

REPORT No. 53/13

CASE 12.864

MERITS

(PUBLICATION)

IVAN TELEGUZ

UNITED STATES*

July 15, 2013

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* Commissioner Dinah Shelton, a U.S. national, did not participate in discussing or deciding this case, in accordance with Article 17.2.a of the IACHR's Rules of Procedure.

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I. SUMMARY

1. On November 2, 2011, the Inter-American Commission on Human Rights ("the Inter-American Commission" or "the IACHR") received a petition and request for precautionary measures filed by Elizabeth Peiffer and Reprieve ("the petitioners") against the United States of America ("the State" or "the United States"). The petition was lodged on behalf of Ivan Teleguz ("the alleged victim" or "Mr. Teleguz") who is deprived of his liberty on death row in the state of Virginia.

2. The petitioners contend that Mr. Teleguz's execution will result in an arbitrary deprivation of life. They contend, *inter alia*, that state officials failed to inform him of his right to consular notification; that he was denied the right to competent and effective counsel; and that prosecutors withheld crucial evidence and presented false testimony. They further claim that the appeals system does not satisfy international standards of fairness and due process; that lethal injection, as currently practiced in Virginia, will expose Mr. Teleguz to an unacceptable and unnecessary risk of a torturous death; and that the clemency system in Virginia does not meet the minimal requirements of fairness. The petitioners hold that those facts constitute violations of Articles I, XVIII, XXIV, XXV and XXVI of the American Declaration of the Rights and Duties of Man ("the American Declaration"). As of the date of approval of this report, the State has not submitted its observations.

3. On March 20, 2012, during its 144th regular sessions, the IACHR examined the contentions of the petitioners on the question of admissibility, and without prejudging the merits of the matter, decided to admit the claims in the present petition pertaining to Articles I, XVIII, XXIV, XXV (regarding the allegations of inhumane treatment related to the method of execution) and XXVI of the American Declaration; and to continue with the analysis of the merits of the case. It also resolved to publish Admissibility Report N° 16/12 and to include it in its Annual Report to the General Assembly of the Organization of American States. The matter was recorded as Case No. 12.864.

4. In the instant report, after analyzing the position of the petitioners, the Inter-American Commission concludes that the United States is responsible for violating Articles I (Right to life, liberty and personal security), XVIII (Right to a fair trial), XXIV (Right of petition), XXV (Right of protection from arbitrary arrest) and XXVI (Right to due process of law) of the American Declaration with respect to Ivan Teleguz. Consequently, should the State carry out the execution of Mr. Teleguz, it would also be committing a serious and irreparable violation of the basic right to life recognized by Article I of the American Declaration.

* Commissioner Dinah Shelton, a U.S. national, did not participate in discussing or deciding this case, in accordance with Article 17.2.a of the IACHR's Rules of Procedure.

II. PROCEEDINGS SUBSEQUENT TO REPORT No. 16/12

5. On April 2, 2012, the IACHR forwarded Admissibility Report No. 16/12 to the State and to the petitioners. In accordance with its Rules of Procedure, the Inter-American Commission set a deadline of three months for the petitioners to submit additional observations on the merits and, at the same time, made itself available to the parties with a view to initiating a possible friendly settlement of the matter.

6. On May 11, 2012, the petitioners submitted additional observations on the merits. On May 14, 2012, the IACHR forwarded the relevant parts to the State, and set a time period until June 29, 2012 to submit its observations, pursuant to Article 37(3) of the Rules of Procedure. No response was received from the State within the stipulated period.

Precautionary Measures

7. On December 22, 2011, the IACHR notified the State that precautionary measures had been granted on behalf of the alleged victim, and requested a stay of execution until such time as it should pronounce on the merits of the petition.

III. POSITIONS OF THE PARTIES

A. Position of the petitioners

8. The petitioners indicate that Mr. Teleguz was convicted and sentenced to death in 2006 on false and unreliable testimony according to which he solicited and paid for the murder of his former girlfriend Stephanie Sipe. According to the petitioners, the prosecution alleged that in 2001 Mr. Teleguz had hired Michael Hetrick and Edwin Gilkes to kill Ms. Sipe in order to avoid paying child support.

9. They claim that this case relied primarily on the testimony of Mr. Hetrick and Mr. Gilkes, the two people directly implicated in the murder, and on the testimony of Aleksey Safanov who claimed that Mr. Teleguz previously attempted to hire him to kill Ms. Sipe. The petitioners submit that the only evidence was testimony obtained by the prosecution in exchange for witness deals to avoid serious punishment and that two of the three witnesses against Mr. Teleguz have subsequently admitted that the crucial portions of their testimony were false.

10. The petitioners argue that Mr. Teleguz was not given strict and rigorous fair trial guarantees and that his execution will result in an arbitrary deprivation of life. In this respect, they claim that there is strong evidence of the alleged victim's innocence; that state officials failed to inform him of his right to consular notification in violation of Article 36 of the Vienna Convention on Consular Relations; that Mr. Teleguz was given incompetent counsel; that prosecutors withheld crucial evidence and presented false testimony; that the appeals system does not satisfy international standards of fairness and due process; that Mr. Teleguz is to be executed using an untested method which exposes him to an unacceptable and unnecessary risk of a torturous death; that the clemency system in Virginia does not meet the minimal requirements of fairness; and that the application of the death penalty in Virginia is arbitrary and notoriously inconsistent.

11. Finally, the petitioners point out that Mr. Teleguz is likely to be executed around September 2012. According to an affidavit submitted by Elizabeth Peiffer, co-petitioner and attorney

appointed to represent Mr. Teleguz at post-conviction proceedings, his case is pending before the United States Court of Appeals for the Fifth Circuit, and a final decision is expected from the Court sometime in July 2012. If the decision is adverse to Mr. Teleguz, it would mean, according to the petitioners, that the State of Virginia would schedule to execute him sometime around September 2012.

