REPORT No. 52/13
CASES 11.575, 12.333 AND 12.341
CLARENCE ALLEN LACKEY *ET AL.*; MIGUEL ÁNGEL FLORES, AND JAMES WILSON CHAMBERS
MERITS
(PUBLICATION)
UNITED STATES
July 15, 2013

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I. SUMMARY

1. This report concerns cases 11.575, 12.333 and 12.341, which allege that the United States (hereinafter "United States" or "the State") violated the rights recognized in articles I, II, XVIII, XXV and XXVI of the American Declaration of the Rights and Duties of Man (hereinafter "the American Declaration" or "the Declaration") to the detriment of Clarence Allen Lackey, David Leisure, Anthony Green, James Brown, Larry Eugene Moon, Edward Hartman, Robert Karl Hicks, Troy Albert Kunkle, Stephen Anthony Mobley, Jaime Elizalde Jr., Ángel Maturino Resendiz, Heliberto Chi Aceituno, David Powell, and Ronnie Gardner (Case 11.575); Miguel Ángel Flores (Case 12.333); and James Wilson Chambers (Case 12.341) [hereinafter "the alleged victims"]. The 16 alleged victims were sentenced to death in six states of the United States (North Carolina, South Carolina, Georgia, Missouri, Texas and Utah) and thereafter executed while beneficiaries of precautionary measures ordered by the Inter-American Commission on Human Rights (hereinafter "the IACHR" or "the Inter-American Commission").

2. According to the petitioners, the alleged victims were sentenced to death in violation of, *inter alia,* the right to life and the right to due process of law, recognized in the American Declaration. The petitioners allege a series of due process violations, salient among them the alleged inefficacy of the court-appointed defense counsel and the violation of the right to consular notification, recognized in Article 36 of the Vienna Convention on Consular Relations. In a number of these cases, the claim is that the alleged victims were sentenced to death and subsequently executed despite their mental disability. The petitioners also allege that the prison conditions, especially the solitary confinement system, are tantamount to cruel and unusual punishment.

3. The State, for its part, asserts, *inter alia,* that the allegations do not demonstrate facts that are violations of the American Declaration and that capital punishment is consistent with international law when applied in the case of the most heinous crimes and observing the guarantees of due process. In response to various allegations made by the petitioners, the State argues that the cases were reviewed in state and federal courts, so that the guarantees of due process were respected. It further contends that the decision adopted by the Supreme Court in the Atkins case puts a significant constraint on the prosecution of persons with mental disability.

[1] In keeping with Article 17(2) of the Commission's Rules of Procedure, Commissioner Dinah Shelton, a United States national, did not participate in the discussion, deliberation or decision on this Report. Commissioner José de Jesús Orozco Henríquez, a Mexican national, felt that, based on Article 17(3) of the Rules of Procedure of the IACHR, he should abstain from participating in the study and decision of this matter, considering that two of the alleged victims in this case are Mexican nationals. The Inter-American Commission accepted his decision to excuse himself, with the result that Commissioner Orozco Henríquez did not participate in the deliberation or vote on this case.

4. After examining the positions of the parties, the Inter-American Commission concludes that the United States is responsible for violating the rights protected under Article I (Right to life, liberty, and personal security) to the detriment of the 16 alleged victims; Article XVIII (Right to a fair trial) to the detriment of Miguel Larry Eugene Moon, Edward Hartman, Robert Karl Hicks, Jaime Elizalde Jr., Ángel Maturino Resendiz, Heliberto Chi Aceituno and Ángel Flores; Article XXV (Right of protection from arbitrary arrest), to the detriment of Ángel Maturino Resendiz and Ronnie Gardner; and Article XXVI (Right to due process of law) to the detriment of David Leisure, James Brown, Larry Eugene Moon, Edward Hartman, Robert Karl Hicks, Troy Albert Kunkle, Heliberto Chi Aceituno, Miguel Ángel Flores, Jaime Elizalde Jr., Ángel Maturino Resendiz and James Wilson Chambers. The Inter-American Commission will, therefore make its recommendations to the United States, pursuant to Article 44 of the IACHR's Rules of Procedure.

II. PROCESSING SUBSEQUENT TO THE ADMISSIBILITY REPORTS

5. On March 24, 2011, the Inter-American Commission adopted Report No. 60/11, in which it declared Case 11.575 admissible with respect to the alleged violations of the rights protected under Articles I, XVIII, XXV and XXVI of the American Declaration, and the right protected under Declaration Article II in the case of Anthony Green and Edward Harman. The IACHR also decided to join the 14 petitions considered in that report. By note of April 4, 2011, transmitted on April 5, 2011, the Inter-American Commission notified the parties of the report, and gave the petitioners two months in which to submit any additional observations they might have on the merits. The IACHR also availed itself of the opportunity to offer its good offices to the parties with a view to reaching a friendly settlement of the matter, in keeping with articles 37(4) and 40 of the IACHR's Rules of Procedure.

6. By a communication received on May 23, 2011, petitioner Karen Parker presented observations with respect to alleged victim Jaime Elizalde, Jr. Those observations were forwarded to the State via a communication dated June 3, 2011.

7. On June 1, 2011, petitioners S. Adele Shank and John Quigley presented observations on the merits with respect to alleged victim David Powell; on June 2, 2011, petitioner Karen Parker presented additional observations concerning the case of Mr. Elizalde, Jr. The Inter-American Commission forwarded those communications to the State on June 17, 2011, and gave it one month to present its observations. On June 22, 2011, the IACHR received observations from the State, which were duly forwarded to the petitioners via a communication dated July 7, 2011.

8. On October 12, 2011, the IACHR reiterated its request for observations on the merits with respect to the remaining alleged victims, giving the petitioners one month to present them. On January 18, 2012, petitioner Sandra L. Babcock sent observations on behalf of Ángel Maturino Resendiz, and a second communication on behalf of Ronnie Gardner. Those two communications were forwarded to the State on February 10, 2012. As of the date of adoption of the present report, the Inter-American Commission has not yet received any response with respect to the other alleged victims

9. On July 22, 2011, the Inter-American Commission adopted Report No. 116/11 in which it declared Case 12.333 admissible with respect to the alleged violations of the rights protected under Articles I, XVIII and XXVI of the American Declaration. On August 4, 2011, the Inter-American Commission forwarded the report to the parties and set a three-month deadline for the petitioners to submit their additional observations on the merits. The IACHR also availed itself of the opportunity to

offer its good offices to the parties, with a view to reaching a friendly settlement of the matter, pursuant to articles 37(4) and 40 of the IACHR's Rules of Procedure.

10. By a communication received on August 8, 2011, the State indicated that because the victim had already been executed, no friendly settlement was possible. That communication was forwarded to the petitioner on August 30, 2011. On November 18, 2011, the IACHR reiterated its request for the petitioner's observations on the merits, and set a two-week deadline. As of the date of the present report, the Inter-American Commission has not yet received any reply to its request.

11. On July 22, 2011, the Inter-American Commission adopted Report No. 117/11, in which it declared Case 12.341 admissible with respect to the alleged violations of the rights protected under Articles I, XVIII, XXV and XXVI of the American Declaration. On July 29, 2011, the IACHR forwarded the report to the parties and set a three-month deadline for the petitioner to present his additional observations on the merits. The Inter-American Commission also availed itself of the opportunity to offer its good offices to the parties, with a view to reaching a friendly settlement of the matter, pursuant to articles 37(4) and 40 of the IACHR's Rules of Procedure.

12. On November 18, 2011, the IACHR reiterated its request that the petitioner file his observations on the merits, and gave the petitioner two weeks to do so. As of the date of the adoption of this report, the Inter-American Commission has not yet received any reply to its request.

III. POSITION OF THE PARTIES

A. Position of the petitioners

Case 11.575 – Clarence Allen Lackey *et al.*

13. Case 11.575 concerns the situation of 14 persons sentenced to death in different criminal trials conducted in six different states of the United States, and who were subsequently executed. What follows is a description of the petitioners' position with respect to each of the alleged victims in the case. Since, in the case of 11 of the 14 alleged victims, the IACHR has not received any observations on the merits, most of the information recounted below was provided by the petitioners prior to the adoption of the admissibility report.

Clarence Allen Lackey

14. The petition asserts that Clarence Allen Lackey was convicted of murder by the Tom Green County Court in Texas, and sentenced to death in 1978. The petition claims that Mr. Lackey's execution came almost twenty years after his conviction and thus constitutes cruel, infamous and unusual punishment. Hence, the State was alleged to have violated the right recognized in Article XXVI of the American Declaration.

15. The petitioner argues 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 an ever-shifting date of execution. He points out that the United States Supreme Court ruled that the death penalty serves two principal social purposes: retribution and deterrence of capital crimes. 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.

16. The petitioner further alleges that it took the state of Texas more than 14 years to deliver a final judgment and that the delay in the criminal case, which 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.

David Leisure

17. David Leisure was convicted of murder and sentenced to death on May 22, 1987, by the Circuit Court for the City of St. Louis, Missouri. The petitioner alleges a lack of effective legal representation. He also alleges Mr. Leisure's diminished mental capacity, which meant that he was not legally competent to be executed. The petitioner further asserted that Mr. Leisure was not afforded the necessary judicial remedies to introduce new evidence, and that the prejudicial evidence admitted during the penalty phase resulted in a disproportionate sentence. Based on all the foregoing, the petitioner alleges that the State violated the rights protected under Articles I, II, XVIII, and XXVI of the American Declaration, to the detriment of Mr. Leisure.

18. The petitioner states that the attorney who represented Mr. Leisure had never defended a death penalty case, and was therefore neither qualified nor prepared to defend the alleged victim. He mentions that the student who assisted in the defense and served as *de facto* legal representative, was under the influence of narcotic drugs during trial, a fact discovered subsequent to the conviction. According to the petitioner, had this fact come to light during the trial, the alleged victim would not have been found guilty. The petitioner also states that had that evidence been available at the time the original petition of *habeas corpus* was filed, the conviction would have been reversed.

19. As for the alleged victim's diminished mental capacity, the petitioner states that the available evidence showed that Mr. Leisure's IQ was under 75, which would be the equivalent of a mentally retarded person. According to tests done by the state of Missouri, the alleged victim's IQ had subsequently dropped to less than 58. A neurological study presented by the petitioner stated that Mr. Leisure had likely suffered brain damage, which diminished the function of his central nervous system, resulting in a low IQ, and was therefore not competent to be executed.

20. Concerning the alleged lack of access to judicial remedies for introducing new evidence, according to the petitioner once the Eastern District Court had denied the original petition of *habeas corpus,* every court –state and federal alike- summarily dismissed his applications for a certificate of appealability. The petitioner points out 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, an application for a certificate of appealability filed by Mr. Leisure was denied by the District Court 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.

21. 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 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.

Anthony Green

22. Anthony Green, an African American, was convicted in the state of South Carolina and sentenced to the death penalty in October 1988, for robbery and murder. The petitioners allege racial discrimination in connection with the murder charge, whose victim was a white woman. They also allege incompetent legal representation, death row syndrome, and extensive referencing to charges in cases not being adjudicated against the alleged victim. The petitioners therefore contend that the State is responsible for violations of Articles I, II, XVIII and XXVI of the American Declaration, in the case of the criminal trial against Mr. Green.

23. The petitioners further state that there is racial bias in South Carolina's application of the death penalty. They 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 more likely to receive the death penalty than a white person so charged. They also point out that in Charleston County, where the events for which Mr. Green was convicted occurred, 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. The petitioners conclude, therefore, that the race of Mr. Green and the alleged murder victim was a determining factor in the decision to seek the death penalty in his case, which is why the United States violated Article II of the American Declaration.

24. Finally, the petitioners also argue the inadequacy of Mr. Green's legal representation, but do not elaborate further and do not say whether the defense lawyer was retained privately or appointed by the State. They also assert that Mr. Green was on death row for 14 years, and that this constitutes cruel, infamous and unusual punishment. Furthermore, the petitioners also allege that at the sentencing phase of the proceedings, the prosecutor had made reference to charges not being adjudicated against the alleged victim, in order to establish an aggravating circumstance of future danger and to ensure that the alleged victim received the death penalty.

James Brown

25. James Brown was convicted of murder and sentenced to death in the state of Georgia in 1990. The petitioner alleges that Mr. Brown's defense counsel was ineffective; that Mr. Brown was suffering from a mental disorder, and was physically abused by the police prior to trial. The petitioner concludes that the violation of due process in a death penalty case, means a violation of the right to life recognized in Article I of the American Declaration. He also states that the physical abuse of a person in the custody of the State constitutes inhuman or degrading treatment. Based on all the foregoing, the petitioner alleges that the State violated the rights protected under Articles I, XVIII, XXV and XXVI of the American Declaration, to the detriment of Mr. James Brown.

26. Concerning the first allegation, the petitioner claims that the defense counsel failed to present the jury with all the evidence of Mr. Brown's history of mental disorders. The petitioner states further that although the jury was told of the abuse the alleged victim suffered as a child, it was unaware of the degree of the abuse and neglect. The jury was allegedly not told that during his childhood, the alleged victim was beaten by his father every day, sometimes to the point of losing consciousness; that he witnessed the terrible beatings that his father inflicted on his mother; that he went to school without having had breakfast and often did not have his lunch with him; that his home was infested with rats; that in winter he had no warm clothing, and that he lived in a house without running water and without windows.

27. The petitioner observes that the lack of adequate legal representation is a violation of the right to a fair trial and due process. The petitioner cites United Nations principles and argues that the standard that applies to legal representation in death penalty cases must be the highest.

28. The petitioner also alleges that Mr. Brown suffered from paranoid schizophrenia, that the diagnosis was well documented and that the state of Georgia was fully aware of the alleged victim's diminished capacity. The petitioner points out 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.

29. Concerning the third allegation, the petitioner states that on March 15, 1975, the day of his arrest, the alleged victim made no statement at all. However, the following day, he had allegedly confessed to the crime in the presence of Gwinnett County authorities and police officers. According to the petitioner, Mr. Davis, the Fulton County Assistant District Attorney had gone to visit Mr. Brown on May 20, 1975, and observed that his back had the mark left by being hit by a chair. The alleged victim is reported to have told him that he was beaten by a police officer. Mr. Davis allegedly contacted the Gwinnett County Assistant District Attorney immediately to tell him what had happened. The petitioner states that while the police officer did not deny having beaten Mr. Brown, he said that the confession was valid because the beating allegedly took place subsequent to his confession.

