*. The petitioners point out that a federal petition of *habeas corpus* was denied on December 27, 2005, and on March 23, 2009, the Supreme Court refused to review the case. Finally, on May 25, 2010, the alleged victim filed an application with the Texas Board of Pardons and Paroles and the Governor of Texas, but was denied.

97. The petitioners made two specific claims: (i) the excessive length of the process, and (ii) jury bias. As for the first argument, the petitioners observe that the protracted period of time that the alleged victim spent on death row was not the fault of any actions on his part, but rather the fault of the appeals system and the defects in the trials that necessitated new trials. The petitioners state that Mr. Powell was tried for the first time in 1978, but his conviction was vacated because of errors in the presentation of experts' testimony. The Court of Appeals had spent nine years, from 1978 to 1987, to decide the automatic appeal of the first conviction. The petitioners point out that despite the amount of time the Court took in arriving at its decision; it still committed an error that resulted in the Supreme Court reversing the Court of Appeals' decision in 1988. They contend that the verdict in the second trial was

⁴⁹ According to that decision, once a person is formally indicted, he or she cannot be examined by a psychiatric expert to determine whether he or she would pose a future danger, without first notifying the defense.

also vacated, this time because of errors in establishing the penalty, whereupon the case was sent back for resentencing. The third trial ended in 1999 with a conviction and death sentence.

98. As for the second claim, the petitioners point out that the jury in the alleged victim's trial was not impartial. This was because of the particular mechanism used to select members of the jury in the United States, whereby potential jury members opposed to the death penalty would not be considered. The petitioners point out that in the new trial held in 1999, the defense questioned the prosecution's exclusion of two jury members. They assert that juries, like judges, must be impartial. According to the petitioners a jury is not impartial if it is composed exclusively of persons inclined to accept the prosecution's version. Finally, they point out that no motion was filed to challenge this point since it would have been futile given the jurisprudence of the United States Supreme Court on this subject

99. The petitioners conclude that the facts recounted above, combined with the many years spent on death row – discussed in the section on the most common claims - constitute violation of articles I, II, XVIII and XXVI of the American Declaration. In a communication dated July 13, 2010, the petitioners informed the Commission that although the alleged victim had been executed, they wanted to pursue his petition with the IACHR.

Ronnie Gardner (P-907-10)

100. The petitioners state that on October 25, 1985, Mr. Gardner was sentenced to death. On direct appeal, the Utah Supreme Court affirmed the sentence. A number of petitions of *habeas corpus* filed were denied. On March 8, 2010, the United States Supreme Court refused to grant a writ of *certiorari*. On May 4, 2010, Mr. Gardner filed a clemency petition with the Utah Board of Pardons and Parole, which was denied on June 14, 2010. Finally, a petition was filed with the Court of Appeals, but was also denied.

101. As for specific claims, the petitioners mention the following: (i) the deplorable prison conditions and (ii) a violation of due process in the clemency proceeding. Concerning the first claim, the petitioners point out that prisons in Utah are generally overcrowded and have an oppressive atmosphere. They point out that Mr. Gardner's circumstances were worse than those of the other inmates. While eight of those incarcerated on death row in Utah could leave their cells for three hours a day, the alleged victim was allowed out for only one hour. As for the second claim, the petitioners contend that the proceeding followed by the Board of Pardons and Parole for hearing clemency requests does not observe the minimum guarantees of due process established by the IACHR. They point out that the Board did not respect the alleged victim's right to an impartial hearing, this because the Office of the Attorney General, which was opposed to the commutation of the alleged victim's sentence, was also legal counsel to the Board in Mr. Gardner's request. Based on the foregoing, the petitioners allege that the United States violated articles I, XVIII, XXV and XXVI of the American Declaration.

B. Position of the State

Clarence Allen Lackey (P-11.575)

102. The State observes that the IACHR should declare this petition inadmissible for failure to exhaust the remedies under domestic law. It contends that, as the petitioner himself acknowledges, the decision in the federal petition of *habeas corpus* was still pending at the time the petition was filed with the Commission. It concludes that given the petitioner's admission, the State is relieved of the burden of demonstrating that adequate remedies remain to be exhausted to repair the violation being alleged.