1. Residual doubt as to guilt

12. The petitioners submit that there is no evidence physically linking Mr. Teleguz to the crime, and that he was convicted largely on testimony that has now been retracted, discredited, or that could have been easily discredited by competent counsel at his initial trial. They submit, as evidence of Mr. Teleguz' innocence, two affidavits of Mr. Gilkes in which he admits that he lied when he accused the alleged victim of paying him to kill Ms. Sipe.

13. The petitioners state that a more thorough investigation conducted post-conviction revealed a great deal of information that indicated that Mr. Teleguz was falsely convicted, and, at a minimum, that the jurors were asked to reach a verdict without awareness of significant factual information implicating others in the murder.

14. They indicate that there is no dispute that Mr. Hetrick murdered Ms. Sipe and that Mr. Teleguz was not present. In February 2003, Mr. Safanov, who allegedly needed to negotiate a favorable plea over pending federal charges and whose credibility was described by an agent as being "garbage," implicated Mr. Teleguz in Ms. Sipe's death. Although Mr. Safanov also implicated Mr. Gilkes, police purportedly did not attempt to question him for several months.

15. According to the petitioners, when questioned, Mr. Gilkes first denied knowledge, then implicated Mr. Hetrick. Months later, police allegedly spoke with Mr. Hetrick and told him that he could face the death penalty for Ms. Sipe's murder; that police had spent three years tracking Mr. Teleguz as part of Ms. Sipe's case; that he was the person they wanted; and that Mr. Hetrick needed to cooperate in the case. The petitioners contend that law enforcement officials had assumed that the alleged victim was involved in killing Ms. Sipe for so long that they ignored every piece of information that pointed to any other explanation of the crime.

16. The petitioners point out that Mr. Teleguz was not granted discovery or an evidentiary hearing, or given any means of developing his allegations. They indicate that in federal habeas proceedings the United States District Court for the Western District of Virginia denied the alleged victim's habeas petition without a hearing and without allowing Mr. Teleguz any means for discovery.

17. Therefore, according to the petitioners, there remains doubt about Mr. Teleguz's guilt. Although they allege that this doubt is substantial, their contention is that any doubt in a death penalty case renders a subsequent execution in violation of Article I of the American Declaration, and of the relevant international standards.

2. Right to consular notification

18. Mr. Teleguz was allegedly denied his right under Article 36 of the Vienna Convention on Consular Relations to be informed without delay of his right to notify the Ukrainian consular authorities of his arrest. Accordingly, although the Harrisonburg Police Department form indicated that Mr. Teleguz's citizenship and place of birth are Ukraine, state officials purportedly failed to inform him of his right to consular notification until almost a year after his arrest.

19. The petitioners contend that, despite being fully aware that Mr. Teleguz was not an American citizen, the local authorities did not explain to him what a consular official was, how the consular office could help him; and that they also failed to ask him whether he wanted Ukrainian consular officials to be notified of his arrest.

20. Had the alleged victim and the Ukrainian government been properly notified of his rights under the Vienna Convention, the Ukrainian government, according to the petitioners, would have been able to provide assistance to Mr. Teleguz's counsel in a full investigation into his case and background and to facilitate the investigation and development of mitigation evidence, locating family and friends in Ukraine and explaining the cultural and historical background of the case.

21. They conclude that, by failing to provide notification, the United States caused substantial harm to Mr. Teleguz's trial, and especially to the penalty phase. The petitioners submit that this failure has fundamentally affected the fairness of the proceedings, and that it is a breach of Mr. Teleguz's right to consular notification.

3. Right to effective counsel

22. The petitioners claim that Mr. Teleguz was denied the right to competent and effective counsel at trial. They maintain that the ineffectiveness of court-appointed counsel severely compromised the fairness of Mr. Teleguz's trial, and that it was a significant --if not the most significant-- factor leading to his being found guilty and then being sentenced to death.¹

23. Referring to an article by then U.S. Supreme Court Justice William J. Brennan, the petitioners point out that it has long been recognized that indigent defendants facing capital charges in the United States often receive inadequate legal representation². In the present case, trial counsel allegedly fell below the standard required in death penalty cases on numerous levels.

24. The petitioners refer the IACHR to the errors, omissions and negligence of counsel presented in an Amended Petition for a Writ of Habeas Corpus before the United States District Court for the Western District of Virginia on November 20, 2010. These are, *inter alia*: failure to impeach the key prosecution witnesses; failure to reasonably address evidence of future dangerousness and to challenge the prosecution's false and inflammatory allegations; failure to make use of readily available

¹ According to the available information, defense counsel at trial was state-appointed (Ivan Teleguz v Loretta K. Kelly (Amended Petition for a Writ of Habeas Corpus) Case No. 7:10-cv-00254, at 5).

² Justice William J. Brennan Jr., "Neither Victims nor Executioners", Notre Dame Journal of Law, Ethics and Public Policy 8 (1994), pp. 1-9, at 3.

evidence to disprove the prosecution's allegations on future dangerousness; and failure to adequately investigate and present readily available mitigation evidence.

25. In the Amended Petition, Mr. Teleguz's counsel alleges that, had trial counsel provided competent representation, each of the three witnesses would have been subjected to impeachment. The petition indicates that, after years of intensive criminal investigation of Mr. Safanov, a federal law enforcement source concluded that his credibility was "garbage." It is claimed that defense counsel had this assessment in their possession but they did nothing with it because they never examined that portion of their file. Additionally, according to the petition, Mr. Safanov was facing federal firearms charges and many years of federal incarceration. However, after cooperating with prosecutors in Teleguz's case, he was sentenced to a year and one day in prison. When reached years later by Teleguz's current counsel, Mr. Safanov allegedly admitted that the most important point in his testimony --his assertion that the alleged victim confessed to Safanov that he had hired the man who killed Ms. Sipe-- was a lie.