30. Lastly, the petitioner points out that the alleged victim claimed to be innocent and, inexplicably, his defense counsel failed to present all the available evidence about the alleged victim's history of mental problems. According to the petitioner, the jury was unaware of the records showing that the alleged victim suffered from a convulsive disorder, conversion hysteria, a psychoneurotic disorder with dissociative reactions and paranoid schizophrenia.

Larry Eugene Moon

31. Larry Eugene Moon was convicted of homicide and armed robbery in the state of Georgia, and sentenced to death on January 21, 1988. The petitioner alleges that the court-appointed defense counsel was incompetent, and that the alleged victim's rights to a fair trial and to due process

were violated. The petitioner concludes that the State violated the rights recognized in Articles I, XVIII and XXVI of the American Declaration, to the detriment of Mr. Moon.

32. The petitioner contends that facts discovered subsequent to the conviction reveal that Mr. Moon was not adequately represented at the sentencing phase of the proceedings. The petitioner asserts that the defense failed to investigate important extenuating circumstances favorable to the alleged victim and called only three witnesses, who provided general information about Mr. Moon. The petitioner states further that in the post-conviction proceedings the defense counsel testified that she did the absolute minimum to investigate and introduce important extenuating evidence and that in all she spent just five hours investigating that extenuating evidence.

33. As for the second allegation, the petitioner contends that in the sentencing phase, the court agreed to allow evidence of two murders not originally charged to be introduced. The petitioner also alleges that in the *habeas corpus* proceedings, officials from other jurisdictions had withheld exculpatory evidence that would have proved Mr. Moon innocent of those crimes.

Edward Hartman

34. Edward Hartman was convicted of first-degree murder and armed robbery with a firearm. On October 20, 1994 he was sentenced to death in the state of North Carolina. The petitioners allege that Mr. Hartman's defense counsel was incompetent and that the prosecution discriminated against him based on his sexual orientation to win a conviction. In conclusion, the petitioners contend that the State is responsible for violations of Articles I, II, and XXVI of the American Declaration, in the criminal case against the alleged victim.

35. As for the first allegation, the petitioners argue that the defense attorney appointed by the state to represent the defendant at trial was ineffective. However, no further details on this point are provided.

36. As for the second allegation, the petitioners contend that the alleged victim was homosexual and, during his childhood, had been the victim of severe sexual abuse by his uncle and another relative. The petitioners point out that in the sentencing phase the defense used this as a mitigating circumstance. Nevertheless, according to the petitioners, the prosecutor made repeated references to the alleged victim's sexual orientation precisely in order to discount this factor as a mitigating circumstance and to inflame any biases among the members of the jury, all in order to win the death sentence.

37. According to the petitioners, the discriminatory conduct of that prosecutor during the trials he prosecuted against homosexuals was a well known fact. They specifically point out that the prosecution maintained that the sexual abuse that the alleged victim suffered when he was eight years old was not meaningful 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. 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.

Robert Karl Hicks

38. Robert Karl Hicks was convicted of murder on January 16, 1986, and sentenced to death in the state of Georgia. The petitioners argue that the alleged victim had a mental disorder, that the court-appointed defense attorney was ineffective, and that Mr. Hicks was the victim of death row syndrome. They argue that when in a death penalty case the right to a fair trial is not rigorously observed, the right to life is also violated. They argue, therefore, that the death penalty is arbitrary and equivalent to a violation of the right to life. Based on these arguments the petitioners allege that the State violated the rights protected under Articles I, XVIII and XXVI of the American Declaration, to the detriment of Mr. Hicks.

39. According to the petitioners, studies done by experts concluded that the alleged victim was suffering from a neurological disorder. They claim that subsequent to the conviction a neurologist who was the head of the neurology department at Georgetown University Hospital did a preliminary physical examination of the alleged victim and concluded that he had microcephaly with frontal lobe dysfunction. The expert had allegedly stated that while he was unable to use his medical instruments because of Mr. Hicks' confinement, he was able to determine conclusively that the alleged victim had a neurological deficiency. He had also allegedly recommended various neurological and psychiatric examinations. The petitioners state that the application for funds to have the examinations done was denied.

40. 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. Based on a request from the defense to have an independent psychiatric evaluation, in a hearing held on November 15, 1985, the judge indicated that he would appoint a psychiatrist from a public hospital to keep down the costs. After more than two weeks, the Court appointed a state psychiatrist, who refused to do the evaluation, whereupon the Court authorized the defense to find an expert. On January 11, 1985, two days before the trial was set to begin, the psychiatrist named by the defense had said that she would have to do a neurological examination in order to be able to diagnose the alleged victim. The judge had refused to authorize the additional funds needed to pay for the study and also denied the defense's request for a continuance.

41. The District Court had allegedly acknowledged that the delay in appointing the psychiatrist and the refusal 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. Even so, the District Court had allegedly denied the petition on the grounds that the violation was harmless.

42. Concerning the alleged ineffectiveness of the court-appointed attorney, the petitioners argue that Mr. Hicks initially had a defense attorney who had no experience in death penalty cases. 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, 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 Lawyers 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.

43. At the time the petition 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 Council in London and the European Court of Human Rights.

Troy Albert Kunkle

44. Troy Albert Kunkle was convicted of homicide in the state of Texas and sentenced to death on February 26, 1985. The petitioner alleges that the defense attorney was incompetent; that the alleged victim was suffering from a mental disorder; that he suffered from death row syndrome, and that Mr. Kunkle's right to due process was also violated. The petitioner points out that in a death penalty case, the right to a fair trial must be scrupulously respected, since a violation of the right to due process in a death penalty case is also a violation of the right to life. The petitioner argues that the State violated the rights recognized in Articles I, XVIII, XXV and XXVI of the American Declaration.

45. Concerning the first allegation, the petitioner states that the defense counsel failed to introduce evidence of Mr. Kunkle's schizophrenia and the severe abuse to which he had been subjected since infancy. Specifically, the defense counsel had allegedly failed to point out that Mr. Kunkle was sent to a special school for emotionally disturbed children, that he was addicted to drugs and that on the night of the crime he was severely intoxicated. Nor did the defense tell the court that the alleged victim had no criminal record. The petitioner contends 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.

46. He 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.

47. The petitioner also argues that the alleged victim's 19 years on death row constitute 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."

48. Finally, the petitioner states that Mr. Kunkle's right to due process was violated, given the restrictive nature of the laws in the state of Texas at the time. Under those laws, when deciding on the death penalty, the jury was asked to answer only two questions: whether the conduct was deliberate and whether the accused would pose a danger in the future. The petitioner argues, therefore, that evidence pertaining to the troubled childhood of the alleged victim, his psychological problems, his history of drug abuse were not considered at the sentencing phase. The petitioner further alleges that the state courts denied Mr. Kunkle the possibility of a hearing to discuss his allegations regarding alleged violations of his constitutional rights, and thereby had allegedly denied him the opportunity to prove the factual basis of his claims.

Stephen Anthony Mobley

49. Stephen Anthony Mobley was convicted in Hall County, Georgia on February 16, 1994, and sentenced to death on February 28, 1994. The petitioner alleges that Mr. Mobley's defense attorney was ineffective and that the Georgia state prosecutor introduced false testimony to ensure that the defendant in the case received the death penalty. The petitioner alleges that the State violated the rights protected under Articles I, XVIII, and XXVI of the American Declaration.

50. Concerning the first allegation, without going into detail, the petitioner states that Mr. Mobley's defense counsel did not carefully investigate the possible extenuating circumstances. Furthermore, 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 the prosecutor in the preliminary phase had 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 and thus get a less severe sentence. 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.

51. The petitioner asserts that Mr. Mobley filed a first round of state and federal petitions for a writ of *habeas corpus.* One of the alleged victim's claims was that the Georgia state prosecutor presented false testimony in order to ensure a death penalty conviction. All the petitions filed were allegedly denied. After the internal remedies were exhausted and a few weeks short of his scheduled execution date, new evidence was reportedly discovered concerning the alleged false testimony introduced by the then prosecutor. 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.

52. The petitioner states that in July 2002, the mother of the person that Mr. Mobley was convicted of killing allegedly told him that, had it not been for the assertion by the then prosecutor 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 that information would demonstrate that the jury was incorrectly instructed on a critical point, which undermined the credibility of the judicial proceeding.

53. 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. He also points that rigorous compliance with those standards is essential in death penalty cases. 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.

Jaime Elizalde Jr.

54. Jaime Elizalde Jr. was convicted of homicide in Texas and sentenced to the death penalty on April 2, 1997. The petitioner alleges that defense counsel was ineffective; that the alleged victim suffered from a mental disorder; and that there were irregularities in the judicial proceeding. The petitioner concludes that the United States violated the rights protected under Articles I and XVIII of the American Declaration, to the detriment of Mr. Elizalde.

55. Regarding the first allegation, the petitioner points out that that there were problems with the alleged victim's court-appointed defense, both at trial, during the appeals filed and in the *habeas corpus* proceedings. The petitioner states that the defense attorney failed to challenge one of the witnesses, despite enormous discrepancies in his testimony, which will be discussed below. 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 counsel was inadequate. The petitioner also claims that the alleged victim was not legally competent to be executed, because he had a mental disability.

56. As for the allegations of irregularities, the petitioner states that there were serious errors in the translation of the witnesses' statements, and conflicting results of the weapons testing. The petitioner states that the only evidence against the alleged victim was a statement made by 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 that the Spanish version of the testimony was not taped, which precluded any appeal on those 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 to test the quality of the translation and suspended any further proceedings until the testimony could be taped. She also observes that 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 could not be established.

57. The petitioner makes reference to paragraphs 141 and 148 of Admissibility Report 60/11 in which the IACHR, given the relationship between exhaustion of domestic remedies and the alleged inefficacy of the defense counsel, decided that the question of prior exhaustion should be examined together with the merits of the case. She points out that when the attorney who represents a prisoner in the appeals process is the same as the one who represented him at trial, as happened in this case, it is difficult to make the case for a claim of inadequate or ineffective representation. The petitioner points out that after the District Court denied a federal petition of *habeas corpus,* a subsequent appeal was filed in which the ineffectiveness of the defense attorney was alleged. The District Court held that the lack of an effective defense by a court-appointed attorney for the federal petitions of *habeas corpus* is not a violation of the right to due process.[2]

58. The petitioner also observes that in 2008, Mr. Elizalde's sister crossed paths with the attorney who had represented him at trial and during the appeals process; and that the attorney asked her how her brother was doing. The petitioner observes that an attorney who is ignorant of the fact that his client was executed is further evidence of the attorney's serious incompetence and his disinterest in his client's fate. The petitioner asserts that this is a violation of Articles XXV and XXVI of the American Declaration.

[2] The petitioner cites Elizalde v. Dretke, 362 F.3d 323 (5th Cir. 2004) (Habeas).

59. The petitioner also argues that the allegations of a mental disorder should be regarded as an impediment to his execution, irrespective of when the symptoms presented themselves. She asserts that such arguments must be allowed at any phase in the proceedings.

60. Lastly, in her observations on the merits, the petitioner urges the IACHR to seek a moratorium on the use of the death penalty in the United States, until a determination is made as to whether the death penalty complies with all the obligations undertaken by the State in the area of human rights.

Ángel Maturino Resendiz

61. Ángel Maturino Resendiz, a Mexican national, was convicted of murder in Harris County, Texas, and sentenced to death on May 22, 2000. The petitioner alleges that his defense counsel was ineffective; that the alleged victim suffered from a severe mental disorder; that the method of execution used in Texas (lethal injection) causes excessive, avoidable suffering; that the clemency proceeding in Texas does not meet the minimum standards of due process; and that incarceration conditions on death row are inhumane. She concludes that the alleged violations constitute violations of the rights guaranteed in Articles I, XVIII, XXV and XXVI of the American Declaration.

62. According to the petitioner, 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.

63. Furthermore, the petitioner states that Mr. Maturino was sentenced to death despite suffering from a "severe mental illness", a fact supported by abundant evidence. She states that the alleged victim had suffered from schizophrenia since he was a young man and that his "illness" was not contested by the prosecutor at trial. She states further that his condition significantly deteriorated during the seven years he spent on death row. During that period, Mr. Maturino had allegedly been taken to a psychiatric hospital eight different times, and had mutilated himself at least 28 times, cutting himself on various parts of his body with a razor. He had allegedly been provided with anti-psychotic drugs to control his hallucinations.

64. The petitioner observes that despite the United States Supreme Court's ruling to the effect that executing "mentally incompetent persons" constitutes cruel punishment, the states have used a very narrow definition of "incompetence". In Mr. Maturino's case the expert appointed by the State during the trial had purportedly acknowledged that the alleged victim had a "mental illness", but was of the view that his condition did not fit the legal definition. Furthermore, the petitioner argues that the proceeding to prove incompetence in the state of Texas would not meet the standard of due process required in death penalty cases.

65. The petitioner also alleges that by imposing the death penalty on a person with a "severe mental illness" but not legally incompetent, the United States government violated the alleged victim's human rights. She argues that both the state and federal laws prevented Mr. Resendiz from

making these arguments because of the draconian restrictions on the filing of successive post-conviction appeals.

66. 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. She points out that the Texas Court of Criminal Appeals 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 ineffectual or incompetent legal representation. Furthermore, she alleges that federal law also imposes insurmountable obstacles and 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.

67. As for the third allegation, the petitioner contends that the method used to apply the lethal injection in the state of Texas carries an unacceptable risk of cruel pain and suffering. She argues that the combination of drugs used poses an unacceptable danger of extreme and unnecessary suffering. She asserts that Mr. Resendiz never had 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.

68. The petitioner also argues 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 ($5.57m^2$) 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".

69. She points out that, according to the documentary evidence, the alleged victim suffered psychological torment. The prison psychiatrists did not prescribe anti-psychotic medications for two years, during which time Mr. Resendiz mutilated himself 28 times. She also observes that the conditions of incarceration on death row in Texas are harsher than conditions in many maximum security prisons elsewhere in the United States. Lastly, in her observations on the State's response, the petitioner points out that the State misinterpreted this argument and apparently was under the misconception that the petitioner's claim regarding the alleged violation of the right to humane treatment was based solely on the protracted period of time that the alleged victim remained on death row, and not the prison conditions.

Heliberto Chi Aceituno

70. Heliberto Chi Aceituno, a Honduran citizen, was convicted of homicide in the state of Texas on November 7, 2002, and sentenced to death on November 14, 2002. The main argument made by the petitioner is the failure to comply with the obligation established in Article 36 of the Vienna Convention on Consular Relations.