103. As for the alleged death row syndrome, the State categorically rejects the position of the European Court of Human Rights in the *Soering* case, where the Court held that prolonged detention on death row amounts to cruel, inhuman and degrading treatment. It observes in this regard that the IACHR ought not to consider itself bound by the European Court's decision, and that other international bodies and domestic courts have rejected that interpretation. The State cites the jurisprudence of the United Nations Human Rights Committee to the effect that "even prolonged periods of detention under a severe

custodial regime on death row cannot generally be considered to constitute cruel, inhuman or degrading treatment if the convicted person is merely availing himself of appellate remedies.”⁵⁰

104. As for the specific claims made, the State contends that the petition does not show facts that constitute violations of the American Declaration. Concerning the alleged excessive duration of the criminal process, the State points out that in order to preserve the accused’ guarantees of due process, some appeals processes are automatic. Such is the case in the state of Texas, whose laws make appeal mandatory in death penalty convictions. The State further contends that in addition to the mandatory appeal, the *habeas corpus* proceedings offer condemned persons another opportunity to obtain a judicial review of their conviction and sentence. It points out that Mr. Lackey filed a number of petitions when the mandatory appeals proceedings were finalized. According to the State, to even consider the petitioner’s argument would mean imposing arbitrary limits on the right of someone sentenced to death to appeal his conviction and sentence to a higher court. It concludes that the petitioner would appear to be after less judicial protection and fewer guarantees.

David Leisure (P-12.201)

105. On September 17, 2010, the State reported that Mr. Leisure had been executed in the state of Missouri on September 1, 1999. As of the date of this report, the State has provided no further observations regarding the petitioner’s claims.

Anthony Green (P-2566-02)

106. The State has not submitted its response to the petition.

James Brown (P-4538-02)

107. On September 17, 2010, the State reported that the execution ordered by the State of Georgia was stayed to allow new evidence to be introduced. Mr. Brown was convicted and sentenced to death, and executed on November 4, 2003. The State has not presented its observations on the petitioners’ claims.

Larry Eugene Moon (P-4659-02)

108. The State requests the Inter-American Commission to declare the petition inadmissible inasmuch as it does not state facts that are sufficient to characterize a violation of the rights protected under the American Declaration and it is manifestly unfounded.

109. Concerning the alleged inadequate legal representation, the State asserts that the alleged inefficacy of the attorney in presenting additional extenuating evidence does not constitute a violation of the alleged victim’s right to a fair trial and right to due process. It observes that the petitioner makes a very vague claim concerning extenuating evidence and that it was the attorney’s decision not to use that evidence. The State alleges that the post-conviction proceedings demonstrate that legal counsel made a number of reasonable and justified strategic decisions with regard to the introduction of extenuating evidence. It also contends that the domestic courts were of the view that there was no reasonable probability that the sentence would have been different had defense counsel opted for another strategy.

110. Concerning the specific claims, the State asserts that the criminal proceedings in Mr. Moon’s case were conducted in accordance with United States law, the American Declaration, and customary international law. It further contends that Article I of the American Declaration does not prohibit the death penalty. Specifically, it points out that when the death penalty is applied for the more serious crimes and the guarantees of due process are respected, the death sentence is consistent with

⁵⁰ Barrett & Sutcliffe v. Jamaica, Communications Nos. 270/1988 and 271/1988.

international law. It asserts that the crime committed by Mr. Moon was sufficiently serious to warrant the death penalty and contends that the alleged victim availed himself of the comprehensive review system and his rights were protected.

111. According to the State, the introduction of evidence related to crimes with which Mr. Moon was not charged did not violate Mr. Moon's right to a fair trial and to due process. The State contends that it is long-standing practice that during the sentencing hearing, the jury should have access to all relevant information, both aggravating and extenuating. The State also contends that this practice was developed to protect defendants in capital cases and that the accused is free to present arguments to refute the incriminating evidence. Furthermore, the State alleges that the jury was not prejudiced by the previous trial; quite the contrary, it was in a better position to understand the nature of the severity of the crimes committed in order to determine what the proper punishment should be. The State asserts that the standard of proof applied in the hearing to determine the sentence is guilt beyond a reasonable doubt.

Edward Hartman (P-784-03)

112. In its response, the State submitted a copy of a communication that the state of North Carolina submitted to the United States Supreme Court in which it objected to the petition for a writ of *certiorari* that the alleged victim had filed. However, the communication makes no specific reference to the arguments made in the petition filed with the IACHR. The State contends in a general way that Mr. Harman was not a victim of any discrimination and that his claim was unfounded.

Robert Karl Hicks (P-580-04)

113. On June 30, 2004, the State reported that it had forwarded the Commission's June 28, 2004 communication to the Georgia Attorney General. On September 17, 2010, the Inter-American Commission received a note from the State indicating that the alleged victim had been executed on July 1, 2004. To date, the State has not submitted its observations on the petitioners' claims.

Troy Albert Kunkle (P-607-04)

114. The State did not submit a substantive response to the claims made in the petition, but simply confined itself to reporting that the United States Supreme Court had stayed the execution while a petition for a writ of *certiorari* was being decided and that if the ruling was not in Mr. Kunkle's favor the Court would notify him of his date of execution with 30 days advance notice.

Stephen Anthony Mobley (P-187-05)

115. The State asserts that the petition is inadmissible as it fails to demonstrate a violation of the American Declaration; internal remedies were not exhausted, and it is manifestly unfounded.