26. With regard to Mr. Hetrick, the Amended Petition indicates that he provided one of the central pillars of the prosecution's case when he testified that his participation in the murder was solicited by Mr. Teleguz at Dave Everhart's birthday party. However, Mr. Teleguz was not present at the party, a fact that readily available witnesses, such as Mr. Everhart himself, could have confirmed. Mr. Teleguz's counsel was allegedly aware of this evidence prior to trial, and that Mr. Everhart was willing to testify. In addition, the petition asserts that Mr. Gilkes later admitted that key portions of his testimony were false. He allegedly stated that "the prosecutor made [him] testify the way [he] did, and if [he] hadn't, she would have sent [him] to death row" and that at various points the prosecutor told him what she wanted him to say.

27. Further, petitioners assert that counsel's performance throughout the guilt phase of Teleguz's trial was thoroughly deficient and that the defense team was dysfunctional and plagued by interpersonal drama. Lead counsel allegedly absented himself from the Office of the Capital Defender for a period of three weeks, leaving the inexperienced mitigation investigator and fact investigator to effectively prepare Mr. Teleguz's case for trial on their own, without guidance. In addition, according to the claims presented in the Amended Petition, despite information in counsel's possession that other persons could have hired Gilkes and Hetrick, counsel allegedly did not investigate this issue.

28. In addition, Mr. Teleguz's counsel contends in the petition that the mitigation specialist was new and inexperienced, and that she had never worked on a capital case before. In addition, the lead attorney allegedly never met with her or the rest of the team and gave her no guidance about developing mitigation in Teleguz's case.

29. With regard to the alleged failure to reasonably address evidence of future dangerousness, in the Amended Petition Mr. Teleguz's counsel states that the prosecutor argued, without any supporting evidence yet without objection from the defense, that Teleguz would be a future danger because he would be able to issue orders over the prison telephone to have people murdered. As a result, at the penalty phase of Mr. Teleguz's trial, the jury found the statutory aggravating circumstance of future dangerousness. Mr. Teleguz's counsel also indicates that the Supreme Court has described the opportunity to rebut prosecutorial predictions of future dangerousness as an "elemental due process requirement" (*Skipper v. South Carolina*, 476 U.S. 1, 5 n.1 (1986)).

30. In addition, Mr. Teleguz's counsel attached to the petition an affidavit of risk assessment done by an expert and psychologist, which allegedly illustrates the evidence the defense could have presented to the jury had counsel not failed to request a risk assessment expert. They conclude that there plainly exists a reasonable probability that at least one juror would have refused to find that death was the appropriate penalty had counsel performed reasonably in confronting the prosecution's future dangerousness argument.

31. Additionally, the petitioners allege that counsel failed to investigate adequately and present evidence necessary to jurors having an accurate and complete understanding of Teleguz's history, background, and character, including the totalitarian Soviet control and pervasive persecution the Teleguz family faced in Ukraine. In the Amended Petition Mr. Teleguz's counsel states that trial counsel failed to consult with expert witnesses. Without this assistance, counsel allegedly failed to adequately investigate the circumstances of Teleguz's life by neglecting to properly interview, or even contact, significant witnesses. Furthermore, counsel purportedly failed to adequately investigate issues such as domestic violence, alcoholism, poverty, and ethnic, sociological and economic pressures.

32. Therefore, according to the petitioners, the ineffectiveness of counsel at both the guilt/innocence and the penalty phases of his trial violates Mr. Teleguz's due process rights under Articles I, XVIII and XXVI of the American Declaration.

4. Prosecutorial misconduct

33. The petitioners argue that prosecutors allowed Mr. Gilkes to present false testimony of an alleged murder committed in Pennsylvania that supposedly involved Mr. Teleguz. However, there are allegedly no records that any such murder took place. The petitioners claim that, despite this, prosecutors led the jury to believe that Mr. Teleguz participated in a murder executed for non-payment of a debt.

34. Additionally, the petitioners contend that prosecutors concealed information from federal and state law enforcement agencies that showed that Mr. Teleguz had no involvement with the Russian mafia, while at the same time they relied upon his alleged mafia connections to secure a death sentence.

35. In the Amended Petition presented before the U.S. District Court, Mr. Teleguz's counsel alleged that prosecutors did not reveal extensive evidence that was material and favorable to him regarding the testimony of Mr. Moore, who testified that he saw Mr. Teleguz leaving Ms. Sipe's apartment about a day or so before her body was discovered. In addition, they argue that prosecutors exploited the suppression of pieces of favorable evidence by presenting Mr. Moore as a disinterested, credible, and concerned neighbor. However, the jury allegedly never learned that his cooperation was obtained in exchange for immunity from prosecution for his criminal behavior. Also, jurors purportedly never learned that Mr. Ferguson, who was present with Mr. Moore on the night of the alleged identification, expressly told the investigator that it was not Mr. Teleguz he saw leaving Sipe's apartment.

36. Evidence and testimony presented at a post-trial hearing allegedly established that the evidence suppressed by the State was favorable to the accused. Therefore, Mr. Teleguz's counsel alleged that there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.

37. Mr. Teleguz's counsel also argued that the government suppressed evidence from statements made by Mr. Safanov and Mr. Gilkes. In this respect, they mention that the investigator made a tape recording of only a portion of this interview with Mr. Gilkes and that during post-conviction proceedings the latter revealed that he "talked with Det. Whitfield before the tape recording was started." He allegedly further explained that "that was how [he] knew it was Ivan that they wanted in this case."

38. Further, prosecutors also allegedly failed to reveal information, including information in possession of state and federal law enforcement agencies that assisted in the prosecution of Teleguz, that he had no known association or involvement with the Russian Mafia. According to the claims presented in the petition, despite this lack of evidence, the prosecutor repeatedly told jurors that Mr. Teleguz was connected in a very important way to the Russian Mafia, in an alleged effort to support arguments that he would commit criminal acts of violence that would constitute a continuing serious threat to society.

39. According to the petitioners, this prosecutorial misconduct has resulted in a flawed and unfair trial, and it violates Mr. Teleguz's rights under Articles I, XVIII, XXV and XXVI of the American Declaration.