71. The petitioner argues that the alleged victim's right to communicate with and be assisted by his country's consular authorities was not observed. The obligation to notify consular authorities of the arrest, detention or imprisonment of one of their foreign nationals, set forth in Article 36 of the Vienna Convention on Consular Relations, was thus violated. He also points out that this omission violated the alleged victim's right to due process.

David Powell

72. David Powell was convicted of homicide and given the death penalty in Austin, Texas in September 1978. The petitioners are alleging the excessive length of the process and argue that the prolonged confinement on death row constitutes inhuman and degrading punishment; they also claim that the jury was not impartial. The petitioners conclude that these factors constitute a violation of Articles I, II, XVIII, and XXVI of the American Declaration.

73. The petitioners argue that the protracted period of confinement on death row was not caused by the alleged victim's actions; instead, it was due to the ineffective appeals system and the defects in the trials that necessitated new trials. They report that Mr. Powell was tried the first time in 1978, but the conviction was overturned because of errors in the presentation of the expert testimony. Moreover, the Court of Appeals had spent nine years, from 1978 to 1987, to decide the automatic appeal of the first conviction.

74. 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 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. The petitioners make the point that Mr. Powell was tried three times and spent over thirty years on death row because of the state's incompetence.

75. With regard to the third allegation, the petitioners contend that the jury that participated in the alleged victim's trial was not impartial because of the jury-selection method used in the United States, whereby potential jury members opposed to the death penalty are excluded from jury service. They point out that in the new trial held in 1999, the defense challenged the prosecution's exclusion of two jury members. They argue that, like judges, juries 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.

76. In their observations on the merits, the petitioners repeat the arguments summarized above. In connection with the jury's alleged lack of impartiality, the petitioners point out that the United States is the only jurisdiction in which potential jury members are questioned about their views on the death penalty. The petitioners contend that the exclusion of certain potential jury members based on their answers to this question makes for a biased jury.

77. In addition to the arguments summarized above, in their observations on the merits the petitioners add another argument: failure to comply with the precautionary measures granted by the IACHR on the alleged victim's behalf. Here they contend that when an OAS member state consents to the filing of petitions with the IACHR, it is implicitly agreeing not to frustrate that proceeding through

actions that render the IACHR's eventual decision on the matter meaningless. The petitioners conclude that when a State executes persons whose rights are alleged to have been violated, it is not complying with the obligations it has undertaken.

Ronnie Gardner

78. Ronnie Gardner was convicted of homicide and, on October 25, 1985, sentenced to death. The original petition alleges that the defense counsel was ineffective; that Mr. Gardner was the victim of death row syndrome; that the conditions of his incarceration were inadequate and his right to due process was violated in the clemency proceeding. The petitioners allege that the United States violated Articles I, XVIII, XXV and XXVI of the American Declaration.

79. With respect to the first allegation, the petitioners contend that the defense did not properly 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.

80. The petitioners also contend that Mr. Gardner had been on death row for almost 25 years, which they said would constitute cruel, infamous and unusual punishment. As for the prison conditions, the petitioners point out that prisons in Utah are generally overcrowded and have an oppressive atmosphere. They observe 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.

81. Finally, 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.

82. On January 18, 2012, the petitioner informed the Commission that she wanted to withdraw the complaint filed on Mr. Ronnie Gardner's behalf.

Case 12.333 – Miguel Ángel Flores

83. Miguel Ángel Flores was convicted of capital murder and sentenced to death in the state of Texas on September 14, 1990. The petitioner contends that the alleged victim did not have an adequate defense; that the guarantees of due process were not respected; and that his right to consular notification, protected under the Vienna Convention on Consular Relations, was violated. The petitioner thus alleges that the State violated the rights protected under Articles I, XXV and XXVI of the American Declaration.

84. With regard to the first point, the petitioner alleges that from the preliminary investigation up to and including the penalty phase, the legal assistance provided by the attorney

appointed by the State[3] was seriously flawed. He further contends that there is a reasonable likelihood that had it not been for these alleged errors, Mr. Flores would not have been sentenced to death. The petitioner also notes that, despite the ample amount of time available for preparation of the defense, the trial counsel failed to interview potential witnesses, failed to obtain the assistance of independent experts and failed to request a mental health evaluation of the alleged victim. Furthermore, he purportedly did not inform the jury about the alleged victim having absolutely no criminal and psychiatric priors. He contends that all of those measures would have changed the jury's response with regard to Mr. Flores being a future danger to society. According to the petitioner, the only evidence introduced by the defense during the sentencing phase was a statistical analysis on the inaccuracy of the assessment of the future danger that the alleged victim would pose to society.

85. With regard to the second argument, the petitioner contends that during the sentencing phase, the State introduced the testimony of a psychiatrist who, without having personally examined Mr. Flores, testified on the future danger he would supposedly pose to society. This evidence is alleged to have been the jury's only basis to apply the death penalty. As to this issue, the petitioner claims that there is a consensus on the unreliability of psychiatric predictions of future dangerousness to society, what has become known to the courts as "junk science." Furthermore, he notes that in one hearing, an expert in laser technology testified that the examination of the vehicle used by Mr. Flores was not valid, given that the appropriate procedure was reportedly not followed. The petitioner claims that these supposed violations of due process were put forth as arguments in both the state and federal courts.

86. Concerning the alleged violation of the right to consular notification, established in Article 36 of the Vienna Convention on Consular Relations, the petitioner contends that when the appeals on this issue were filed with the domestic courts, the State did not contest the violation of that provision.[4] He claims that Mr. Flores was detained, deprived of his liberty, arrested, tried and sentenced to death without having been advised of his right to contact Mexican consular authorities. He notes that the case only came to the attention of the Mexican State one year after imposition of the death penalty.

87. According to the petitioner, the alleged victim argued the violation of this right in filing petitions for state and federal writs of habeas corpus. The petitioner contends that the case file contains ample evidence of the fact that Mr. Flores' lack of consular assistance was highly prejudicial to his case, and had he had that assistance, the outcome of the trial might have been different. He points out that one police officer admitted at trial that he told Mr. Flores that his mother, who was in custody, would be released if he agreed to talk. The alleged victim, who the petitioner says had very serious limitations and no exposure at all with the United States system of justice, had allegedly confessed after persistent questioning by the police and because of the promise that his mother would be released.

88. The petitioner argues that the consular assistance would have relieved the atmosphere of coercion that forced a confession out of the alleged victim. Moreover, it would have meant additional legal assistance in preparing for the sentencing phase, such as helping to compile evidence and contacting family members willing to testify. The petitioner contends that the involvement of the consular authorities would have drastically changed the jury's perception, which had no information at all about Mr. Flores' character. According to a report prepared by Mexico's Secretariat for Foreign

[3] According to information available in the case file, the defense attorney was appointed by the State (communication from the Secretariat of Foreign Relations of Mexico, received on November 1, 2000, paragraph 3).

[4] The petitioner is referring to Flores v. Johnson, 210 F.3d 456, 457 (5th Circuit, 2000).

Affairs, which the petitioner cites, the Mexican State provided consular assistance to 261 Mexican nationals involved in death penalty cases; 119 of these did not have to face capital punishment, 19 were acquitted and two death sentences were commuted.

89. Lastly, it is worth noting that on two different occasions, the petitioner refers to Mr. Flores as a mentally impaired person with an IQ of 85. However, he provides no further details in this regard and does not tie that factor into his arguments.

Case 12.341 – James Wilson Chambers

90. James Wilson Chambers, who stood trial three times, was convicted of murder and sentenced to death on December 23, 1982, in the state of Missouri. According to the petitioner, the penalty imposed was disproportionate; guarantees of due process were violated; Mr. Chambers had a diminished mental capacity; and the conditions on death row were inhumane. The petitioner concludes that the State violated Mr. Chambers' rights under Articles I, XVIII and XXVI of the American Declaration.

91. The first allegation was that the penalty was disproportionate to the offense charged. The petition argues that the homicide occurred in the context of a fight outside a bar, where a person died after being shot just once. The petitioner argued further that there was no record of a similar case in which the death penalty had been imposed and that in a similar case, the Nevada Supreme Court overturned the sentence on the grounds that it was disproportionate. The petitioner also notes that the person whom Mr. Chambers was convicted of killing was violent and had been involved in various altercations similar to the one that ended in his death.

92. As for the alleged violations of due process, the petitioner contends that the alleged victim was denied an evidentiary hearing with respect to the prosecution's key witness, who had allegedly given four different versions of what happened on the day of the events. The petitioner asserts that the witness in question had initially testified that he was sitting at the bar at the time of the altercation and saw the shooting through the window. Later it was allegedly discovered that the window was painted black, whereupon the witness, aided by the prosecution, had purportedly altered his testimony, moving his position to the bar room door itself. The petitioner further alleged that the prosecution did not disclose material evidence favorable to the theory that the alleged victim had acted in legitimate self-defense.

93. According to the petitioner, Mr. Chambers had a low mental capability, with an I.Q. of 78. He states further that this important information was not put before the jury in the sentencing phase of the third trial. Furthermore, the jury foreman purportedly forwarded an unsolicited affidavit to the Missouri Governor at the time indicating that he would not have voted for the death sentence had he known of Mr. Chambers' diminished mental capacity.

94. As for the prison conditions, the petitioner contends that the alleged victim was incarcerated on death row for over 15 years; that during that time, he received two orders of execution; and that he was confined in the basement of the Missouri State Penitentiary, located in Jefferson. The petitioner contends that the conditions were inhumane, which is why the alleged victim and other inmates filed a federal lawsuit in August 1985. That federal lawsuit was allegedly the subject of an out-of-court settlement prompted by the state government.

95. Lastly, the petitioner states that the majority of the delays in the trial prosecuted against Mr. Chambers were due to the conduct of the state of Missouri, particularly the failure to instruct the jury with regard to a finding of legitimate self-defense in the 1982 trial, and the incompetence of the defense counsel in the 1985 trial. The petitioner concludes that the nine years and seven months the victim had already spent behind bars were because the first two trials were unconstitutional.

B. Position of the State

Case 11.575 - Clarence Allen Lackey *et al.*

Clarence Allen Lackey

96. As to 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 […] 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."[5]

97. As for the specific claims made, the State contends that the petition does not state 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

98. The State provided no observations regarding the petitioner's claims.

Anthony Green

99. The State has not submitted its response to the petitioners' assertions.

James Brown

100. The State has not provided its observations on the petitioners' claims.

[5] Barrett & Sutcliffe v. Jamaica, Communications Nos. 270/1988 and 271/1988.

Larry Eugene Moon

101. Concerning the allegedly inadequate legal representation, the State's contention is 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 counts were of the view that there was no reasonable probability that the sentence would have been different had defense counsel opted for another strategy.

102. 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 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.

103. According to the State, the introduction of evidence related to crimes with which Mr. Moon was not charged did not violate Mr. Moon's rights 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

104. In its response, the State presented 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. In the brief the state of North Carolina points out that Mr. Hartman was not discriminated against based on his sexual orientation.

105. It points out in this regard that in the direct appeal and in the Motion for Appropriate Relief, the alleged victim argued that the prosecutor had made reference to his supposed homosexuality as a means to discredit the evidence concerning the sexual abuse he had suffered. On this point, North Carolina observes that the North Carolina Supreme Court established that the prosecutor's questions concerning Mr. Hartman's sexual orientation were not prejudicial, since all the objections made by the defense were sustained by the Court, which instructed the jury not to consider those questions or statements. The state of North Carolina therefore asked that the *certiorari* petition be denied.

Robert Karl Hicks

106. The State has not presented any observations regarding the petitioners' allegations.

Troy Albert Kunkle

107. The State has not presented any observations regarding the petitioners' allegations.

Stephen Anthony Mobley

108. The State's contention is that the petition does not show a violation of the American Declaration and is manifestly unfounded. As for 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. 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.

109. 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 the then prosecutor was going to testify about the reasons for rejecting the guilty plea.

110. As to the prosecutor'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, the prosecutor 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 the prosecutor at the time 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 make any substantive arguments to suggest otherwise. The State contends that the IACHR would be acting as a fourth instance review body.

111. 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.

112. The State observes that the petition does not state facts that tend to characterize violations of the American Declaration. 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.[6]

113. 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 for a writ 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 systems afford due process and ensure that the death penalty is not used arbitrarily.

Ángel Maturino Resendiz

114. The State asserts that the petition is without merit. It argues that the claim of supposed inadequate legal representation is unfounded as the legal representation was adequate and enabled the alleged victim to exhaust various remedies. As for the failure to include the argument of Mr. Maturino's mental disorder in the petitions for a writ 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 the defense filed after the deadline- was not the only remedy he had vis-à-vis the domestic courts. It points out that in fact, Mr. Resendiz' defense counsel filed two state petitions for a writ of *habeas corpus,* a petition requesting that Mr. Resendiz be declared incompetent for execution, another federal petition for a writ of *habeas* corpus, and a civil suit challenging the lethal injection protocol.

115. The State asserts that the alleged victim's purported incompetency was extensively litigated in the U.S. courts. It states that Mr. Resendiz 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. Resendiz 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.

116. 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. Resendiz 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.

[6] The State is referring to the state petition for a writ of *habeas corpus* denied on January 30, 2006, and to the appeal filed with the United States Court of Appeals for the Fifth Circuit, denied on January 31, 2006.

117. Furthermore, in response to the claim made concerning the prison conditions, the State alludes to the prolonged period of time spent on death row and observed that this was the result of the review procedure provided to persons sentenced to death, which meets 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.

118. 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 178th District Court of Harris County (twice), the Texas Court of Criminal Appeals (three times), the District Court (eight times), the United States Court of Appeals for the Fifth Circuit (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. Resendiz' claims.

119. The State argues that, when the delay between sentencing and execution is due to the fact that all available review 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.

120. 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

121. The State has not presented any observations regarding the petitioners' allegations.

David Powell

122. The State has not presented any observations regarding the petitioners' allegations.

Ronnie Gardner

123. The State has not presented any observations regarding the petitioners' allegations.

Case 12.333 – Miguel Ángel Flores

124. The State has not presented any observations regarding the petitioner's allegations. By a communication received on August 8, 2011, the State stated simply that inasmuch as the victim had already been executed, a friendly settlement was out of the question.

Case 12.341 – James Wilson Chambers

125. The State has not presented any observations regarding the petitioner's allegations.

IV. ESTABLISHED FACTS

126. As it has in other cases, the Commission will offer a preliminary observation to the effect that an international proceeding concerning human rights violations has greater flexibility in assessing the evidence than domestic legal systems have.