116. As to the claim of inadequate legal representation, the State asserts that said claim is unclear as it does not specify which factors the attorney failed to investigate; furthermore, no domestic remedy was filed to make this claim, which means that internal remedies were not exhausted where this claim is concerned. The State concludes that Mr. Mobley had the benefit of a comprehensive review system and ample due process, with more than 15 decisions at the state and federal levels.

117. The State further maintains that the introduction of evidence to the effect that the alleged victim purportedly attempted to plead guilty and the prosecutor's alleged reason for rejecting the guilty plea, are not violations of the right to a fair trial or the right to due process. It maintains that prior to the start of trial, Mr. Mobley appealed to the Georgia Supreme Court in order to be permitted to introduce evidence of his proposal to plead guilty, and that the Court agreed to his request on the condition that the State would also be given an opportunity to explain its reasons for rejecting his proposal to plead guilty. It points out that prior to the introduction of that evidence, the Court, the attorney for the State and the

attorney representing the alleged victim discussed all the ramifications of the testimony and that everyone understood that then prosecutor Fuller was going to testify about the reasons for rejecting the guilty plea.

118. As to Fuller's alleged perjury concerning the position of the victim's family on the use of the death penalty, the State asserts that according to the trial transcript, Fuller never said that the family was determined to have the death penalty and he never told the jury that the family's feelings were a factor in his decision to go for the death penalty. The State contends also that Fuller not only denied that the family's opinion was an important factor in his decision, but also explained what those reasons were: the fact that the crime had been committed in cold blood, Mr. Mobley's confession, and his behavior while in custody. On this matter, the State concludes that the alleged victim's due process rights were observed and that the alleged victim did not introduce evidence or made any substantive arguments to suggest otherwise. The State contends that the IACHR would be acting as a fourth instance review body.

119. Finally, with respect to the alleged violation of the right to life, the State observes that when the death penalty is reserved for the most serious crimes and due process is observed, there is no violation of international law.

Jaime Elizalde Jr. (P-1246-05)

120. The State observes that the petition does not state facts that tend to characterize violations of the American Declaration. The claim asserting inadequate legal representation was not made on direct appeal or in the state petitions of *habeas corpus*. It points out that when the allegation was made in federal court, the latter declared the appeal inadmissible on the grounds that this point had never been raised with the state courts.

121. The State asserts that the issue of the alleged victim's purported mental disability was reviewed by the state and federal courts, which concluded that Mr. Elizalde was competent to be executed. Thus, the State argued, Mr. Elizalde had been provided all the judicial protection that United States law affords. The State observes that in January 2006 the alleged victim filed two petitions raising the question of his mental disability, both of which were denied.⁵¹

122. Regarding the specific claims, the State contends that the petition does not present any evidence corroborating the alleged presence of errors in the translation of the testimonies or supposed inconsistencies in the results of the ballistics tests. It also points out that those purported failures were not alleged at trial or on appeal. The State also observes that on January 27, 2006, Mr. Elizalde filed a federal petition of *habeas corpus* in which he challenged the use of lethal injection. That petition was also denied. The State asserts that the petitions filed with the Court of Appeals and the United States Supreme Court on January 31, 2006, were also denied. Finally, it observes that the state and federal judicial system afford due process and ensures that the death penalty is not used arbitrarily.

Ángel Maturino Resendiz (P-360-06)

123. The State asserts that the petition does not comply with the rule of prior exhaustion of domestic remedies and that it is without merit. It contends that, as the petitioner herself acknowledges, the available resources to challenge most of the claims made to the Inter-American Commission were not exhausted. It observes that four of the six claims were never introduced in domestic courts.⁵² It also points out that because he failed to meet certain deadlines, Mr. Maturino limited the number of remedies available to him to exhaust.

⁵¹ The State makes reference to the state petition of *habeas corpus* denied on January 30, 2006, and to the petition filed with the 5th Circuit Court of Appeals and denied on January 31, 2006.

⁵² The claims the State mentions are: (i) the imposition of the death penalty as cruel, inhuman and degrading treatment; (ii) prison conditions on death row as cruel, inhuman and degrading treatment; (iii) noncompliance with the standards of due process in clemency proceedings in Texas, and (iv) ineffectual legal representation by the public defender.

124. Concerning the supposed inadequate legal representation, the State contends that this claim is unfounded, and was never litigated before the domestic courts. As for the failure to include the argument of Mr. Maturino's mental disorder in the petitions of *habeas corpus*, the State points out that this allegation was eventually examined in a hearing held for that very purpose. The State asserts that the appeal of the denial of the federal petition of *habeas corpus* –which Mr. Maturino's defense counsel filed after the deadline- was not the only remedy he had vis-à-vis the domestic courts. It points out that in fact, Mr. Maturino's defense counsel filed two state petitions of *habeas corpus*, a petition requesting that Mr. Maturino be declared incompetent for execution, another federal petition of *habeas corpus*, and a civil suit challenging the lethal injection protocol.