5. Right to Appeal and Procedural Bars

40. In their claims, the petitioners contend that strict procedural bars on the consideration of new evidence render the appeals process hollow and make it extremely difficult to correct errors made at trial. According to the petitioners, reviews limited only to questions of law, as opposed to examination of the law and facts, may not satisfy the requirements of the guarantee of the right to appeal to a higher court.

41. Petitioners refer to a review of the death penalty as it was administered in Virginia conducted by the Joint Legislative Audit and Review Commission (JLARC) of the Virginia General Assembly in 2001³. This study found that judicial review in Virginia is characterized by narrowly defined sentence review at direct appeal and adherence to procedural restriction during the post-conviction stage. Petitioners assert that the recent judgment in *Cullen v. Pinholster* 131 S. Ct. 1388 (2011) further restricts review of claims of a petitioner who had no previous opportunity to present a claim in state court, requiring that the federal court show deference to a state court that did not see the new evidence, and to ignore that new evidence in considering the state court's decision. They contend that such a restrictive procedural stance is entirely contrary to the heightened standards of due process required in a death penalty case.

42. Further, the petitioners refer to a report of the American Civil Liberties Union (ACLU) which provides additional information about the inadequacies of the appeals process in Virginia⁴. They highlight the report's assessment on the doctrine of procedural default and the pernicious effect of the Anti-Terrorism and Effective Death Penalty Act (AEDPA).

³ Review of Virginia's System of Capital Punishment, JLARC, December 10, 2001.

⁴ Broken Justice: the Death Penalty in Virginia, ACLU, November 2003.

43. The report indicates that, in criminal trials, if a lawyer fails to object, the issue is deemed “waived,” and the lawyer cannot raise it on appeal. However, if the lawyer’s failure to object was obviously wrong and substantially affected their client’s rights, the court will usually consider the merits of a legal issue even if the objection has not been properly preserved. In Virginia, however, courts do not allegedly follow the “plain-error” doctrine.⁵

44. In addition, according to the procedural default doctrine first raised in *Slayton v. Parrigan*, 215 Va. 356, 366 (1996), a lawyer who properly objects at trial, but then fails to raise the objection on appeal, may not raise the issue in any subsequent post-conviction proceedings. The ACLU report further indicates that a Virginia Statute extends this rule even further, providing that any claim that is not raised in an initial habeas petition may not be raised in any subsequent petitions. Finally, the report mentions that the United States Supreme Court’s decision in *Coleman v. Thompson*, prevents federal courts from reviewing state court cases that have been dismissed on procedural grounds.⁶

45. Regarding AEDPA, the report establishes that this act erodes the power of writ by requiring federal courts to give extreme deference to state court rulings in death penalty cases. Accordingly, under AEDPA, federal courts no longer independently review federal constitutional questions but consider only whether the decision “was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States.” Therefore, according to the report, erroneous factual determinations can only form the basis for federal habeas relief if they are “unreasonable.”⁷

46. Another rule that, according to the report, impacts the procedural default rule is the 50-page limit on briefs to the Virginia Supreme Court. The report indicates that, while page limits are not uncommon, what is uncommon is the Court’s extreme reluctance to grant requests to extend the page limitation, a common practice in other states. Accordingly, this reluctance is particularly striking in death penalty cases, where the importance of adjudications that are free from all constitutional error is paramount.⁸

47. With regard to the present case, the petitioners assert that a great deal of substantial evidence was not even considered by the federal judge because of the procedural restrictions and excessive deference to bad state court decisions imposed by the AEDPA and by *Pinholster*. They indicate in this respect that the judge at federal habeas made it clear that the restrictions under which he could work made his review of the case “exceedingly limited.”

6. Method of execution

48. The petitioners indicate that the Code of Virginia dictates that executions shall be carried out by electrocution or by lethal injection and that it merely states, with regard to the latter, that the executions by lethal injections “shall be permitted in accordance with procedures developed by the

⁵ Broken Justice: the Death Penalty in Virginia, ACLU, November 2003, p. 21.

⁶ Broken Justice: the Death Penalty in Virginia, ACLU, November 2003, p. 21.

⁷ Broken Justice: the Death Penalty in Virginia, ACLU, November 2003, p. 27.

⁸ Broken Justice: the Death Penalty in Virginia, ACLU, November 2003, p. 24.

Department⁹.” They further state that these procedures referred to in the statute are both confidential and subject to arbitrary amendment. However, some extremely disturbing new information has allegedly come to light regarding the purported illegality, incompetence and recklessness of the administration of lethal injections in Virginia.

49. According to the petitioners, although the precise drugs and procedures used in that state are secret, there is substantial evidence that Virginia, like almost all of the states, uses the three drug protocol that was originally devised when lethal injection was introduced into the United States. They also state that the world-wide shortage of sodium thiopental caused Virginia’s executioners to replace that drug with pentobarbital, which had never before been used in Virginia.

50. The petitioners claim that pentobarbital has not been tested for use in executions, and that neither the manufacturer nor any other medical or scientific authority has evidence that it can be safely and efficaciously used to induce an anesthetic coma in human beings. When the pentobarbital fails to function as the executioner intends, the prisoner is allegedly subjected to involuntary suffocation and then an intense and excruciating burning pain in his veins whilst fully conscious but completely paralyzed.

51. In addition, the petitioners argue that researchers have discovered that in Virginia lethal injections are administered by individuals with no training in anesthesia. They allege that in preparing and conducting executions by lethal injection, the Department of Corrections in Virginia and its employees have engaged in these practices without licenses or specific authorization and in an incorrect and unsafe manner.

52. In this respect, they argue that the Director of the Department mandates a dosage of pentobarbital which is 50% lower than that used in other states’ departments of corrections and designates a waiting period after injection of only 30 seconds for the pentobarbital to take effect. According to the petitioners, this is significantly lower than that used by other states and half the length of time noted in the documents the Department of Corrections apparently used to establish its waiting period. In addition, no one in the execution team allegedly checks to make sure that the pentobarbital has taken effect and anaesthetized the prisoner. The petitioners state that the subsequent injections of pancuronium and potassium chloride would be excruciatingly painful in circumstances where the anesthetic fails to take effect.