127. Concerning the standard for assessing evidence in human rights cases, given the objectives of international human rights law, the Commission recalls that in the Inter-American procedure the assessment of evidence has greater flexibility than in the national legal systems. This is because the object of the analysis is not the determination of the criminal liability of those responsible for the violations of human rights, but the international responsibility of the State for the actions and omissions of its authorities. Precisely because of the nature of certain human rights violations, the Commission evaluates the sum of the evidence at its disposal, taking into consideration rules on the burden of proof according to the circumstances of the case. This leads on many occasions to logical inferences, presumptions and to the determination of facts from the body of evidence and with reference to more general contexts.

128. Therefore, in application of Article 43(1) of its Rules of Procedure, the Inter-American Commission will examine the facts alleged by the parties and the evidence provided during the processing of these cases. The IACHR will focus on the procedural history of each case, analyzing the most specific aspects in the respective sections that follow.

129. It will also take into account publicly available court rulings and decisions mentioned by one of the parties in its submissions to the Inter-American Commission. Concerning those decisions, the IACHR notes that while copies of those decisions are not in the case file, they were not contested by the other party and an examination of the body of evidence revealed nothing to call into question the veracity of that information.

Case 11.575 - Clarence Allen Lackey *et al.*

Clarence Allen Lackey

130. In August 1977, the state of Texas charged Clarence Allen Lackey with the murder of Diane Kimph on approximately July 31, 1977.[7] Mr. Lackey was initially convicted of capital homicide and sentenced to death in Tom Green County, Texas, in the spring of 1978. On September 15, 1982, the Texas Court of Criminal Appeals decided the mandatory appeal by reversing the conviction and the sentence given to the alleged victim.[8] In April 1983 in Midland County, Texas, Mr. Lackey was convicted a second time and again given the death penalty. In 1991, the Court of Criminal Appeals upheld the

[7] Communication from the petitioner received on January 29, 1996, p. 5 (Ex Parte Lackey, 559 S.W.2d 823 (Tex. Crim.App. 1977)).

[8] Communication from the petitioner received on January 29, 1996, p. 5 (Lackey v. State, 638 S.W.2d 439, 471-76 (Tex. Crim.App.1982)).

conviction and the sentence in the decision it delivered on direct appeal. The first execution date was set for July 17, 1992. Between 1992 and 1995, Mr. Lackey filed various state and federal habeas corpus appeals.[9] During that time, four new dates were set for his execution.

131. On March 27, 1995, the United States Supreme Court denied Mr. Lackey's petition for a writ of certiorari, thus declining to review the state courts' decision, which had denied a state petition of *habeas corpus.*[10] On May 3, 1996, the United States Court of Appeals for the Fifth Circuit, affirmed the district court's denial of Mr. Lackey's petition for writ of *habeas corpus.*[11] On May 5, 1996, the United States Court of Appeals denied a petition for a writ of *habeas corpus*. That decision was appealed to the United States Supreme Court. On February 1, 1996, the IACHR granted precautionary measures on behalf of the alleged victim. Clarence Allen Lackey was executed in the state of Texas on May 20, 1997.

David Leisure

132. On April 7, 1987, David Leisure was convicted of the murder of James A. Michaels, who was killed when a bomb attached to his car was detonated as he was driving. Mr. Leisure was sentenced to death in the state of Missouri. The direct appeal to the Missouri Supreme Court was denied,[12] as was a motion for post-conviction relief filed with the same court under Missouri Supreme Court Rule 29.15.[13]

133. On January 13, 1998, the Eastern District Court denied a federal petition for a writ of *habeas corpus.*[14] On March 9 of that year, the same court denied a petition filed by the alleged victim.[15] On May 26, 1998, the United States Court of Appeals for the Eighth Circuit denied an application for a certificate of appealability.[16] On March 29, 1999, the United States Supreme Court denied a petition for a writ of *certiorari.*[17]

134. Thereafter, the alleged victim challenged the decision delivered by the District Court on March 9, 1998. There he argued that his legal defense had been ineffectual, based on evidence allegedly not available at the time the appeal was filed. That appeal was denied on June 18, 1999, on

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[9] Communication from the petitioner received on January 29, 2996, p. 6 (Ex Parte Lackey, Writ No. 24,267-01 (Tex.Crim.App.Dec. 16, 1992), cert. denied Lackey v. Texas, 113 S. Ct. 1319 (1993); Lackey v. Collins, *memorandum opinion and order*, No. MO-92-181 (W.D. Tex. June 11, 1993), aff'd Lackey v. Scott, 28 F.3d 486 (5th Cir. 1994), cert. denied, 115 S. Ct. 743 (Jan. 9, 1995)).

[10] Communication from the petitioner received on January 29, 1996, p. 7 (Lackey v. Texas, 115 S. Ct. 1421 (1995)).

[11] Lackey v. Johnson, 83 F.3d 116 (1996). Available at: http://www.leagle.com/xmlResult.aspx?page=1&xmldoc=199619983F3d116_1175.xml&docbase=CSLWAR2-1986-2006&SizeDisp=7

[12] State v. Leisure, 749 S.W.2d 366 (Mo. 1988) (en banc) (direct appeal).

[13] Leisure v. State, 828 S.W.2d 872 (Mo. 1992) (en banc).

[14] Leisure v. Bowersox, 990 F. Supp. 769 (E.D. Mo. 1998).

[15] Communication received from the petitioner on August 24, 1999, p. 6.

[16] Leisure v. Bowersox, No. 98-2285EMSL (May 26, 1998).

[17] Leisure v. Bowersox, No. 98-7607 (March 29, 1999).

procedural grounds.[18] Mr. Leisure appealed that decision, but the District Court denied his appeal on July 12, 1999.[19] On July 26, the District Court denied his application for a certificate of appealability.[20]

135. On August 2, 1999, the Missouri Supreme Court denied a petition for a writ of *habeas corpus* and set the execution date for September 1, 1999.[21] On August 9, 1999, the Missouri Supreme Court denied a petition for a stay of execution.[22] On August 27, 1999, the IACHR granted precautionary measures on behalf of David Leisure, who was executed in the state of Missouri on September 1, 1999.

Anthony Green

136. Anthony Green was convicted of the 1987 robbery and the murder of Susan Babitch in Charleston County, South Carolina. He was sentenced to death in October 1988. The South Carolina Supreme Court upheld the conviction and sentence in March 1990[23]; an application for post-conviction relief was denied.

137. Subsequently, the alleged victim filed a petition for a federal writ of *habeas corpus,* which the United States District Court denied. The Fourth Circuit Court of Appeals confirmed that ruling.[24] Mr. Green then filed a petition for a writ of *habeas corpus* with the South Carolina Supreme Court, which the latter denied on May 6, 2002. His last appeal filed with the United States Supreme Court was also denied. On July 29, 2002, the IACHR granted precautionary measures on behalf of Anthony Green, who was executed in the state of South Carolina on August 23, 2002.

James Brown

138. James Brown was convicted of the May 15, 1975 murder of Brenda Watson, and sentenced to death in the state of Georgia in July 1981. On direct appeal, the Georgia Supreme Court confirmed the conviction and sentence.[25] The subsequent state appeals filed to challenge the conviction were denied, and his petition for a writ of certiorari from the United States Supreme Court was denied on December 7, 1987.[26]

139. On September 30, 1988, the alleged victim was granted a federal writ of *habeas corpus,* after which he underwent another jury trial in Gwinnett County, Georgia. Mr. Brown was convicted and given the death penalty in 1990. On direct appeal, the Georgia State Supreme Court confirmed the

[18] Leisure v. Bowersox, No. 4 : 92CV2193-DJS (June 18, 1999).

[19] Leisure v. Bowersox, No. 4 : 92CV2193-DJS (July 12, 1999).

[20] Leisure v. Bowersox, No. 4 : 92CV2193-DJS (July 26, 1999).

[21] Leisure v. Bowersox, S.C. No. 81801 (August 2, 1999).

[22] Missouri v. Leisure, Supreme Court No. 69470 (August 9, 1999).

[23] State v. Green, 301 S.C. 347, 392 S.E.2d 157, *cert. denied*, Green v. South Carolina, 498 U.S. 881, 112 L. Ed. 2d 183, 111 S. Ct. 229 (1990).

[24] Green v. Catoe, 220 F.3d 220 (4th Cir. 2000), *cert. denied*, 532 U.S. 1039, 121 S. Ct. 2002, 149 L. Ed. 2d 1004 (2001).

[25] Brown v. State, 295 S.E.2d 727 (Ga. 1982).

[26] Brown v. Dodd, 484 U.S. 982 (1978).

conviction and the sentence.[27] On December 9, 1991, the United States Supreme Court denied his petition for a writ of certiorari.[28] Following that decision, the alleged victim filed a series of state remedies, which were denied. On January 21, 1997, the United States Supreme Court denied the petition for a writ of certiorari[29] and on March 17 of that year denied a petition for a rehearing.[30]

140. Thereafter, a petition for a writ of *habeas corpus* filed with the United States District Court for the Northern District of Georgia was denied on February 8, 2000. A motion to alter and amend, also filed with the United States District Court for the Northern District of Georgia, was denied on September 27, 2000. Finally, on November 15, 2001, the United States Court of Appeals for the Eleventh Circuit denied a petition filed by the alleged victim; the United States Supreme Court denied his petition for a writ of certiorari on October 21, 2002. On November 18, 2002, the IACHR granted precautionary measures on behalf of Mr. James Brown, who was executed in the state of Georgia on November 4, 2003.

Larry Eugene Moon

141. Larry Eugene Moon was convicted of armed robber and the murder of Ricky Callahan. On January 21, 1988, he was given the death penalty in the state of Georgia. On November 30 of that year, the Georgia State Supreme Court confirmed the conviction and the sentence.[31] On April 22, 1991, the United States Supreme Court denied the alleged victim's petition for a writ of *certiorari.*[32]

142. When the Butts County Superior Court partially granted a state petition for a writ of *habeas corpus,* the Georgia Supreme Court reversed the decision[33] and the United States Supreme Court denied a petition for a writ of *certiorari.*[34] On April 22, 1996, the alleged victim filed a federal petition for a writ of *habeas corpus* with the United States District Court for the Northern District of Georgia, which was denied on August 2, 1999, a decision subsequently confirmed by the United States Court of Appeals for the Eleventh Circuit on March 18, 2002.[35] On October 5, 2002, the alleged victim filed a petition with the United States Supreme Court seeking a writ of *certiorari* which was denied on January 13, 2003.[36] On January 6, 2003, the IACHR granted precautionary measures on behalf of Larry Eugene Moon, who was executed in the state of Georgia on March 25, 2003.

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[27] Brown v. State, 401 S.E.2d 492 (Ga. 1991).

[28] Brown v. Georgia, 502 U.S. 1009 (1991).

[29] Brown v. Turpin, 519 U.S. 1098 (1997).

[30] Brown v. Turpin, 520 U.S. 1140 (1997).

[31] Moon v. State, 258 Ga. 748, 375 S.E.2d 442 (1988).

[32] Moon v. Georgia, 499 U.S. 982, 111 S. Ct. 1638, 113 L. Ed. 2d 733 (1991).

[33] Zant v. Moon, 264 Ga. 93, 440 S.E. 2d 657 (Ga. 1988).

[34] Moon v. Zant, 513 U.S. 968 (1994).

[35] Moon v. Head, 285 F.3d 1301 (11th Cir. 2002).

[36] Moon v. Head, 123 S.Ct. 863, 2003 WL 99464 (U.S. Jan 13, 2003).

Edward Hartman

143. Edward Hartman was convicted of first-degree murder and armed robbery. On October 20, 1994, he was sentenced to death in the state of North Carolina. The judge sustained the defense's objections to the prosecutor's reference to Mr. Hartman's sexual orientation and instructed the jury not to consider the reference.[37] The North Carolina Supreme Court affirmed the conviction and the sentence on October 11, 1996.[38] The alleged victim's petition for a writ of *certiorari* for a review of the North Carolina Supreme Court's decision was denied on April 28, 1997.[39]

144. On April 26, 1999, the Northampton County Superior Court denied the state motion filed by Mr. Hartman for appropriate relief. On October 7 of that year, the North Carolina Supreme Court denied the petition for a writ of *certiorari* seeking a review of that decision. On July 31, 2000, the United States District Court for the Eastern District of North Carolina denied a petition for a writ of *habeas corpus* and on January 13, 2003, the United States Supreme Court declined to review the decision.

145. On February 5, 2003, the alleged victim filed a state petition for a writ of *habeas corpus* on the grounds of a violation of due process. He requested a stay of his execution, scheduled for February 29 of that year. His request was granted. However, the North Carolina Supreme Court denied his petition for a writ of *habeas corpus* on August 22, 2003, and a petition for review of that decision. On September 24, 2003, the Superior Court denied another petition filed, and on October 1, 2003, the North Carolina Supreme Court declined to review the decision. The IACHR granted precautionary measures for Edward Hartman on September 30, 2003. Mr. Hartman was executed on October 3, 2003.

Robert Karl Hicks

146. The Spalding County Superior Court in the state of Georgia convicted Robert Karl Hicks of murder on January 16, 1986, and sentenced him to death on the following day. The Georgia Supreme Court[40] affirmed the conviction and sentence and then denied a petition for a writ of *certiorari.*[41]

147. On December 28, 1988, the Butts Count Superior Court denied a petition for a writ of *habeas corpus.* On October 5, 1989, the Georgia Supreme Court denied an application for a certificate of appealability and then denied a petition for a writ of *certiorari*.[42]

148. After filing a number of petitions in state and federal courts, the alleged victim filed a federal petition for a writ of *habeas corpus* with the United States District Court for the Northern District of Georgia, which was denied on September 5, 2000. The Supreme Court denied a petition for a writ of

[37] Hartman v. State of North Carolina, *Respondent's brief in opposition to petition for writ of certiorari to the Supreme Court of North Carolina*, No. 03-6660, p. 10.

[38] State v. Hartman, 344 N.C. 445, 476 S.E.2d 328 (1996).

[39] Hartman v. North Carolina, 520 U.S. 1201, 137 L.Ed.2d 708 (1997).

[40] Hicks v. State, 256 Ga. 715, 352 S.E.2d 762 (1978).

[41] Hicks v. Georgia, 482 U.S. 931 (1987).

[42] Hicks v. Kemp, 494 U.S. 1074 (1990).

certiorari on June 14, 2004. On June 28, 2004, the IACHR granted precautionary measures for the alleged victim, who was executed in the state of Georgia on July 1, 2004.