125. The State asserts that the alleged victim's purported incompetency was extensively litigated in the U.S. courts. It states that Mr. Maturino filed a petition in April 2006 with the Court of the 178th Judicial District, which held a two-day hearing at which evidence was introduced to determine whether the alleged victim was competent to be executed. At that hearing, both the defense and the State reportedly summoned witnesses to testify; court-appointed experts also testified. After hearing all the testimony, the Court concluded that the alleged victim was conscious of the following: (i) that his execution was imminent; (ii) that the State of Texas was going to inject chemicals into his body; (iii) that the purpose of the lethal injection was to stop his heart, lungs and brain from functioning; and (iv) that other people would consider him dead. The Court also concluded that Mr. Maturino understood that he had been sentenced to die and he understood the lethal injection procedure. Based on that reasoning, the Court concluded that the alleged victim was competent to be executed.

126. The State observes that in the *Atkins* case, the United States Supreme Court held that executing a mentally retarded person constitutes cruel and unusual punishment. It points out that the ruling in that case puts a significant constraint on the prosecution of persons with mental disabilities. The State contends that in the present case, the jury rejected the plea of not-guilty by reason of insanity that Mr. Maturino entered; it pointed out that the Court later examined this issue at a hearing and concluded that the alleged victim was competent to be executed.

127. Furthermore, in response to the claim made concerning the prison conditions, the State alluded to the prolonged period of time spent on death row and observed that this is the result of the review procedure provided to persons sentenced to death, which complies with the highest international standard of protection. It observes that state and federal proceedings are available to review any conviction and that some types of appeal are automatic. It also observes that the federal *habeas corpus* proceedings are an opportunity to review both substance and procedure when state courts impose the death penalty. The State contends that the proceedings available make certain that the trial was fair and impartial, that the conviction was based on substantial evidence and that the sentence fits the crime.

128. The State also asserts that the guarantees of due process were observed at both the state and federal levels. It contends that Mr. Maturino was able to avail himself of a broad system of review and protection of his rights; in the space of six years, the defense's arguments were reviewed by the 178 District Court of Harris County (twice), the Texas Court of Criminal Appeals (three times), the District Court (eight times), the 5th Circuit Court of Appeals (4 times), and the United States Supreme Court (twice). According to the State, this clearly demonstrates that the authorities devoted considerable time and resources to reviewing Mr. Maturino's claims.

129. The State argues that, when the delay between sentencing and execution is due to the fact that remedies are being exhausted, the condemned person cannot then allege that the delay constitutes cruel, infamous or unusual punishment. It contends that if such a delay were deemed to be a violation of the American Declaration, the perverse effect would be to foreshorten the scope of the judicial protection available to those condemned to die.

130. Finally, the State observes that since 2004, when his sentence became final, the alleged victim was aware of the chemicals used in the lethal injection; hence, the District Court was reasonable in denying the petition on the grounds that it was untimely. The State observes that even if the alleged

victim had filed his petition on time, it would have been unfounded, since the lethal injection protocol used in Texas had by then been extensively litigated and upheld by the United States courts.

Heliberto Chi Aceituno (P-1232-07)

131. In a note dated October 1, 2007, the State reported that the IACHR's communication had been forwarded to the appropriate state authorities. In a communication received on October 5, 2007, the State report that Mr. Chi Aceituno's execution had been stayed pending the outcome of a petition that the alleged victim had filed challenging the lethal injection protocol. It also asked the Commission to declare the petition inadmissible by virtue of the fact that domestic proceedings were still pending. In a note received on September 17, 2010, the State reiterated that the Commission's communication had been duly forwarded to state authorities. It also reported that Mr. Chi Aceituno had been executed in the state of Texas on August 7, 2008.

David Powell (P-873-10)

132. On June 14, 2010, the State reported that the Commission's communication had been forwarded to the state authorities. Thus far, the Commission has not received the State's observations on this petition.

Ronnie Gardner (P-907-10)

133. On June 17, 2010, the State reported that the Commission's communication had been forwarded to the state authorities. To date, the Commission has not received the State's observations on this petition.

IV. ANALYSIS ON COMPETENCE AND ADMISSIBILITY

A. Competence

134. Under Article 32 of the Rules of Procedure of the Commission, the petitioners are, in principle, entitled to file petitions with the Inter-American Commission. The persons named in the petitions as the alleged victims are individuals whose rights under the American Declaration the United States undertook to respect and guarantee. As for the State, the Inter-American Commission observes that under Article 1(2)(b) and Article 20 of the Statute of the Inter-American Commission and Article 51 of the Commission's Rules of Procedure, the United States is bound by the obligations that the American Declaration imposes upon it. The United States has been subject to the jurisdiction of the Inter-American Commission since June 19, 1951, the date on which it deposited its instrument of ratification of the OAS Charter.⁵³ Furthermore, the Commission is competent *ratione personae* to examine these petitions.