53. Additionally, petitioners argue that pancuronium acts as a paralytic affecting all voluntary muscles but has no effect on awareness, thought or sensation. This drug allegedly creates an unacceptable risk of extreme and unnecessary suffering because it stops the prisoner from expressing or showing any pain he is consciously experiencing during the process. They indicate that the regulations of the Virginia State Veterinarian implicitly prohibit the use of pancuronium in the euthanasia of animals.

54. Therefore, petitioners contend that the United States will permit Mr. Teleguz to be put to death by means of a lethal injection with no official indication as to the drugs to be used, the procedure to be followed, the dosage to be used or the qualifications, training and respective roles of the members of the execution team. Moreover, according to the petitioners, the law allows for the

⁹ Va. Code § 53.1-234

protocol to be amended on an ad hoc case by case basis giving the alleged victim's executioners a practically unbridled discretion to do as they please.

55. The petitioners conclude that the failure to disclose the precise manner in which Mr. Teleguz is to die and the fact that he is therefore unable to examine or challenge the nature of the punishment, violates Article XXIV of the American Declaration and places him under a peculiar and terrible uncertainty. According to the petitioners, by unnecessarily and recklessly exposing Mr. Teleguz to such risks and to the terrible fear and mental torment that accompanies them, the state has violated his rights to humane treatment and freedom from torture and cruel, inhuman, infamous and degrading treatment under Articles I, XXV and XXVI of the American Declaration.

7. Unfair clemency review in Virginia

56. In their claims, the petitioners contend that clemency review in Virginia fails to live up to the minimal fairness guarantees required by Article XXVI of the American Declaration. They indicate that, through Article V, § 12 of the Virginia Constitution and § 53.1-229 of the Code of Virginia, Governors have been vested with the power to commute capital punishment sentences and to grant pardons or reprieves. Petitioners state that this power is subject to the Governor's unlimited discretion.

57. Further, petitioners contend that in 2001 even the Virginia General Assembly's own auditing commission raised serious concerns about the fairness of the clemency process, and that the process remains closed and arbitrary. In addition, they describe as shocking the fact that Governor Robert F. McDonnell, who has such absolute power over the life and death of Mr. Teleguz, is also the person who, as Attorney General, was in charge of the state's efforts to execute him. According to the petitioners, by any standard whatsoever, this constitutes an unacceptable conflict of interest and renders it impossible for Mr. Teleguz to have a minimally fair clemency process, or even one that appears anything more than an empty formality.

58. The petitioners also claim that the clemency process in Virginia offers even fewer safeguards than that in Texas, as it is almost completely unstructured. In this respect, they state that the nature of the clemency process in Virginia is secretive and in the end clemency is decided on the sole authority and discretion of the Governor. Accordingly, the governor has complete discretion in deciding whether and how to investigate and determine the issues raised in a request for clemency.

8. Death penalty in Virginia

59. The petitioners argue that Virginia's death penalty is applied arbitrarily and subject to excessive discretion on the part of prosecutors. They indicate that the abovementioned JLARC's review, found that prosecutorial discretion had resulted in virtually identical cases being treated differently with regard to the imposition of the death penalty.¹⁰

60. Furthermore, this vague discretion is allegedly also inherent in the state statutes on the death penalty in three respects. First, Virginia Code § 19.2-264.4(C) purportedly establishes a test that is

¹⁰ Review of Virginia's System of Capital Punishment, JLARC (December 10, 2001), at 46.

incomprehensible and impossible to satisfy, with the effect of giving the jury a boundless discretion to rule as they please.¹¹

61. Second, the same vagueness and muddling of terms can allegedly be found in Virginia's aggravating factor of vileness. In the Amended Petition filed before the U.S. District Court, Mr. Teleguz's counsel indicates that Virginia's death penalty statutes provide for two aggravating factors, one or both of which must be proven beyond a reasonable doubt before a convicted capital defendant may be considered even eligible for the death penalty: the "future dangerousness" and the "vileness" factor. The latter requires the Commonwealth to prove that the defendant's "conduct in committing the offense for which he stands charged was outrageously or wantonly vile, horrible, or inhuman in that it involved torture, depravity of mind or an aggravated battery to the victim". According to the claims of Mr. Teleguz's counsel, the vileness aggravating factor, including its sub-elements, does not provide objective standards or detailed guidance sufficient to avoid substantial risk of the arbitrary and capricious infliction of a death sentence.

62. Third, the petitioners contend that the Virginia Supreme Court's power to review death sentences to see if they are excessive or disproportionate is ineffective and unfair. In this regard, they contend that it ignores the circumstances of any capital cases in which death was not imposed and it bases proportionality decisions on overturned cases or cases decided on bad law. Further, it allegedly purports to compare cases based on the same aggravating factors, but the vagueness of "vileness" or "future dangerousness" makes such comparison meaningless. The petitioners point out that the court has never overturned a sentence of death on the basis of proportionality. Therefore, they conclude that the review is perfunctory, often taking no more than a paragraph and relying on a string of citations rather than any consideration of the facts of the particular case.

63. Based on the above allegations, the petitioners state that the Virginia death penalty system fails to safeguard Mr. Teleguz's most basic rights to due process and a fair, impartial, objective or consistent application of the death penalty, violating his rights under Articles I, XVIII and XXVI of the American Declaration.

B. Position of the State

64. The IACHR has not received any information or observations from the State regarding Mr. Teleguz's allegations.

IV. ESTABLISHED FACTS

A. Relevant legal framework

65. Sec. 104 of the Antiterrorism and Effective Death Penalty Act (AEDPA) establishes:¹²

¹¹ Virginia Code § 19.2-264.4(C) states that "the penalty of death shall not be imposed unless the Commonwealth shall prove beyond a reasonable doubt that there is a probability based upon evidence of the prior history of the defendant or of the circumstances surrounding the commission of the offense of which he is accused that he would commit criminal acts of violence that would constitute a continuing serious threat to society".

¹² Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214.