Troy Albert Kunkle

149. On February 22, 1985, Troy Albert Kunkle was convicted of the murder of Stephen Horton. Mr. Kunkle was sentenced to death on February 26 of that year. The conviction and sentence were upheld on direct appeal,[43] and the United States Supreme Court denied a petition for a writ of *certiorari.*[44] The Texas Court of Criminal Appeals denied a state petition for a writ of *habeas corpus,* filed in July 1989.

150. In August 1993, the alleged victim filed his first federal petition for a writ of *habeas corpus,* which was denied in January 1995 for failure to exhaust some of the claims in state courts. Subsequently, Mr. Kunkle did assert the claims in state courts, but they were denied.

151. In September 2002, the federal district court denied *habeas* relief. On July 7, 2004, the IACHR granted precautionary measures for the alleged victim. On October 4, 2004, the United States Supreme Court denied a petition for a writ of *certiorari.* Troy Albert Kunkle was executed in the state of Texas on January 25, 2005.

Stephen Anthony Mobley

152. In February 1994, Stephen Anthony Mobley was convicted of murder and armed robbery in the state of Georgia and given the death penalty. On March 17, 1995, the Georgia Supreme Court affirmed the conviction and the sentence.[45] On October 30, 1995, the United States Supreme Court denied the petition for a writ of *certiorari.*[46]

153. On July 15, 1998, the Georgia Supreme Court reversed a state court's decision that had granted *habeas* relief on the claim of ineffective assistance of counsel.[47] On May 25, 2000, the United States District Court for the Northern District of Georgia denied a federal petition for *habeas* relief; an appeal filed with the Eleventh Circuit Court of Appeals was also denied on October 4, 2001.[48] On June 28, 2002, the United States Supreme Court denied a petition for a writ of *certiorari*.

154. The alleged victim filed an application for a certificate of appealability and a motion for a stay of execution with the Georgia Supreme Court, which was denied on August 1, 2002. On April 26, 2004, the Court of Appeals upheld the District Court ruling denying the request for a new federal *habeas corpus* hearing. On January 18, 2005, the United States Supreme Court denied a petition for a writ of

[43] Kunkle v. State, 771 S.W.2d 435 (Tex. Crim. App. 1986).

[44] Kunkle v. Texas, 492 U.S. 924, 109 S.Ct. 3259, 106 L.Ed2d 604 (1989).

[45] Mobley v. State, 265 Ga. 292, 455 S.E.2d 61 (1995).

[46] Mobley v. Georgia, 516 U.S. 942 (1995).

[47] Head v. Mobley, 269 Ga. 635, 502 S.E.2d 458 (1998).

[48] Mobley v. Head, 267 F.3d 1312 (11th Cir. 2001).

certiorari. On February 28, 2005, the IACHR granted precautionary measures for Stephen Anthony Mobley, who was executed in the state of Georgia on March 1, 2005.

Jaime Elizalde Jr.

155. Jaime Elizalde Jr. was convicted of murder in Harris County, Texas, and in March 1997 sentenced to death. The Texas Court of Criminal Appeals affirmed the conviction and the sentence on July 5, 1999,[49] and on April 11, 2001, denied a petition for *habeas* relief. On April 16, 2003, the United States District Court of the Southern District of Texas denied a petition for a writ of *habeas corpus.*[50] Subsequently, the United States Court of Appeals for the Fifth Circuit denied a certificate of appealability on a number of grounds, among them the fact that the claim of ineffective assistance of court-appointed habeas counsel in his federal petitions for a writ of *habeas corpus* was not a violation of due process.[51] On October 7, 2004, the United States Supreme Court denied his petition for a writ of *certiorari.*[52] Then, on November 1, 2005, the IACHR granted precautionary measures for the alleged victim.

156. The alleged victim subsequently filed a state petition for *habeas* relief, based on his alleged "mental retardation". The Texas Court of Criminal Appeals denied *habeas* relief on January 30, 2006. On January 27, 2006, the alleged victim filed a request with the District Court for a stay of execution, which that court denied. On January 30, the United States Supreme Court denied an appeal filed by the alleged victim. Jaime Elizalde Jr. was executed in the state of Texas on January 31, 2006.

Ángel Maturino Resendiz

157. Ángel Maturino Resendiz was convicted of murder on May 18, 2000, in Harris County Texas. Sentencing was on May 22, 2000, and the alleged victim was given the death penalty. The Texas Court of Criminal Appeals affirmed the conviction and sentence on May 21, 2003.[53] The two state petitions for *habeas* relief that Mr. Resendiz filed were both denied.[54]

158. On September 7, 2005, the United States Court of Appeals for the Fifth Circuit denied a federal petition for a writ of *habeas corpus.*[55] On May 1, 2006, the IACHR granted precautionary measures for the alleged victim. On June 23, 2006, Mr. Resendiz filed another federal petition for *habeas* relief, which was also denied.[56] On June 27, 2006, the United States Supreme Court denied a petition for a writ of *certiorari.*[57] Ángel Maturino Resendiz was executed that same day.

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[49] Elizalde v. State, No. 72,813 (Tex. Crim. App. July 5, 1999).

[50] Elizalde v. Cockrell, No. H-02-0745 (S.D. Tex. Apr. 16, 2003).

[51] Elizalde v. Dretke, 362 F.3d 323 (5th Cir. 2004) (Habeas)

[52] Elizalde v. Dretke, 543 U.S. 849 (2004).

[53] Resendiz v. Texas, 112 S.W.3d 541, 543-44 (Tex. Crim. App. 2003).

[54] Ex parte Resendiz, 2004 WL 885742 (Tex. Crim. App. 2004); Ex parte Resendiz, 2006 WL 1752319 (Tex. Crim. App. 2006).

[55] Resendiz v. Dretke, 2005 WL 2171890 (S.S. Tex. 2005).

[56] Resendiz v. Quarterman, 2006 WL 1767183 (S.D. Tex. 2006).

[57] Resendiz. Quarterman, 2006 WL 1733853 (2006).

Heliberto Chi Aceituno

159. Heliberto Chi Aceituno was convicted of capital murder in Texas on November 7, 2002, and was sentenced to death on November 14, 2002. Prior to the commencement of trial, the alleged victim had filed an objection to have the statement he made to the police officer at the time of his arrest suppressed based on a violation of the Vienna Convention on Consular Relations. At trial, the police officer claimed that he did not know he was required to inform Mr. Chi Aceituno of his right to consular assistance; he also stated that the entire conversation was in Spanish. The court, however, denied the motion on the grounds that both California and Texas are bilingual and the fact that a person speaks Spanish is not sufficient for an officer to assume that the person is a foreign national, unless that person so states.[58]

160. On May 26, 2004, the Texas Court of Criminal Appeals affirmed the conviction and the sentence.[59] The United States Supreme Court denied a petition for a writ of certiorari on November 15, 2004.[60]

161. The alleged victim subsequently filed a state petition for *habeas* relief, which was denied on February 28, 2005. The Texas Court of Criminal Appeals upheld that decision on April 27, 2005.[61] On June 21, 2006, the Fort Worth federal district court denied the federal petition for *habeas* relief filed by Mr. Chi Aceituno. The application for certificate of appealability was also denied.

162. On September 28, 2007, the IACHR granted precautionary measures for the alleged victim. The first execution date, set for October 3, 2007, was stayed because an appeal was pending questioning the lethal injection protocol used in Texas. When that appeal was denied, Mr. Chi Aceituno was executed on August 7, 2008.

David Powell

163. David Powell was convicted of murder and sentenced to death in Texas in September 1978. The Texas Court of Criminal Appeals affirmed the conviction and sentence,[62] but the United States Supreme Court reversed the ruling.[63]

164. In 1991, the alleged victim was tried again for capital murder, convicted and sentenced to death. The Texas Court of Criminal Appeals affirmed the conviction but reversed the sentence, and sent the case back for retrial owing to an error in the jury instruction.[64] Mr. Powell filed a petition for a writ of *certiorari,* arguing that he had a right to a full retrial. However, his petition was denied.[65]

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[58] Chi v. Nathaniel Quarterman, *Opposition to Application for Certificate of Appealability*, No. 06-70030, pp. 7-9.

[59] Chi v. State, No. 74,492 (Tex. Crim. App. 2004).

[60] Chi v. Texas, 543 U.S. 989 (2004).

[61] Ex parte Chi, No. 61.600-01.

[62] Powell v. State, 742 S.W.2d 353 (Tex. Crim. App. 1987).

[63] Powell v. Texas, 492 U.S. 680 (1989).

[64] Powell v. State (Powell III), 897 S.W.2d 307 (Tex. Crim.App.1994).

[65] Powell v. Texas, 516 U.S. 808 (1995).

165. In 1999, the alleged victim was sentenced again to death. The Texas Court of Criminal Appeals affirmed the lower court ruling[66] and a petition for a writ of certiorari filed with the United States Supreme Court[67] was denied in 2002.

166. Subsequently Mr. Powell filed a state petition for *habeas* relief, and a federal petition for *habeas* relief, both of which were denied. On July 16, 2008, the United States Court of Appeals for the Fifth Circuit upheld the denial of the federal petition[68] and the petition for a writ of *certiorari* filed with the United States Supreme Court was denied on March 23, 2009.[69] On June 14, 2010, the IACHR granted precautionary measures for David Powell, who was executed in the state of Texas on June 15, 2010.

Ronnie Gardner

167. Ronnie Gardner was convicted of murder and sentenced to death in the state of Utah on October 25, 1985.[70] The Utah Supreme Court affirmed the conviction and the sentence.[71] A petition for a writ of *certiorari* filed with the United States Supreme Court was denied on April 16, 1990.[72]

168. On July 16, 1990, the alleged victim filed a state petition for *habeas* relief, which was partially granted on July 26, 1991, on the claim of the alleged ineffectie legal counsel. With that, the death sentence was reversed. The Utah Supreme Court subsequently reversed that decision.[73]

169. In 1997, Mr. Gardner filed a petition for a federal writ of *habeas corpus* which the district court denied. Later, he filed new state and federal petitions for *habeas* relief, which were both denied. On March 8, 2010, the United States Supreme Court denied a petition for a writ of *certiorari.* On June 17, 2010, the IACHR granted precautionary measures for Ronnie Gardner, who was executed on June 18, 2010 in the state of Utah.

Case 12.333 – Miguel Ángel Flores

170. Miguel Ángel Flores was convicted of murder on September 12, 1990 and sentenced to death on September 14 of that year. The Texas Court of Criminal Appeals affirmed the conviction and the sentence.[74] A petition for a writ of *certiorari* was denied on October 11, 1994.

171. The alleged victim's state petition for a writ of *habeas corpus* was denied on July 10, 1994. The Texas Court of Criminal Appeals affirmed that decision on July 28, 1994.

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[66] Powell v. State, No. 71,399 (Tex.Crim.App.2002).

[67] Powell v. Texas, 537 U.S. 1015 (2002).

[68] Powell v. Quarterman, 536 U.S. 325 (5th Cir. 2008).

[69] Powell v. Quarterman, 129 S.Ct 1617 (2009).

[70] State of Utah v. Ronnie Lee Gardner, Case No. CR 851907002 (Third Jud. Dist. Ct. Oct. 25, 1985).

[71] Gardner v. State, 789 P.2d 273 (Utah 1989).

[72] Gardner v. Utah, 494 U.S. 1090 (1990).

[73] Gardner v. Holden, 888 P.2d 608 (Utah 1994), cert. denied, 516 U.S. 828 (1995).

[74] Flores v. State, 871 S.W.2d 714 (Tex. Crim. App. 1993) (*en banc*).

172. On November 9, 1998, the federal district court denied a petition for a writ of *habeas corpus;* the appeal filed to challenge that decision was denied on April 20, 2000 by the United States Court of Appeals for the Fifth Circuit.[75] On September 11, 2000, the alleged victim filed a petition for a writ of *certiorari* with the United States Supreme Court, which was denied. On October 25, 2000, the IACHR granted precautionary measures for Miguel Ángel Flores, who was executed in the state of Texas on November 9, 2000.

Case 12.341 – James Wilson Chambers[76]

173. James Wilson Chambers was convicted of murder on November 20, 1982 and, on December 23, 1982, was sentenced to death in the state of Missouri. On June 19, 1984, the Missouri Supreme Court reversed the conviction and sentence on the grounds of an absence of a direction to the jury on self defense.

174. In the second trial, held in Jefferson County, the jury decided that the alleged victim was guilty of the crime of capital homicide and recommended that he be given the death penalty. On June 5, 1985, Mr. Chambers was again sentenced to die. On July 15, 1986, the Missouri Supreme Court affirmed the conviction and the sentence given to James Wilson Chambers; on December 22, 1987, the Missouri Court of Appeals upheld the denial of a petition filed by the alleged victim.

175. On July 19, 1988, the U.S. Court for the Eastern District of Missouri denied a federal petition for a writ of *habeas corpus* that challenged both the conviction and the sentence. On September 15, 1989, the U.S. Court of Appeals for the Eighth Circuit reversed the conviction and granted relief based on the alleged ineffective assistance of trial counsel.

176. In a third trial conducted in Cole County, Mr. Chambers was convicted again and sentenced to death on July 1, 1992. A petition filed with the district court was denied on October 14, 1993. The Missouri Supreme Court affirmed Mr. Chambers' conviction and sentence, and upheld the denial of the post-conviction appeal. A federal petition for *habeas* relief was filed thereafter, and also denied by the district court on March 12, 1997. On September 23, 1998, the U.S. Court of Appeals for the Eighth Circuit affirmed the district court's denial of *habeas* relief. On June 21, 1999, the United States Supreme Court denied the federal petition for a writ of *habeas corpus.* On November 10, 2000, the IACHR granted precautionary measures for James Wilson Chambers, who was executed in the state of Missouri on November 15, 2000.

V. LEGAL ANALYSIS

A. Preliminary matters

177. In Admissibility Report No. 60/11 the Inter-American Commission decided to join under Case 11,575, fourteen petitions concerning persons sentenced to death in different states of the United States, pursuant to Article 29(1)(d) of the Commission's Rules of Procedure. Subsequently, during the

[75] Flores v. Johnson, 210 F.3d 456 (5th Cir. 2000) (*per curiem*).

[76] Information available at the website http://www.missourinet.com/, cited in http://www.clarkprosecutor.org/html/death/US/chambers675.htm

merits phase, the IACHR joined the cases of Miguel Ángel Flores and James Wilson Chambers, also sentenced to death and executed in the United States, to Case 11.575.

178. The element that all these cases have in common is that the alleged victims were sentenced to death and then executed while they were the beneficiaries of precautionary measures granted by the IACHR. In other words, the alleged victims were executed before the Inter-American Commission had an opportunity to issue its finding on the alleged violations of rights protected under the American Declaration.