135. The Inter-American Commission is competent *ratione loci* to take up these 14 petitions, inasmuch as they allege violations of rights protected under the American Declaration, said to have occurred with the territory of the United States, a state Party to that Declaration. The Inter-American Commission is also competent *ratione temporis* inasmuch as the obligation to respect and guarantee the rights protected in the American Declaration was already in force for the State on the date the facts alleged in the petitions were said to have occurred. Finally, the IACHR is competent *ratione materiae* because the petitions denounce possible violations of human rights protected under the American Declaration.

B. Admissibility requirements

1. Exhaustion of domestic remedies

⁵³ See, I/A Court H.R., Interpretation of the American Declaration of the Rights and Duties of Man within the Framework of Article 64 of the American Convention on Human Rights. Advisory Opinion OC-10/89 of July 14, 1989. Series A No. 10, para. 45.

136. Article 31(1) of the Inter-American Commission's Rules of Procedure provides that in order to decide on the admissibility of a matter, the Commission must verify whether the remedies of the domestic legal system have been pursued and exhausted in accordance with generally recognized principles of international law. The purpose of this requirement is to give the national authorities the opportunity to take the alleged violation of a protected right under advisement and, if appropriate, resolve the matter before it is taken up by an international body.

137. Article 31(2) of the IACHR's Rules of Procedure states that the rule requiring exhaustion of local remedies shall not apply when: a) the domestic legislation of the State concerned does not afford due process of law for protection of the right or rights that have allegedly been violated; b) the party alleging violation of his or her rights has been denied access to the remedies under domestic law or has been prevented from exhausting them; or c) there has been an unwarranted delay in rendering a final judgment under the aforementioned remedies.

138. In all 14 petitions, the petitioners state that the conviction was confirmed on appeal and that the remedies filed thereafter were denied, in particular, state and federal petitions of *habeas corpus* and petitions filed with the United States Supreme Court requesting a writ of *certiorari*. Furthermore, in petitions P-12.201, P-2566-02, P-4538-02, P-4659-02, P-784-03, P-580-04, P-607-04, P-873-10 and P-907-10, the State did not dispute the fact that internal remedies had been exhausted. In the case of the other petitions, the State alleges a failure to exhaust domestic remedies in relation to either the petition as a whole or some of its claims.

139. The State requests that P-11.575 be declared inadmissible on the grounds of a failure to exhaust domestic remedies, because at the time the petition was filed a notice of appeal was still pending with the Appeals Court to challenge the decision to deny a petition of *habeas corpus*. The petitioner, for his part, points out that he turned to the Commission before that remedy was exhausted in view of the urgency of the case. The Commission has written that "the requirement of exhaustion of domestic remedies does not mean that the alleged victims have the obligation to exhaust all the remedies available to them." Accordingly, "if the alleged victim endeavored to resolve the matter by making use of a valid, adequate alternative available in the domestic legal system and the State had an opportunity to remedy the issue within its jurisdiction, the purpose of the international legal precept is fulfilled."⁵⁴ The IACHR also wrote that this requirement is decided at the time the admissibility analysis is done, not when the complaint is submitted.⁵⁵

140. The State also contends that in P-187-05 no internal remedy was ever filed alleging inadequate legal representation, so that internal remedies were not exhausted where this issue was concerned. However, in its response to the petition, the State itself asserts that on March 12, 1996, the petitioner filed a state petition of *habeas corpus* in which he alleged inadequate legal representation, and that the Georgia Supreme Court had denied that petition on July 15, 1998.⁵⁶ Therefore, based on the information available, the Inter-American Commission concludes that internal remedies were exhausted where that point was concerned.

141. In the case of P-1246-05, the State alleges that the supposed existence of errors in the translation of the testimony and the inconsistencies in the results of the ballistics tests were not alleged either at trial or on appeal. The Inter-American Commission would point out that one of the claims the petitioner makes is the lack of adequate and effective legal representation. Here, the petitioner contends that there were deficiencies in the defense both at trial and in the appeals phase, as the attorney failed to

⁵⁴ IACHR, Report No. 69/04, Petition 667-01, Admissibility, Jesús Manuel Naranjo Cárdenas et al. – Pensioners of the Venezuelan Aviation Company – VIASA, Venezuela, October 13, 2004, para. 52.

⁵⁵ IACHR, Report No. 146/10, Petition 212-05, Admissibility, Manuel Santiz Culebra et al. – Acteal Massacre, Mexico, November 1, 2010, para. 39.