Section 2254 of title 28, United States Code, is amended—

[...]

(3) by inserting after subsection (c) the following new subsection:

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding;

(4) by amending subsection (e), as redesignated by paragraph (2), to read as follows:

(e)(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

(2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that—

(A) the claim relies on—

(i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and

(B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense; [...]

66. Code of Virginia § 53.1-229 (Powers vested in Governor) indicates that:

[...]

In accordance with the provisions of Article V, Section 12 of the Constitution of Virginia, the power to commute capital punishment and to grant pardons or reprieves is vested in the Governor.

67. Code of Virginia § 53.1-234 (Transfer of prisoner; how death sentence executed; who to be present) provides that:

[...]

The Director, or the assistants appointed by him, shall at the time named in the sentence, unless a suspension of execution is ordered, cause the prisoner under sentence of death to be electrocuted or injected with a lethal substance, until he is dead. The method of execution shall be chosen by the prisoner. In the event the prisoner refuses to make a choice at least fifteen days prior to the scheduled execution, the method of execution shall be by lethal injection. Execution by lethal injection shall be permitted in accordance with procedures developed by the Department. At the execution there shall be present the Director or an assistant, a physician employed by the Department or his assistant, such other employees of the Department as may be required by the Director and, in addition thereto, at least six citizens who shall not be employees of the Department. In addition, the counsel for the prisoner and a clergyman may be present.

68. Article 36 (Communication and contact with nationals of the sending State) of the Vienna Convention on Consular Relations establishes that:

1. With a view to facilitating the exercise of consular functions relating to nationals of the sending State:

(a) consular officers shall be free to communicate with nationals of the sending State and to have access to them. Nationals of the sending State shall have the same freedom with respect to communication with and access to consular officers of the sending State;

(b) if he so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner. Any communication addressed to the consular post by the person arrested, in prison, custody or detention shall be forwarded by the said authorities without delay. The said authorities shall inform the person concerned without delay of his rights under this subparagraph;

(c) consular officers shall have the right to visit a national of the sending State who is in prison, custody or detention, to converse and correspond with him and to arrange for his legal representation.

They shall also have the right to visit any national of the sending State who is in prison, custody or detention in their district in pursuance of a judgement. Nevertheless, consular officers shall refrain from taking action on behalf of a national who is in prison, custody or detention if he expressly opposes such action.

2. The rights referred to in paragraph 1 of this article shall be exercised in conformity with the laws and regulations of the receiving State, subject to the proviso, however, that the said laws and regulations must enable full effect to be given to the purposes for which the rights accorded under this article are intended.

B. Relevant domestic case law

69. In *Coleman v. Thompson*, a death penalty case, the United States Supreme Court held that Coleman's claims presented for the first time in the state habeas proceeding are not subject to review in federal habeas proceedings.¹³

(a) Because of [...] the requirement that States have the first opportunity to correct their own mistakes, federal habeas courts generally may not review a state court's denial of a state prisoner's federal constitutional claim if the state court's decision rests on a state procedural default that is independent of the federal question and adequate to support the prisoner's continued custody.

[...]

(e) In all cases in which a state prisoner has defaulted his federal claims in state court pursuant to an independent and adequate state procedural rule, federal habeas review of the claims is barred unless the prisoner can demonstrate cause for the default and actual prejudice as a result

¹³ *Coleman v. Thompson* (89-7662), 501 U.S. 722 (1991) (Syllabus).

of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice. [...]

(f) Coleman's contention that it was his attorney's error that led to the late filing of his state habeas appeal cannot demonstrate "cause" under the foregoing standard. *Carrier, supra*, at 488, establishes that attorney error can be "cause" only if it constitutes ineffective assistance of counsel violative of the Sixth Amendment. Because there is no constitutional right to an attorney in state post conviction proceedings, see, e. g., *Pennsylvania v. Finley*, 481 U.S. 551, a petitioner cannot claim constitutionally ineffective assistance of counsel in such proceedings, see, *Wainwright v. Torna*, 455 U.S. 586. [...]

70. In *Cullen v. Pinholster*, also a death penalty case, the United States Supreme Court held that review under §2254(d)(1) is limited to the record that was before the state court that adjudicated the claim on the merits¹⁴:

(a) As amended by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), §2254 sets several limits on a federal court's power to grant habeas relief to a state prisoner. As relevant here, a claim that has been "adjudicated on the merits in State court proceedings," "shall not be granted . . . unless the adjudication" "(1)resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law," or "(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." §2254(d). This "difficult to meet," *Harrington v. Richter*, 562 U. S. ___, ___, and " 'highly deferential standard' . . . demands that state court decisions be given the benefit of the doubt," *Woodford v. Visciotti*, 537 U. S. 19, 24. Section 2254(d)(1)'s backward-looking language—"resulted in" and "involved"—requires an examination of the state-court decision at the time it was made. It follows that the record under review is also limited to the record in existence at that same time—i.e., the state-court record. This understanding is compelled by "the broader context of the statute as a whole," which demonstrates Congress' intent to channel prisoners' claims first to state courts. *Robinson v. Shell Oil Co.*, 519 U. S. 337, 341. It is also consistent with this Court's precedents, which emphasize that §2254(d)(1) review focuses on what a state court knew and did. See, e.g., *Lockyer v. Andrade*, 538 U. S. 63, 71–72. Moreover, it is consistent with *Schriro v. Landrigan*, 550 U. S. 465, 474, which explained that a federal habeas court is "not required to hold an evidentiary hearing" when the state-court record "precludes habeas relief" under §2254(d)'s limitations. The Ninth Circuit wrongly interpreted *Williams v. Taylor*, 529 U. S. 420, and *Holland v. Jackson*, 542 U. S. 649, as supporting the contrary view. Pp. 8–12.

(b) This holding does not render superfluous §2254(e)(2)—which limits the federal habeas courts' discretion to take new evidence in an evidentiary hearing. At a minimum, §2254(e)(2) still restricts their discretion in claims that were not adjudicated on the merits in state court. Although state prisoners may sometimes submit new evidence in federal court, AEDPA's statutory scheme is designed to strongly discourage them from doing so. Pp. 13–14.