179. Based on the facts proven and other considerations examined in this section, what follows are the Commission's conclusions on the claims made in Case 11.575 with respect to the alleged violation of the rights protected under Articles I, XVIII, XXV and XXVI of the American Declaration; the claims made in Case 12.333 with respect to the alleged violation of the rights protected under Articles I, XVIII and XXVI of the Declaration, and the claims made in Case 12.341 with respect to the alleged violation of Articles I, XVIII, XXV and XXVI of the Declaration.

180. As pointed in the section on processing subsequent to the admissibility reports, the merits-related observations the IACHR has received have concerned only 3 of the 16 alleged victims in the present case. The Inter-American Commission does not, therefore, have sufficient information for a detailed analysis of each violation originally alleged in relation to each alleged victim. Accordingly, the IACHR will not examine the allegations made with respect to violations of due process described in admissibility reports Nos. 60/11, 116/11 and 117/11; nor will it examine the alleged violations of Article II of the American Declaration mentioned in the original petitions filed on behalf of Anthony Green and Edward Hartman.

181. As for the alleged racial discrimination against Mr. Green, in the original petition the petitioners contend that there is racial bias in South Carolina's application of the death penalty. They present statistics which, in the petitioners' opinion, demonstrate that race is a significant factor in determining which defendants will get the death penalty. The IACHR considers that allegations of this kind are particularly serious and, if proven, could constitute a violation of the rights protected under the American Declaration. However, because the Commission never received observations on the merits, the general allegations cannot be applied to the specific case.

182. The application of the death penalty is a matter of serious consequence because it is irreversible. Therefore, the Inter-American Commission has decided to focus its legal analysis on five aspects of particular relevance and that have been asserted in connection with a number of the alleged victims and for which the Commission has sufficient information. These are the right to consular notification and assistance; the inadequacy of the court-appointed legal counsel; the right of every person with a mental disability not to be subjected to the death penalty; every person's right not to be subjected to protracted solitary confinement, and the State's duty to comply with the precautionary measures granted by the IACHR.

183. The Commission also notes that, following the adoption of Admissibility Report No. 60/11, the petitioner in Mr. Gardner's case reported that she wished to withdraw the complaint on the alleged victim's behalf. One of the violations claimed in connection with the alleged victim was prolonged solitary confinement and noncompliance with the precautionary measures granted for him. Therefore, the IACHR considers that given the serious, irreversible consequences of capital punishment, it should examine these allegations on its own initiative, pursuant to Article 41 of its Rules of Procedure.

184. Before addressing the merits of the present case, the Commission wishes to reaffirm and reiterate its well-established doctrine that it will apply a heightened level of scrutiny in deciding capital punishment cases. The right to life is widely-recognized as the supreme right of the human being, and the *conditio sine qua non* for the enjoyment of all other rights.

185. While Article I of the American Declaration protects the right to life without an express reference to the death penalty, capital punishment is not exempt from the Declaration's standards and protections. Indeed, the IACHR has written that:

> [r]ather, in part by reference to the drafting history of the American Declaration as well as the terms of Article 4 of the American Convention on Human Rights, the Commission has found that Article I of the Declaration, while not precluding the death penalty altogether, prohibits its application when doing so would result in an arbitrary deprivation of life or would otherwise be rendered cruel, infamous or unusual punishment.[77]

186. Hence, the Inter-American Commission 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. This "heightened scrutiny test" is consistent with the restrictive approach taken by other international human rights authorities to the imposition of the death penalty,[78] and has been articulated and applied by the Commission in previous capital cases before it.[79]

B. Right to a fair trial and right to due process of law (Articles XVIII and XXVI of the American Declaration)

187. The American Declaration guarantees every person's right to a fair trial and to due process, respectively, in the following provisions:

Article XVIII – Right to a fair trial

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[77] See IACHR, Andrews v. United States, Report No. 57/96, Annual Report of the IACHR 1997, cited in Report No. 62/02, Case No. 12.285, Michael Domingues v. United States, Annual Report of the IACHR 2002, paragraph. 52.

[78] See, for example, I/A Court H.R., Advisory Opinion OC-16/99 (October 1, 1999) "The Right to Information on Consular Assistance in the Framework of the Guarantees of Due Process of Law," paragraph 136 (where the Court wrote that "[b]ecause execution of the death penalty is irreversible, the strictest and most rigorous enforcement of judicial guarantees is required of the State so that those guarantees are not violated and a human life not arbitrarily taken as a result"); U.N.H.R.C., *Baboheram-Adhin et al. v. Suriname*, Communications Nos. 148-154/1983, approved April 4, 1985, paragraph 14.3 ((finding that the law must strictly control and limit the circumstances in which a person may be deprived of his life by the authorities of the state); Report by the U.N. Special Rapporteur on Extra-judicial Executions, Mr. Bacre Waly Ndiaye, submitted pursuant to Commission on Human Rights Resolution 1994/82, Question of the Violation of Human Rights and Fundamental Freedoms in any part of the World, with particular reference to Colonial and Other Dependent Countries and Territories, U.N. Doc.E/CN.4/1995/61 (14 December 1994) (hereinafter the "Ndiaye Report"), paragraph 378 (commenting upon fair trial standards relating to capital punishment to the effect that it is the application of these standards to each and every case that needs to be ensured and, in case of indications to the contrary, verified, in accordance with the obligation under international law to conduct exhaustive and impartial investigations into all allegations of violation of the right to life).

[79] IACHR, Report No. 57/96, Andrews, United States, Annual Report of the IACHR 1997, paragraphs 170-171; Report No. 38/00 Baptiste, Grenada, Annual Report of the IACHR 1999, paragraphs 64-66; Report No. 41/00, McKenzie *et al.*, Jamaica, Annual Report of the IACHR 1999, paragraphs 169-171.

> Every person may resort to the courts to ensure respect for his legal rights. There should likewise be available to him a simple, brief procedure whereby the courts will protect him from acts of authority that, to his prejudice, violate any fundamental constitutional rights.
>
> Article XXVI – Right to due process of law
>
> Every accused person is presumed to be innocent until proven guilty.
>
> Every person accused of an offense has the right to be given an impartial and public hearing, and to be tried by courts previously established in accordance with pre-existing laws, and not to receive cruel, infamous or unusual punishment.

1. Consular notification and assistance

188. According to the petitioners, the United States allegedly violated, to the detriment of Heliberto Chi Aceituno and Miguel Ángel Flores, the right to consular notification established in Article 36 of the Vienna Convention on Consular Relations. The State, for its part, has not contested that allegation.

189. The IACHR has held, on a number of occasions, that it has competence to consider the extent to which a state party has given effect to the requirements of Article 36 of the Vienna Convention on Consular Relations for the purpose of evaluating that state's compliance with a foreign national's due process rights under Articles XVIII and XXVI of the American Declaration.[80]

190. In that regard, the Commission has written that "non-compliance with obligations under Article 36 of the Vienna Convention is a factor that must be evaluated together with all of the other circumstances of each case in order to determine whether a defendant received a fair trial."[81]

191. Also, the "Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas," [82] adopted by the Commission in 2008, establish that:

> Persons deprived of liberty in a Member State of the Organization of American States of which they are not nationals, shall be informed, without delay, and in any case before they make any statement to the competent authorities, of their right to consular or diplomatic assistance, and to request that consular or diplomatic authorities be notified of their deprivation of liberty

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[80] IACHR, Report No. 90/09, Case 12.644, Admissibility and Merits (Publication), Medellín, Ramírez Cárdenas and Leal García, United States, August 7, 2009, paragraphs 124-132; IACHR, Report No. 91/05, Case 12.421, Merits, Javier Suárez Medina, United States, October 24, 2005, paragraphs 81-87; IACHR, Report No. 1/05, Case 12.430, Merits, Roberto Moreno Ramos, United States, January 28, 2005, paragraphs 62-64; IACHR, Report No. 99/03, Case 11.331, Merits, Cesar Fierro, United States, December 29, 2003, paragraphs 37-42; IACHR, Report No. 52/02, Case 11.753, Merits, Ramón Martínez Villarreal, United States, October 10, 2002, paragraphs 64-84.

[81] IACHR, Report Nº 90/09, Case 12.644, Admissibility and Merits (Publication), Medellín, Ramírez Cárdenas and Leal García, United States, August 7, 2009, paragraph 127.

[82] "Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas," approved by the Commission at its 131st regular session, March 3 to 14, 2008. Available at: http://www.oas.org/en/iachr/mandate/Basics/principlesdeprived.asp.

> immediately. Furthermore, they shall have the right to communicate with their diplomatic and consular authorities freely and in private.[83]

192. Similarly, the Inter-American Court has written that exercise of the right to consular notification is contingent only upon the will of the individual concerned, which reaffirms the personal nature of the rights recognized in Article 36 of the Vienna Convention, and that noncompliance with the obligation to notify implies a violation of due process of law similar to noncompliance with the obligation to inform about other means of defense.[84]

193. In the case of Mr. Chi Aceituno, the petitioner states that the United States authorities' failure to comply with the "obligation to notify consular authorities of the arrest, detention or imprisonment of one of their foreign nationals" leaves the alleged victim defenseless and is a violation of his right to due process.

194. In the case of Mr. Flores, the petitioner contends that the alleged victim was detained, tried, convicted and sentenced to death without ever being informed of his right to contact the Mexican consular authorities; the Mexican State learned of the case one year after the death sentence was imposed. He also argues that the lack of consular assistance was highly prejudicial to the alleged victim's case; had he had that assistance, the trial might have had a different outcome. He notes in this regard that consular assistance would have eased the atmosphere of coercion that induced a confession from the alleged victim and would have afforded him additional legal assistance. For those reasons, the petitioner maintains that the involvement of consular authorities would have radically changed the jury's perception.

195. Therefore, the IACHR concludes that the failure of the State to respect and ensure the rights of the alleged victims to consular notification and assistance violated their rights to a fair trial and to due process. The Inter-American Commission thus concludes that the State's obligation under Article 36(1) of the Vienna Convention on Consular Relations to notify Messrs. Chi Aceituno and Flores of their rights to consular notification and assistance was a fundamental component of the standards of due process to which they were entitled under the American Declaration. The State's failure to respect and ensure this obligation had the effect of denying them a criminal process that rose to the minimum standards of due process and a fair trial required under Articles XVIII and XXVI of the Declaration.

2. Ineffective assistance of court-appointed counsel

196. According to the petitioners, the State violated the right of Messrs. Moon, Hartman, Hicks, Elizalde, Resendiz, Flores, Leisure, Green, Brown, Kunkle, Mobley and Gardner to adequate legal counsel. In the case of the first six of the above-named alleged victims, the petitioners indicate that the defense counsel was assigned by the state or information in the case file so indicates. No information is available for the remaining six alleged victims.

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[83] Principle V (Due Process) of the "Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas" approved by the Commission at its 131st regular session, March 3 to 14, 2008. Available at: http://www.oas.org/en/iachr/mandate/Basics/principlesdeprived.asp .

[84] I/A Court H.R., Advisory Opinion OC-16/99 (October 1, 1999) "The Right to Information on Consular Assistance in the Framework of the Guarantees of Due Process of Law," paragraph 106.

197. The IACHR has written that in death penalty cases, the right to due process protected under the American Declaration ensures that the accused will have the opportunity to present arguments and evidence as to whether the application of the death penalty is permissible or appropriate in the case at hand. The fundamental due process requirements in death penalty trials include the obligation to afford a defendant a full and fair opportunity to present mitigating evidence for consideration in determining whether the death penalty is the appropriate punishment in the circumstances of his or her case. [85] The considerations taken into account in the sentencing phase include the defendant's history and character, the subjective factors that might have motivated his or her conduct, the design and manner of execution of the particular offense, and the possibility of reform and social re-adaptation of the offender.

198. The Inter-American Commission has pointed out that the American Bar Association, the principal national association of attorneys in the United States, has prepared and adopted guidelines and commentaries that stress the importance of investigating and introducing mitigating evidence in capital cases. According to the commentary for guideline 10.7, counsel needs to do a thorough investigation of the defendant's personal and family history.[86]

199. Furthermore, the IACHR has acknowledged that U.S. laws offer ample due process protections to persons facing criminal proceedings, which include the right to effective legal representation at public expense if the person is unable to pay for an attorney. However, it has underscored the point that while it is fundamental for these protections to be prescribed under domestic law, States must also ensure that these protections are provided in practice in the circumstances of each individual defendant.[87]

200. Concerning the alleged victims whose defense was provided by the State, the petitioners allege, *inter alia,* that Mr. Moon's defense counsel failed to investigate important mitigating evidence and investigated some pieces of the mitigating evidence for only five hours; that the defense counsel the State appointed to defend Mr. Hicks was an attorney with no experience in death penalty cases; that during the appeals phase and the habeas corpus proceedings, Mr. Elizalde Jr.'s defense counsel failed to explore obvious lines of investigation and failed to challenge one of the witnesses despite the enormous discrepancies in his statement; that the defense attorney who represented Mr. Resendiz in the post-conviction phase was negligent as he missed an important deadline and then argued general procedural matters; and that Mr. Flores' defense counsel failed to interrogate potential witnesses, did not obtain an independent expert and did not request a mental health evaluation of the alleged victim. It is worth noting that nothing in the case file refutes those allegations.

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[85] IACHR, Report No. 90/09, Case 12.644, Admissibility and Merits (Publication), Medellín, Ramírez Cárdenas and Leal García, United States, August 7, 2009, paragraphs 133-143; IACHR, Report No. 81/11, Case 12.776, Merits, Jeffrey Timothy Landrigan, United States, July 21, 2011, paragraphs 35-37, 41-43, 45.

[86] American Bar Association, *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases* (Revised Edition) (February 2003), http://www.abanet.org/legalservices/downloads/ sclaid/deathpenaltyguidelines.pdf, Guideline 10.7 – Investigation.

[87] IACHR, Report No. 90/09, Case 12.644, Admissibility and Merits (Publication), Medellín, Ramírez Cárdenas and Leal García, United States, August 7, 2009, paragraph 137.

201. The State, for its part, observes, *inter alia,* that Mr. Resendiz' allegation is unfounded, as the quality of his legal representation was adequate and enabled him to present various appeals. The State did not contest the allegations made with respect to the other alleged victims.