⁵⁶ Communication from the State, received April 28, 2005, page 2.

explore obvious lines of investigation and was not up to the standards of due diligence that are vital in death penalty cases. The petitioner observes that while the alleged victim called the attorney's attention to the translation errors, the attorney never challenged them. Therefore, given the obvious relationship that exists between the alleged failure to file a remedy and one of the violations alleged by the petitioner, the Inter-American Commission considers that the question of prior exhaustion of remedies must be examined when the merits of the case are considered.⁵⁷

142. The petitioner in P-360-06 invokes the exception to the rule requiring exhaustion of local remedies with respect to three of the six claims made, although she does not indicate which of the exceptions allowed under the Commission's Rules of Procedure applies in each case. The State, for its part, makes a generic claim to the effect that the remedies available to challenge most of the claims made to the Inter-American Commission were not exhausted, but fails to indicate what the available remedies are. As for the lack of a proper defense in one of the post-conviction proceedings, the petitioner states that neither the United States Constitution nor the Constitution of the state of Texas guarantees legal representation to an indigent person sentenced to death to enable that person to file post-conviction remedies, a claim that the State has not contested. The Inter-American Commission has previously observed that the impossibility of effectively challenging one's lawyer's performance is a serious gap in the protection of the fundamental due process rights of capital defendants.⁵⁸ The Inter-American Commission therefore concludes that the prior exhaustion exception set forth in Article 31(2)(a) of the Commission's Rules of Procedure applies with respect to this claim.

143. As to the claims made concerning the detention conditions and the unlawfulness of the death penalty applied to persons who are not legally incompetent but who suffer from some severe mental disorder, the petitioner alleges, *inter alia*, that the state and federal laws place draconian limitations on the filing of successive post-conviction petitions, which prevented Mr. Maturino from ever asserting these claims. The State, for its part, has not contested that allegation. Therefore, from the information available, the Inter-American Commission concludes that with respect to these two claims in P-360-06, the petitioner is exempt from the prior exhaustion rule under the provisions of Article 31(2)(b) of the Commission's Rules of Procedure.

144. Finally, concerning P-1232-07, in a communication dated October 10, 2007, the State asked the IACHR to declare the petition inadmissible because at the time, proceedings were still pending in the domestic courts. Again, the Inter-American Commission would point out that this requirement is weighed at the time the petition's admissibility is taken up, not when the complaint is presented.⁵⁹

145. The Commission therefore concludes that in the instant case, the remedies under domestic law have either been pursued and exhausted in accordance with Article 31(1) of the Commission's Rules of Procedure or, in some cases, the exhaustion rule exception provided for in Article 31(2)(a) and 31(2)(b) of the Commission's Rules of Procedure applies.

2. Timeliness of the petition

146. Under Article 32(1) of the Commission's Rules of Procedure, a petition must be lodged within a period of six months from the date on which the final decision adopted at the national level was notified. However, under Article 32(2) of the Commission's Rules of Procedure, in those cases in which the exceptions to the requirement of prior exhaustion of domestic remedies are applicable, the petition shall be presented within a reasonable period of time, as determined by the Commission. For this

⁵⁷ See, by analogy, IACHR, Report No. 121/06, Petition 554-04, Admissibility, John Doe *et al.*, Canada, October 27, 2006, paragraphs 612 and 63; Report No. 61/03, Petition 4446-02, Admissibility, Roberto Moreno Ramos, United States, October 10, 2003, paragraphs 62 and 63.

⁵⁸ IACHR, Report No. 1/05, Case 12.430, Merits, Roberto Moreno Ramos, United States, January 28, 2005, para. 55.

⁵⁹ IACHR, Report No. 146/10, Petition 212-05, Admissibility, Manuel Santiz Culebra *et al.* – Acteal Massacre, Mexico, November 1, 2010, para. 39.

purpose, the Commission shall consider the date on which the alleged violation of rights occurred and the circumstances of each case.⁶⁰

147. Petitions P-12.201, P-2566-02, P-4538-02, P-4659-02, P-784-03, P-580-04, P-607-04, P-187-05, P-1232-07, P-873-10, and P-907-10 were filed within six months from the date of notification of the final decisions on the questions put to the Commission. In the case of P-11.575, the deadline stipulated in Article 32(1) of the Rules of Procedure is closely linked to the exhaustion of domestic remedies which, as previously noted, were exhausted subsequent to the date on which the petition was filed with the Commission.⁶¹

148. In the case of P-1246-05, the Inter-American Commission considers that the question of the timeliness of the petition depends in the final analysis on the Commission's decision regarding exhaustion of domestic remedies. Therefore, the Inter-American Commission decides to join, not only the issue of exhaustion of domestic remedies, but also the timeliness of the petition to the merits of the case.⁶² As for the claims made in P-360-06 where the Commission determined that the exceptions allowed under articles 31(2)(a) and 31(2)(b) of the Rules of Procedure apply, the alleged violations occurred in the period between the alleged victim's conviction and the date on which the petition was filed, which was April 13, 2006, so that the requirement stipulated in Article 32(2) of the Commission's Rules of Procedure has been satisfied.

149. The Inter-American Commission therefore concludes that the petitions satisfy the requirement set forth in Article 32 of the Commission's Rules of Procedure.