[...]

(b) *Strickland v. Washington*, 466 U. S. 668, provides the clearly established federal law here. To overcome the strong presumption that counsel has acted competently, *id.*, at 690, a defendant must show that counsel failed to act "reasonabl[y] considering all the circumstances," *id.*, at 688, and must prove the "reasonable probability that, but for counsel's unprofessional errors, the

¹⁴ *Cullen v. Pinholster* 131 S. Ct. 1388 (2011) (Syllabus).

result of the proceeding would have been different," *id.*, at 694. Review here is thus "doubly deferential," *Knowles v. Mirzayance*, 556 U. S. ___, ___, requiring a "highly deferential" look at counsel's performance, *Strickland, supra*, at 689, through §2254(d)'s "deferential lens," *Mirzayance, supra*, at ___, n. 2. Pp. 16–18.

C. State and federal proceedings

71. With regard to the state and federal proceeding in Mr. Teleguz's case, after a comprehensive review of the arguments and evidence presented by the parties, the Commission concludes that the following facts have been proven:¹⁵

State proceedings

- Mr. Teleguz was arrested in Pennsylvania on July 1, 2004, and subsequently extradited to Virginia. He was appointed counsel and tried by a jury in the Circuit Court of Rockingham County. The jury found Mr. Teleguz guilty of capital murder for hire on February 9, 2006. On February 14, 2006, the jury established Mr. Teleguz's punishment to be death. The trial court entered a final judgment on July 20, 2006, sentencing Mr. Teleguz to death in accordance with the jury's verdict.
- Mr. Teleguz appealed his conviction and sentence to the Supreme Court of Virginia. The court unanimously affirmed the conviction and sentence on April 20, 2007.¹⁶ On May 21, 2007, he filed a petition for rehearing, which was denied on June 22, 2007. The alleged victim sought a writ of certiorari from the United States Supreme Court, which was denied on February 19, 2008, and moved for a rehearing, which was also denied on April 14, 2008.
- Post-conviction counsel was appointed, and Mr. Teleguz filed a petition for a writ of habeas corpus with the Supreme Court of Virginia on April 20, 2008. The state habeas petition asserted twenty claims, *inter alia*, actual innocence, ineffective assistance of trial counsel, that the state withheld exculpatory evidence and failed to disclose information; and requested expert assistance, discovery, and an evidentiary hearing. On January 15, 2010, the Supreme Court of Virginia dismissed the petition on the grounds that the claims failed to satisfy the "performance" or the "prejudice" prong of the two-part test enunciated in *Strickland v. Washington*, 466 U.S. 668, 687 (1984), or because the claim is outside the scope of habeas corpus review.¹⁷
- On February 16, 2010, the alleged victim filed a petition for a rehearing, which was denied on April 22, 2010. The Rockingham County Circuit Court then scheduled Mr. Teleguz's execution for June 21, 2010.

Federal proceedings

- On June 14, 2010, Mr. Teleguz filed a motion in the United States District Court for the Western District of Virginia to stay his scheduled execution, a notice of intent to file a petition for a writ of habeas corpus and a motion seeking appointment of counsel. The U.S. District Court appointed

¹⁵ *Ivan Teleguz v Loretta Kelly* 2011 U.S. Dist. LEXIS 83884 (W.D. Va., Aug. 1, 2011) at 5-8. Annex B. Communication from the petitioners received on November 2, 2011.

¹⁶ *Ivan Teleguz v Commonwealth of Virginia*. 273 Va. 458 (April 20, 2007). Annex C. Communication from the petitioners received on November 2, 2011.

¹⁷ *Ivan Teleguz v Warden of the Sussex I State Prison*, 688 S.E.2d 865, 868 (Va. 2010). Communication from the petitioners received on November 2, 2011.

counsel and stayed the execution pending determination of Mr. Teleguz's federal habeas petition.

- In an Amended Petition for a Writ of Habeas Corpus filed December 6, 2010, Mr. Teleguz asserted twelve grounds for habeas relief with regard to ineffective assistance of counsel at the guilt and penalty phase of trial; violation of the Vienna Convention on Consular Relations; suppression by the prosecution of evidence favorable to Mr. Teleguz; use of false testimony by the state; actual innocence; improper jury instructions; failure to remove juror for cause; trial court's denial of continuance; and the unconstitutionality of Virginia's death penalty¹⁸. The U.S. District Court denied the petition. In its opinion rendered on August 1, 2011, the federal judge concluded that "[a]s Congress and the Supreme Court have made abundantly clear, [his] review of a state criminal case as a federal judge is exceedingly limited, even where, as here, the case involves our society's ultimate criminal penalty."¹⁹
- Mr. Teleguz's case is currently pending before the United States Court of Appeals for the Fourth Circuit.²⁰

72. Additionally, in an affidavit provided to the lawyer of Mr. Teleguz and presented before the IACHR, Edwin Gilkes affirms that:²¹

Most of my testimony [before the prosecution] was fabricated. Before I testified, Marsha Garst and Investigator Whitfield told me that I should say that Teleguz was responsible for Mr. Sipe's murder. They made clear that, if I did not, I would have been the one on death row today, not Teleguz. So I did what I had to do to stay alive and made up testimony against Teleguz.

[...]

I don't have any reason to lie about all of this anymore. [...] I really thought that since I made everything up, the courts would see the truth and he would get out of his death sentence.

V. LEGAL ANALYSIS

A. Preliminary matters

73. Before embarking on its analysis of the merits in the case of Ivan Teleguz, the Inter-American Commission believes it should reiterate its previous rulings regarding the heightened scrutiny to be used in cases involving the death penalty. The right to life has received broad recognition as the supreme human right and as a *sine qua non* for the enjoyment of all other rights.

¹⁸ Ivan Teleguz v Loretta K. Kelly (Amended Petition for a Writ of Habeas Corpus) Case No. 7:10-cv-00254 (W.D. Va.). Annex A. Communication from the petitioners received on November 2, 2011.