202. The right to legal representation provided by the State must be guaranteed in a manner that renders it effective and therefore requires not only that defense counsel be provided, but that defense counsel be competent in representing the defendant. The Inter-American Commission has recognized that a State cannot be held responsible for every shortcoming on the part of an attorney. The legal profession is independent of the State; hence, the State has neither knowledge of nor control over how defense counsel represents his or her client. Even so, the national authorities have an obligation to intervene if a failure by defense counsel to provide effective representation is manifest or is sufficiently brought to their attention.[88] That obligation is all the greater when the legal representation is provided by the State.

203. As indicated in the observations on the merits presented by Mr. Elizalde Jr.'s petitioner, when it rejected the appeal filed for the alleged ineffectual defense counsel, the District Court held that the denial of effective assistance of state-appointed habeas counsel is not a violation of due process.[89] On this point the IACHR has written that strict observance of the right to be assisted by effective legal counsel appointed by the State is fundamental in trials involving capital offenses, and that this right attends the individual at all stages of the criminal proceedings.[90] Point 5 of the United Nations "Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty" makes reference to the "right of anyone suspected of or charged with a crime for which capital punishment may be imposed to adequate legal assistance at all stages of the proceedings."[91]

204. Based on the foregoing, the IACHR concludes that the State's obligations under articles XVIII and XXVI of the American Declaration include the right to adequate defense representation. It further concludes that the State's failure to respect and ensure this obligation resulted in additional violations of the rights to due process and to a fair trial, protected under the American Declaration, to the detriment of Messrs. Moon, Hartman, Hicks, Elizalde Jr., Resendiz and Flores.

205. Lastly, in the case of Messrs Leisure, Green, Brown, Kunkle, Mobley and Gardner, from the information available in the IACHR's file it is unable to determine whether they were represented by court-appointed defense counsel or private defense attorneys. Furthermore, neither the allegations made by the respective petitioners nor the case files contain sufficient information for the IACHR to make a determination as to whether the right to an adequate defense was violated to the detriment of the six afore-named alleged victims.

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[88] See IACHR, Report No. 41/04, Case 12.417, Merits, Whitley Myrie, Jamaica, October 12, 2004, paragraph 62.

[89] Communication received from petitioner Karen Parker on May 23, 2011, p. 2 (Elizalde v. Dretke, 362 F.3d 323 (5th Cir. 2004) (Habeas)). The file with the IACHR does not have a copy of that decision.

[90] *See* McKenzie *et al.* v. Jamaica, Annual Report of the IACHR 1999, paragraphs 304-305.

[91] 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).

C. Right of every person with a mental disability not to be subjected to capital punishment (Articles I and XXVI of the American Declaration)

206. While the American Declaration does not expressly prohibit the imposition of the death penalty in the case of persons with mental disability, such a practice is in violation of the rights recognized in Articles I and XXVI of the American Declaration.

207. Article I of the American Declaration reads as follows:

> Every human being has the right to life, liberty and the security of his person.

208. The final part of Article XXVI of the American Declaration provides that:

> Every person accused of an offense has the right […] not to receive cruel, infamous or unusual punishment.

209. According to the petitioners, David Leisure, James Brown, Robert Karl Hicks, Troy Albert Kunkle, Jaime Elizalde Jr., Ángel Maturino Resendiz and James Wilson Chambers, had some degree of mental disability. The petitioners mention cases of schizophrenia, I.Q.s as low as 58, visual and auditory hallucinations, microcephaly with frontal lobe dysfunction, internments in psychiatric hospitals, and episodes of self-mutilation. According to the information available, those issues were brought to the attention of the appropriate authorities.

210. The State, for its part, observed that the point made concerning Mr. Elizalde Jr.'s "mental retardation" was reviewed by the state and federal courts, which concluded that the alleged victim was legally competent to be executed. As for Mr. Resendiz, the State also argued that his alleged mental disability was extensively litigated in the United States courts and that, after holding a hearing, the 178th District Court concluded that the alleged victim was legally competent to be executed. The State did not contest the allegations made with respect to the other alleged victims.

211. States have a special duty to protect persons with mental disabilities, because they are particularly vulnerable. That duty is all the greater in the case of persons in the State's custody in prison institutions.

212. The Inter-American Commission has written that:

> […] in interpreting and applying the Declaration, it is necessary to consider its provisions in the context of the international and Inter-American human rights systems more broadly, in the light of developments in the field of international human rights law since the Declaration was first composed and with due regard to other relevant rules of international law applicable to Member States against which complaints of violations of the Declaration are properly lodged.[92]

213. It is a principle of international law that persons with mental disabilities, either at the time of the commission of the crime or during trial, cannot be sentenced to the death penalty. Likewise,

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[92] IACHR, Report No. 48/01, Case No. 12.067 and others, Michael Edwards *et al.*, The Bahamas, April 4, 2001, paragraph 107.

international law also prohibits execution of a person sentenced to death if that person has a mental disability at the time of execution.

214. In a case involving Trinidad and Tobago, the Human Rights Committee held that the reading of a death warrant to a "mentally incompetent person", even if that person had been competent at the time of his or her conviction, is a violation of the right not to be subjected to torture or to cruel, inhuman or degrading treatment or punishment.[93] The United Nations "Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty" provide that a death sentence shall not be carried out on […] "persons who have become insane."[94] The United Nations Commission on Human Rights called upon all States that still have the death penalty "[n]ot to impose the death penalty on a person suffering from any mental or intellectual disabilities or to execute any such person."[95]

215. In Atkins v. Virginia,[96] the United States Supreme Court held that "executions of mentally retarded criminals are cruel and unusual punishments prohibited by the Eighth Amendment" of the U.S. Constitution. In its ruling, the Supreme Court traced the history of the concept of "excessive" sanctions and underscored the fact that the consensus today unquestionably reflects widespread judgment about the relative culpability of "mentally retarded offenders."[97] In the Atkins Case, the Supreme Court also makes reference to studies indicating that an IQ between 70 and 75 or lower "is typically considered the cutoff IQ score for the intellectual function prong of the mental retardation definition."[98] In Ake v. Oklahoma,[99] the Supreme Court held that an indigent defendant has a right to an expert psychiatrist for his defense.

216. The petitioner for Mr. Resendiz observes that despite the United States Supreme Court's ruling in the Atkins Case, states have used a very narrow definition of the term "incompetence". She also alleges that by imposing the death penalty on an individual with a "severe mental illness" but not legally incompetent, the United States government violated the alleged victim's human rights.

217. The United Nations Human Rights Committee, in its final observations on the reports presented by the United States, welcomed the Supreme Court's decision in Atkins v. Virginia and encouraged the State party to ensure that "persons suffering from severe forms of mental illness not amounting to mental retardation are equally protected."[100] The Committee also expressed its concern

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[93] Human Rights Committee, Sahadath v. Trinidad and Tobago, Communication No. 684/1996, April 2, 2002, CCPR/C/74/D/684/1996, paragraph 7.2.

[94] 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).

[95] United Nations Commission on Human Rights, Promotion and Protection of Human Rights, The question of the death penalty, E/CN4/2005/L.77, April 14, 2005, paragraph 7(c). Available at: http://daccess-dds-ny.un.org/doc/UNDOC/LTD/G05/124/37/PDF/G0512437.pdf?OpenElement.

[96] *Atkins v. Virginia*, 536 U.S. 304 (2002).

[97] *Atkins v. Virginia*, 536 U.S. 304 (2002), p. 311-317.

[98] *Atkins v. Virginia*, 536 U.S. 304 (2002), p. 309.

[99] *Ake v. Oklahoma*, 470 U.S. 68 (1985).

[100] United Nations, Human Rights Committee, CCPR/C/USA/CO/3, September 15, 2006, paragraph 7. Available at: http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G06/459/61/PDF/G0645961.pdf?OpenElement.

"about the reported high numbers of severely mentally ill persons in (…) [maximum security] prisons, as well as in regular in U.S. jails."[101]

218. As the right to life is the ultimate right, and given the heightened degree of scrutiny required in capital cases, the Inter-American Commission considers that persons with mental disability cannot be subjected to capital punishment, as these individuals are unable to comprehend the reason for or consequence of their execution.

219. Furthermore, because of its special duty to protect persons with mental disabilities, in death penalty cases the State has an obligation to have some procedures in place to identify those accused or convicted persons who have a mental disability. States also have an obligation to survey all records and information in their possession concerning the mental health of a person accused of a capital offense. The State must provide any indigent person with the means necessary to have an independent evaluation done of his or her mental health, which evaluation must be done in a timely manner.

220. Based on the above considerations, and given the heightened degree of scrutiny that it has applied in death penalty cases,[102] the IACHR considers that the fact that the United States executed persons with mental disabilities, or who were not given sufficient and timely means to obtain an independent evaluation of their mental health, constitutes arbitrary deprivation of life and cruel, infamous and unusual punishment. Accordingly, the Inter-American Commission concludes that the United States violated Articles I and XXVI of the American Declaration to the detriment of David Leisure, James Brown, Robert Karl Hicks, Troy Albert Kunkle, Jaime Elizalde Jr., Ángel Maturino Resendiz and James Wilson Chambers.

D. The right of every person deprived of liberty not to be subjected to prolonged solitary confinement (articles XXV and XXVI of the American Declaration)

221. The final part of Article XXV of the American Declaration reads as follows:

> Every individual who has been deprived of his liberty […] has the right to humane treatment during the time he is in custody.

222. The final part of Article XXVI of the American Declaration provides that:

> Every person accused of an offense has the right […] not to receive cruel, infamous or unusual punishment.

223. According to the petitioners, Ángel Maturino Resendiz and Ronnie Gardner were subjected to inhumane detention conditions during their time on death row. Mr. Maturino Resendiz spent six years on death row, while Mr. Gardner was on death row for over 20 years.

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[101] United Nations, Human Rights Committee, CCPR/C/USA/CO/3, September 15, 2006, paragraph 32. Available at: http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G06/459/61/PDF/G0645961.pdf?OpenElement.

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

224. The petitioners make specific reference to solitary confinement on death row. In the case of Mr. Resendiz, they alleged, *inter alia,* that those sentenced to death in the state of Texas were held in cells measuring approximately 60 square feet (roughly 5.57 m^2), completely segregated from the other prisoners. They also pointed out that they were not permitted to watch television and were often denied the use of radios, a main source of mental stimulation. They were prohibited from having any physical contact with relatives, friends and attorneys, even in the days and hours leading up to their execution. In Mr. Gardner's case, he was only allowed outside his cell for an hour each day.

225. In the case of Mr. Resendiz, in its response to the petition the State examines the allegation regarding the prolonged period of imprisonment, but does not address the alleged conditions of his incarceration. The State has not contested the allegations made in the case of Mr. Gardner.

226. International standards are that persons deprived of liberty and facing the death penalty should not be subjected to solitary confinement as a regular condition of imprisonment, but solely as a disciplinary punishment in those instances and under the same conditions in which these measures apply to the rest of the inmates.[103]

227. The Istanbul Statement on the Use and Effects of Solitary Confinement defines solitary confinement as follows:

> Solitary confinement is the physical isolation of individuals who are confined to their cells for twenty-two to twenty-four hours a day. In many jurisdictions prisoners are allowed out of their cells for one hour of solitary exercise. Meaningful contact with other people is typically reduced to a minimum. The reduction in stimuli is not only quantitative but also qualitative. The available stimuli and the occasional social contacts are seldom freely chosen, are generally monotonous, and are often not empathetic.[104]

228. According to the Istanbul Statement, in practice one of the circumstances under which solitary confinement is used is as a court imposed sentence. This circumstance may include cases in which the law prescribes that either all or part of a sentence must be served in solitary confinement.[105]

229. The IACHR has written that solitary confinement should only be used on an exceptional basis, for the shortest amount of time possible and only as a measure of last resort.[106] Here, the Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas underscore the exceptional nature of the practice of solitary confinement where it provides that:

> Solitary confinement shall only be permitted as a disposition of last resort and for a strictly limited time, when it is evident that it is necessary to ensure legitimate interests relating to the

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[103] IACHR, Report on the human rights of persons deprived of liberty in the Americas, OEA/Ser.L/V/II.Doc.64., December 31, 2011, paragraph 517.

[104] Istanbul Statement on the Use and Effects of Solitary Confinement, adopted on December 9, 2007, at the International Psychological Trauma Symposium.

[105] IACHR, Report on the human rights of persons deprived of liberty in the Americas, OEA/Ser.L/V/II.Doc.64., December 31, 2011, paragraph 397.

[106] IACHR, Report on the human rights of persons deprived of liberty in the Americas, OEA/Ser.L/V/II.Doc.64., December 31, 2011, paragraph 411.

institution's internal security, and to protect fundamental rights, such as the right to life and integrity of persons deprived of liberty or the personnel.[107]

230. On October 18, 2011, the United Nations Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment called for the prohibition of indefinite solitary confinement and prolonged solitary confinement, which he defined as for any period in excess of 15 days.[108] The Special Rapporteur concluded that 15 days "is the limit between 'solitary confinement' and 'prolonged solitary confinement' because at that point, according to the literature surveyed, some of the harmful psychological effects of isolation can become irreversible." The U.N. Rapporteur also observed that "even a few days of solitary confinement will shift an individual's brain activity towards an abnormal pattern characteristic of stupor and delirium."[109]

231. Furthermore, according to the UN Special Rapporteur, while there is no universal instrument that specifies a minimum acceptable cell size, domestic and regional jurisdictions have sometimes ruled on the matter. According to the European Court of Human Rights in Ramírez Sanchez v. France, a cell measuring 6.84 square metres (73.6 square feet) is "large enough" for single occupancy. However, the Special Rapporteur begs to differ, "especially if the single cell should also contain, at a minimum, toilet and washing facilities, bedding and a desk."[110]

232. Under the Istanbul Statement, solitary confinement can have serious psychological effects, ranging from depression to paranoia and psychosis, as well as physiological effects such as cardiovascular problems and profound fatigue.[111] The European Court has held that protracted sensory isolation, coupled with social isolation, can destroy the personality and constitutes a form of inhuman treatment.[112]

233. The United Nations Human Rights Committee has expressed its concern over the practice in some maximum security prisons in the United States "to hold detainees in prolonged cellular confinement, and to allow them out-of-cell recreation for only five hours per week, in general conditions of strict regimentation in a depersonalized environment."[113]

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[107] IACHR, Resolution 1/08, Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas, Principle XXII (3).

[108] *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment*, Juan E. Méndez, January 18, 2010, A/HRC/19/61, paragraph 18.

[109] United Nations, General Assembly, Torture and other cruel, inhuman or degrading treatment or punishment, August 5, 2011, A/66/268, paragraphs 26 and 55.