⁶⁰ IACHR, Report No. 63/10, Petition 1119-03, Admissibility, Garífuna Community of Punta Piedra and Its Members, Honduras, March 24, 2010, para. 49.

⁶¹ IACHR, Report No. 20/05, Petition 714-00, Admissibility, Rafael Correa Díaz, Peru, February 25, 2005, para. 34.

⁶² See, by analogy, IACHR, Report No. 121/06, Petition 554-04, Admissibility, John Doe *et al.*, Canada, October 27, 2006, para. 64.

3. Duplication and international *res judicata*

150. Nothing in the case file suggests that these petitions are pending settlement in another international proceeding or that they are substantially the same as ones previously examined by the Commission or any other international body. The requirements established in Articles 33(1) of the Commission's Rules of Procedure have therefore been satisfied.

4. Colorable claim

151. Article 34(a) of the Inter-American Commission's Rules of Procedure provides that the Commission shall declare any case or petition inadmissible if it does not state facts that tend to establish a violation of the rights referred to in Article 27 of the Rules of Procedure. If it does not state such facts, then the petition must be dismissed as either "manifestly groundless" or "out of order," in the language of Article 34(b). The standard for evaluating those requirements differs from that used to rule on the merits of a petition; the Commission must perform a *prima facie* evaluation to determine whether the petition establishes the basis for a possible or potential violation of a right guaranteed by the American Declaration. This is a preliminary analysis that does not imply any prejudgment of the merits.

152. Three claims run through a significant number of these petitions: the inadequacy of the legal representation; the mental disability of the alleged victims, and death row syndrome. As for the first claim, the petitioners contend that the defense did not perform up to the standards of due diligence required in death penalty cases due, *inter alia*, to their failure to investigate extenuating evidence and the failure to explore obvious lines of investigation. They also contend that under Texas state law, an indigent person sentenced to death is not entitled to legal representation in the post-conviction appeals. With respect to P-4659-02 the State contends that the alleged failure of the defense attorney to introduce additional extenuating circumstances does not constitute a violation of due process. As for the petitioners, the State asserts that the claim of inadequate representation is either unfounded or was never argued before the domestic courts.

153. Concerning the supposed mental disability, a number of the petitions claim that the alleged victim was suffering from schizophrenia or some type of neurological disorder, and were therefore legally incompetent to be executed. They also assert that despite the Supreme Court's decision prohibiting the execution of mentally retarded persons,⁶³ the states had allegedly used a very narrow definition of the term "incompetence". The State asserts, *inter alia*, that the state and federal courts examined this issue extensively and concluded that the alleged victims were competent to be executed.

154. As for the death row syndrome, the petitioners claim that keeping a person in that situation for an excessive period of time and subjecting the condemned person to successive dates of execution, constitutes cruel, inhuman or degrading treatment or punishment. From the information provided, one of the alleged victims was on death row for more than 30 years; another had to prepare himself for imminent execution five times over. In response to one of the petitions, the State asserted that the IACHR ought not to feel itself bound by the decision of the European Court of Human Rights in the *Soering* case⁶⁴ and cites jurisprudence of the United Nations Human Rights Committee in this regard.

155. The other specific claims made by the petitioners include the excessive duration of the process; discrimination by reason of race and sexual orientation; failure to comply with the obligation to notify consular authorities concerning the arrest of one of their nationals; jury bias; obstacles to the introduction of new evidence; and the existence of restrictive laws for the sentencing phase and for filing appeals. Concerning the first claim, the State responded that, in order to safeguard the due process guarantees of those convicted, some appeals are automatic and that the *habeas corpus* proceedings offer convicted persons another opportunity to have their conviction reviewed by a court. It contends that

⁶³ *Atkins v. Virginia*, 536 U.S. 304 (2002).

⁶⁴ *Soering v United Kingdom* 11 Eur. Ct. H.R. (ser. A) (1989).

otherwise, arbitrary limits would be placed on the right of a person facing the death penalty to appeal to a higher court.

156. As for the specific claims made in petitions P-2566-02 and P-784-03 concerning alleged violations of Article II of the American Declaration by virtue of the discrimination that the alleged victims purportedly suffered during their trials by reason of their race (and/or ethnic origin) and their sexual orientation, respectively, the IACHR observes, without prejudging the merits of the matter, that if the facts alleged are proved they may tend to establish a violation of Article II of the American Declaration.

157. The Inter-American Commission takes note that the petitioners' claims regarding Article II of the American Declaration are couched in terms of the requirements for a fair trial set forth in the inter-American instruments on human rights, which include the requirement that the court with competence be impartial and provide each party equal protection of the law, without discrimination of any kind. In jury systems, these requirements apply equally to judges, prosecutors and jury members.⁶⁵ Therefore, where these two petitions are concerned, the Commission will examine, in the merits phase, whether the international norm concerning the impartiality of the judge and jury was observed. It will do so using an objective test based on reasonableness and the appearance of impartiality in order to determine whether there is a real danger that the jury and/or other officers of the court have improperly inflamed prejudices that would be classified as prohibited discrimination.

158. Given the more rigorous scrutiny that it has applied in death penalty cases,⁶⁶ the Inter-American Commission observes that if proven, the petitioners' claims could characterize violations of articles I, XVIII, XXV and XXVI of the American Declaration, and Article II of that instrument in the case of the alleged victims named in petitions P-2566-02 y P-784-03. Concerning Article XXV, the Inter-American Commission will examine, in the merits phase, whether the claims made with respect to the so-called "death row syndrome" are a violation of one's right to humane treatment during the time one is in custody, as provided in the third paragraph of that article. The Inter-American Commission therefore has an enhanced obligation to ensure that any deprivation of life which may occur through the application of the death penalty complies strictly with the requirements of the applicable inter-American human rights instruments, including the American Declaration.⁶⁷

159. As for the claim that the petitioners in petitions P-1246-05 y P-873-10 make with regard to the alleged violation of Article II of the American Declaration, the Inter-American Commission observes that the petitioners offer no arguments concerning the violation of Article II that they are alleging. Hence, the Commission cannot declare that claim admissible.

160. Finally, the Commission observes that the present complaint has implications for the State's obligations vis-à-vis the inter-American human rights system, given the failure to comply with the precautionary measures that the Commission granted. As the Inter-American Commission has stated on numerous occasions, "the failure of an OAS member state to preserve a condemned prisoner's life pending review by the Commission of his or her complaint undermines the efficacy of the Commission's process, deprives condemned persons of their right to petition in the inter-American human rights system, and results in serious and irreparable harm to those individuals."⁶⁸ For these reasons, the Commission has determined that a member state fails in its fundamental human rights obligations under the OAS Charter and related instruments when it does not implement the precautionary measures issued by the Commission on behalf of persons sentenced to death.

⁶⁵ See, *mutatis mutandi*, IACHR, Report 1/05, Case 12.430, Merits, Roberto Moreno Ramos, United States, January 28, 2005, paragraphs 66-70.

⁶⁶ See IACHR, Report No. 77/09, Petition 1349-07, Admissibility, Orlando Cordia Hall, United States, August 5, 2009, para. 47; Report No.61/03, Petition 4446-02, Admissibility, Roberto Moreno Ramos, United States, para. 66; Report No. 41/00, Case 12.023, Merits, McKenzie *et al.*, Jamaica, paragraphs. 169 -171.

⁶⁷ IACHR, Report No. 1/05, Case 12.430, Merits, Roberto Moreno Ramos, United States, January 28, 2005, para. 43.

⁶⁸ IACHR, Report No. 1/05, Case 12.430, Merits, Roberto Moreno Ramos, United States, January 28, 2005, para. 75.

161. The Inter-American Commission observes that if proved, the petitioners' allegations could characterize violations of articles I, XVIII, XXV and XXVI of the American Declaration and additionally of its Article II in the case of the alleged victims named in petitions P-2566-02 and P-784-03. Therefore, the Inter-American Commission considers that the requirements established in Article 34 of its Rules of Procedure have been satisfied.

V. CONCLUSIONS

162. Based on these considerations of fact and of law, and without prejudging the merits of the case, the Inter-American Commission concludes that petitions P-11.575; P-12.201; P-2566-02; P-4538-02; P-4659-02; P-784-03; P-580-04; P-607-04; P-187-05; P-1246-05; P-360-06; P-1232-07; P-873-10 and P-907-10 satisfy the admissibility requirements set forth in Articles 31 to 34 of its Rules of Procedure and, therefore,

THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS

DECIDES:

1. To declare P-11.575; P-12.201; P-2566-02; P-4538-02; P-4659-02; P-784-03; P-580-04; P-607-04; P-187-05; P-1246-05; P-360-06; P-1232-07; P-873-10 and P-907-10 admissible with respect to articles I, XVIII, XXV and XXVI of the American Declaration;
2. To declare petitions P-2566-02 and P-784-03 admissible with respect to Article II of the American Declaration;
3. To declare petitions P-1246-05 and P-873-10 inadmissible with respect to Article II of the American Declaration;
4. To notify the parties of this decision;
5. To join the 14 petitions considered in this Admissibility Report under case number 11.575;
6. To proceed to its analysis of the merits of the case; and
7. To publish this decision and include it in its Annual Report to the General Assembly of the Organization of American States.

Done and signed in the city of Washington, D.C., on the 24th day of March 2011. (Signed): José de Jesús Orozco Henríquez, First Vice President; Rodrigo Escobar Gil, Second Vice President; Paulo Sérgio Pinheiro, Felipe González, Luz Patricia Mejía Guerrero, and María Silvia Guillén, Commission Members.