[110] United Nations, General Assembly, Torture and other cruel, inhuman or degrading treatment or punishment, August 5, 2011, A/66/268, paragraph 49.

[111] Shalev, Sharon, *A sourcebook on solitary confinement*, Mannheim Centre for Criminology, LSE, 2008, pp. 15 and 16. Available at: http://solitaryconfinement.org/uploads/sourcebook_web.pdf, cited in IACHR, Report on the human rights of persons deprived of liberty in the Americas, OEA/Ser.L/V/II.Doc.64., December 31, 2011, paragraph 492.

[112] *European Court of Human Rights, Case of Ramírez Sánchez v. France, (Application no. 59450/00), Judgment of July 4, 2006, Grand Chamber*, paragraphs 120-123, cited in IACHR, Report on the human rights of persons deprived of liberty in the Americas, OEA/Ser.L/V/II.Doc.64., December 31, 2011, paragraph 416.

[113] United Nations, Human Rights Committee, CCPR/C/USA/CO/3, September 15, 2006, paragraph 32. Available at: http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G06/459/61/PDF/G0645961.pdf?OpenElement.

234. For its part, in an application filed with the Inter-American Court in connection with a death penalty case in which the victims were held in solitary confinement for protracted periods, the Inter-American Commission established that the State failed to ensure respect for the inherent dignity of the human person, regardless of the circumstance, and the right not to be subjected to cruel, inhuman or degrading treatment or punishment.[114]

235. The Inter-American Commission reaffirms that all persons deprived of liberty must receive humane treatment, commensurate with respect for their inherent dignity. This means that the conditions of imprisonment of persons sentenced to death must meet the same international norms and standards that apply in general to persons deprived of liberty. In this regard, the duties of the State to respect and ensure the right to humane treatment of all persons under its jurisdiction apply regardless of the nature of the conduct for which the person in question has been deprived of his liberty.[115]

236. Therefore, based on the information available, the IACHR considers that the alleged victims in the present case were held under prolonged solitary confinement solely on the basis of the fact that they had been sentenced to die. Measures such as prohibiting any form of physical contact with family members and attorneys, and with other inmates, would appear to be disproportionate, illegitimate and unnecessary.

237. Based on international standards, the Inter-American Commission concludes that by keeping Mr. Resendiz and Mr. Gardner in prolonged solitary confinement, the United States subjected them to inhumane treatment during their incarceration and imposed on them a cruel, infamous and unusual punishment, in violation of Articles XXV and XXVI of the American Declaration.

E. Failure to comply with the precautionary measures (Article I of the American Declaration)

238. The IACHR observes that the present complaint has implications vis-à-vis the State's obligations under the inter-American system of human rights, given the failure to comply with the precautionary measures that the IACHR granted.

239. The Inter-American Commission granted precautionary measures for 16 alleged victims and asked the United States to suspend execution until such time as the Commission issued its finding on the merits of the respective petitions. All the alleged victims were executed while the measures were still in effect. In a number of cases, the executions took place within days or weeks of the petition being filed with the IACHR.

240. The IACHR has expressed its profound concern over the fact that its ability to effectively investigate and issue a finding on death penalty cases is frequently undermined when States proceed to execute condemned persons, despite the fact that they have cases pending with the IACHR. This is why, in death penalty cases, the Inter-American Commission requests precautionary measures of the States

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[114] I/A Court H.R., *Case of Hilaire, Constantine and Benjamin et al. v. Trinidad and Tobago,* Judgment of June 21, 2002. Series C No. 94, paragraphs 154-156.

[115] IACHR, Report on the human rights of persons deprived of liberty in the Americas, OEA/Ser.L/V/II.Doc.64., December 31, 2011, paragraph 513.

to suspend the inmate's execution until it has had an opportunity to investigate the violations being alleged.[116]

241. Here, the IACHR again makes the point that:

> […] OAS member states, by creating the Commission and mandating it through the OAS Charter and the Commission's Statute to promote the observance and protection of human rights of the American peoples, have implicitly undertaken to implement measures of this nature where they are essential to preserving the Commission's mandate. Particularly in capital cases, the failure of a member state to preserve a condemned prisoner's life pending review by the Commission of his or her complaint emasculates 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, and accordingly is inconsistent with the state's human rights obligations.[117]

242. The Inter-American Commission considers that the jurisprudence of the system "articulates a principle common to the functioning of international adjudicative systems that requires the systems' member states to implement interim or precautionary measures when doing so is necessary to preserve the very purposes for which the systems were created and to prevent irreparable harm to the parties whose interests are determined through those systems."[118]

243. To be in compliance with Article I of the American Declaration and the principles of due process spelled out in Articles XVIII and XXVI of that instrument, the death penalty can only be applied when all existing remedies have been exhausted. This includes domestic and international remedies. Consequently, requests for the adoption of precautionary measures must be respected in order to ensure the effective conclusion of proceedings with this Commission.[119]

244. For all the foregoing reasons, the Inter-American Commission has concluded that a member state fails its basic human rights obligations under the OAS Charter and related instruments when it neglects to enforce precautionary measures granted by the Inter-American Commission in circumstances of this nature.

245. The Commission therefore concludes that the fact that the alleged victims were executed when an international claim was still pending constitutes an aggravated violation of the State's obligation to protect the right to life, recognized in Article I of the American Declaration. That violation caused irreparable harm to the alleged victims, who were arbitrarily deprived of the right to life by not having had the opportunity to have their allegations investigated by the IACHR, which was also a violation of their right to petition this body, as set forth in Article 23 of its Rules of Procedures.

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[116] IACHR, Case No. 12.243, Report No. 52/01, Juan Raúl Garza v. United States, Annual Report of the IACHR 2000, paragraph 117.

[117] IACHR, Case No. 12.243, Report No. 52/01, Juan Raúl Garza v. United States, Annual Report of the IACHR 2000, paragraph 117. *See also,* IACHR, Report No. 1/05, Case 12.430, Merits, Roberto Moreno Ramos, United States, January 28, 2005, paragraph 75.

[118] IACHR, Report No. 91/05, Case 12.421, Merits, Javier Suarez Medina, United States, October 24, 2005, paragraph 90.

[119] *See, mutatis mutandi*, IACHR, Fifth Report on the Situation of Human Rights in Guatemala, Chapter V: The Right to Life, April 6, 2001, OEA/Ser.L/V/II.111, doc. 21 rev., paragraph 75.

VI. ACTIONS SUBSEQUENT TO REPORT No. 69/12

246. On July 17, 2012, the Inter-American Commission approved Report No. 69/12 on the merits of this matter, which comprises paragraphs 1 to 245 *supra*, with the following recommendations to the State:

> 1. Provide reparations to the families of Clarence Allen Lackey, David Leisure, Anthony Green, James Brown, Larry Eugene Moon, Edward Hartman, Robert Karl Hicks, Troy Albert Kunkle, Stephen Anthony Mobley, Jaime Elizalde Jr., Ángel Maturino Resendiz, Heliberto Chi Aceituno, David Powell, Ronnie Gardner, Miguel Ángel Flores and James Wilson Chambers as a consequence of the violations established in this report;
>
> 2. Ensure that every foreign national deprived of his or her liberty is informed, without delay and prior to his or her first statement, of his or her right to consular assistance and to request that the diplomatic authorities be immediately notified of his or her arrest or detention;
>
> 3. Push for urgent passage of the bill for the "Consular Notification Compliance Act" ("CNCA"), which has been pending with the United States Congress since 2011;
>
> 4. Provide every indigent person accused of a capital offense with the necessary legal representation;
>
> 5. Ensure that the legal counsel provided by the State in death penalty cases is effective, trained to serve in death penalty cases, and able to thoroughly and diligently investigate all mitigating evidence;
>
> 6. Review its laws, procedures and practices to make certain that no one with a mental disability at the time of the commission of the crime or execution of the death sentence, receives the death penalty or is executed. The State should also ensure that anyone accused of a capital offense who requests an independent evaluation of his or her mental health and who does not have the means to retain the services of an independent expert, has access to such an evaluation;
>
> 7. Review its laws, procedures and practices to ensure that solitary confinement is not used as a court-imposed sentence in the case of persons sentenced to death. Ensure that solitary confinement is reserved for only the most exceptional circumstances, in accordance with international standards;
>
> 8. Ensure that persons convicted and sentenced to death have the opportunity to have contact with family members and access to various programs and activities; and
>
> 9. As a measure of non-repetition, ensure compliance with the precautionary measures granted by the IACHR for persons facing the death penalty.

247. Also, "[g]iven the violations of the American Declaration that the IACHR has established in the present case and in others involving application of the death penalty, the Inter-American Commission [recommended] to the United States that it adopt a moratorium on executions of persons sentenced to death."[120]

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[120] See in this regard, IACHR, The death penalty in the Inter-American Human Rights System: From restrictions to abolition, OEA/Ser.L/V/II.Doc 68, December 31, 2011.

248. On August 2, 2012, the report was transmitted to the State with a time period of two months to inform the Inter-American Commission on the measures taken to comply with its recommendations. On that same date, the pertinent parts of the report were transmitted to the petitioners. No response was received from the State on the measures taken to comply with the recommendations set forth in Report No. 69/12.

249. On March 19, 2013, the Inter-American Commission approved Report No. 4/13 containing the final conclusions and recommendations indicated *infra*. As set forth in Article 47.2 of its Rules of Procedure, on April 24, 2013, the IACHR transmitted the report to the parties with a time period of one month to present information on compliance with the final recommendations. On May 27, 2013, petitioner Karen Parker informed the Inter-American Commission that the Government of the United States had not contacted her or any of the family of victim Jaime Elizalde Jr. in regards to the decision on the merits of the case. No response from the State was received within the stipulated period.

VII. FINAL CONCLUSIONS AND RECOMMENDATIONS

250. In accordance with the legal and factual considerations set out in this report, the Inter-American Commission concludes that the United States is responsible for the violation of the following provisions:

- The right to a fair trial and the right to due process, recognized in Articles XVIII and XXVI of the American Declaration, respectively, to the detriment of Heliberto Chi Aceituno and Miguel Ángel Flores, by virtue of its violation of their rights to consular notification and assistance; and Larry Eugene Moon, Edward Hartman, Robert Karl Hicks, Jaime Elizalde Jr., Ángel Maturino Resendiz and Miguel Ángel Flores, by virtue of the ineffective legal counsel assigned by the State;

- The right to life, to liberty, and personal security and the right to due process of law, protected, respectively, under Articles I and XXVI of the American Declaration, to the detriment of David Leisure, James Brown, Robert Karl Hicks, Troy Albert Kunkle, Jaime Elizalde Jr., Ángel Maturino Resendiz and James Wilson Chambers by virtue of the violation of the right of every person with mental disabilities not to be subjected to the death penalty;

- The right of protection against arbitrary arrest and the right to due process of law, protected, respectively, under Articles XXV and XXVI of the American Declaration, to the detriment of Ángel Maturino Resendiz and Ronnie Gardner by virtue of its violation of the right of every person deprived of liberty not to be subjected to prolonged confinement; and

- The right to life, liberty and personal security, protected under Article I of the American Declaration, to the detriment of Clarence Allen Lackey, David Leisure, Anthony Green, James Brown, Larry Eugene Moon, Edward Hartman, Robert Karl Hicks, Troy Albert Kunkle, Stephen Anthony Mobley, Jaime Elizalde Jr., Ángel Maturino Resendiz, Heliberto Chi Aceituno, David Powell, Ronnie Gardner, Miguel Ángel Flores and James Wilson Chambers, by virtue of its failure to comply with the precautionary measures that the IACHR granted for the alleged victims.

251. The IACHR finds that the state has not taken measures toward compliance with the recommendations in the merits report in this case. Accordingly,

THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS REITERATES ITS RECOMMENDATIONS THAT THE UNITED STATES:

1. Provide reparations to the families of Clarence Allen Lackey, David Leisure, Anthony Green, James Brown, Larry Eugene Moon, Edward Hartman, Robert Karl Hicks, Troy Albert Kunkle, Stephen Anthony Mobley, Jaime Elizalde Jr., Ángel Maturino Resendiz, Heliberto Chi Aceituno, David Powell, Ronnie Gardner, Miguel Ángel Flores and James Wilson Chambers as a consequence of the violations established in this report;

2. Ensure that every foreign national deprived of his or her liberty is informed, without delay and prior to his or her first statement, of his or her right to consular assistance and to request that the diplomatic authorities be immediately notified of his or her arrest or detention;

3. Push for urgent passage of the bill for the "Consular Notification Compliance Act" ("CNCA"), which has been pending with the United States Congress since 2011;

4. Provide every indigent person accused of a capital offense with the necessary legal representation;

5. Ensure that the legal counsel provided by the State in death penalty cases is effective, trained to serve in death penalty cases, and able to thoroughly and diligently investigate all mitigating evidence;

6. Review its laws, procedures and practices to make certain that no one with a mental disability at the time of the commission of the crime or execution of the death sentence, receives the death penalty or is executed. The State should also ensure that anyone accused of a capital offense who requests an independent evaluation of his or her mental health and who does not have the means to retain the services of an independent expert, has access to such an evaluation;

7. Review its laws, procedures and practices to ensure that solitary confinement is not used as a court-imposed sentence in the case of persons sentenced to death. Ensure that solitary confinement is reserved for only the most exceptional circumstances, in accordance with international standards;

8. Ensure that persons convicted and sentenced to death have the opportunity to have contact with family members and access to various programs and activities; and

9. As a measure of non-repetition, ensure compliance with the precautionary measures granted by the IACHR for persons facing the death penalty.

252. Given the violations of the American Declaration that the IACHR has established in the present case and in others involving application of the death penalty, the Inter-American Commission

reiterates its recommendation to the United States that it adopt a moratorium on executions of persons sentenced to death.[121]

VIII. PUBLICATION

253. In light of the above and in accordance with Article 47.3 of its Rules of Procedure, the IACHR decides to make this report public, and to include it in its Annual Report to the General Assembly of the Organization of American States. The Inter-American Commission, according to the norms contained in the instruments which govern its mandate, will continue evaluating the measures adopted by the United States with respect to the above recommendations until it determines there has been full compliance.

Done and signed in the city of Washington, D.C., on the 15 day of the month of July, 2013. (Signed): President; Tracy Robinson, First Vice-President; Rosa Maria Ortiz, Second Vice-President; Felipe González, Rodrigo Escobar Gil, and Rose-Marie Antoine, Commissioners.

[121] See in this regard, IACHR, The death penalty in the Inter-American Human Rights System: From restrictions to abolition, OEA/Ser.L/V/II.Doc 68, December 31, 2011.