¹⁹ Ivan Teleguz v Loretta Kelly 2011 U.S. Dist. LEXIS 83884 (W.D. Va., Aug. 1, 2011) at 103. Annex B. Communication from the petitioners received on November 2, 2011.

²⁰ Affidavit of Elizabeth J. Peiffer of the 7th May 2012. Annex A. Communication from the petitioners received on November 11, 2012.

²¹ Affidavit of Edwin Gilkes of the 24th September 2010. Annex D. Communication from the petitioners received on November 11, 2012.

74. That gives rise to the particular importance of the IACHR's obligation to ensure that any denial of life that may arise from the enforcement of the death penalty strictly abides by the requirements set forth in the applicable instruments of the inter-American human rights system, including the American Declaration. That heightened scrutiny is consistent with the restrictive approach adopted by other international human rights bodies in cases involving the imposition of the death penalty,²² and it has been set out and applied by the Inter-American Commission in previous capital cases brought before it.²³

75. As the Inter-American Commission has explained, this standard of review is the necessary consequence of the specific penalty at issue and the right to a fair trial and all attendant due process guarantees²⁴:

due in part to its irrevocable and irreversible nature, the death penalty is a form of punishment that differs in substance as well as in degree in comparison with other means of punishment, and therefore warrants a particularly stringent need for reliability in determining whether a person is responsible for a crime that carries a penalty of death.²⁵

76. The IACHR has further affirmed that it has competence to apply the heightened scrutiny test and is not precluded by the "fourth instance formula" which establishes that, in principle, it will not review the judgments issued by the domestic courts acting within their competence and with due judicial guarantees. In this respect, the IACHR points out that the fourth instance formula does not preclude it from considering a case where the petitioner's allegations entail a possible violation of any of the rights set forth in the American Declaration.²⁶

77. The Inter-American Commission will therefore review the petitioners' allegations in the present case with a heightened level of scrutiny, to ensure in particular that the rights to life, due

²² 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 the Due Process of Law*, para. 136 (finding that "because 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 is not arbitrarily taken as a result"); United Nations Human Rights Committee, *Baboheram-Adhin et al. v. Suriname*, Communications Nos. 148-154/1983, adopted on April 4, 1985, para. 14.3 (observing that "the law must strictly control and limit the circumstances in which a person may be deprived of his life by the authorities of a State"); *Report of the United Nations Special Rapporteur on Extrajudicial Executions*, 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, UN Doc.E/CN.4/1995/61 (December 14, 1994) ("the Ndiaye Report"), para. 378 (emphasizing that in capital cases, it is the application of the standards of fair trial 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).

²³ IACHR, Report No. 57/96, Andrews, United States, IACHR Annual Report 1997, para. 170-171; Report No. 38/00 Baptiste, Grenada, IACHR Annual Report 1999, paras. 64-66; Report No. 41/00, McKenzie *et al.*, Jamaica, IACHR Annual Report 1999, paras. 169-171.

²⁴ IACHR, The death penalty in the Inter-American System of Human Rights: From restrictions to abolition, OEA/Ser.L/V/II.Doc. 68, December 31, 2011, para. 41.

²⁵ IACHR, Report No. 78/07, Case 12.265, Merits (Publication), Chad Roger Goodman, The Bahamas, October 15, 2007, para. 34.

²⁶ See, *mutatis mutandi*, IACHR, Report No. 57/96, Case 11.139, William Andrews, United States, December 6, 1996, para.

process, and to a fair trial as prescribed under the American Declaration have been respected by the State.

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

78. The American Declaration guarantees the right of all persons to a fair trial and to due process of law, respectively, in the following terms:

Article XVIII – Right to a fair trial

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 proved 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. Right to consular notification and assistance

79. The petitioners allege that, despite being fully aware that Mr. Teleguz was not an American citizen, state officials failed to inform him of his right to consular notification until almost a year after his arrest. They claim that the Ukrainian government would have been able to provide assistance to Mr. Teleguz's counsel and that, by failing to provide notification; the United States caused substantial prejudice to the alleged victim's right to a fair trial, and especially to the penalty phase.

80. The Commission has determined in previous cases that it may consider the extent to which a state party has given effect to the requirements of Article 36 of the Vienna Convention 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. Therefore, it is appropriate to consider compliance with Article 36 of the Vienna Convention when interpreting and applying the provisions of the American Declaration to a foreign national who has been arrested, committed to trial or to custody pending trial, or is detained in any other manner by that state.²⁷

81. In this regard, the Commission has noted 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."²⁸

²⁷ IACHR, Report No. 90/09, Case 12.644, Admissibility and Merits (Publication), Medellín, Ramírez Cardenas and Leal García, United States, August 7, 2009, paras 124-132. See also, IACHR, Report No. 91/05 (Javier Suarez Medina), United States, Annual Report of the IACHR 2005; Report No. 1/05 (Roberto Moreno Ramos), United States, Annual Report of the IACHR 2005; and Report 52/02, Case 11.753 (Ramón Martínez Villarreal), United States, Annual Report of the IACHR 2002.

²⁸ IACHR, Report No. 90/09, Case 12.644, Admissibility and Merits (Publication), Medellín, Ramírez Cardenas and Leal García, United States, August 7, 2009, para. 127.

82. In addition, the “Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas” 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 immediately. Furthermore, they shall have the right to communicate with their diplomatic and consular authorities freely and in private.²⁹

83. The significance of consular notification is also reflected in practice guidelines such as those adopted concerning the due process rights of foreign nationals in capital proceedings by the American Bar Association, a national organization for the legal profession in the United States, which has indicated in its Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases that:

[u]nless predecessor counsel has already done so, counsel representing a foreign national should: 1. immediately advise the client of his or her right to communicate with the relevant consular office; and 2. obtain the consent of the client to contact the consular office. After obtaining consent, counsel should immediately contact the client’s consular office and inform it of the client’s detention or arrest [...]³⁰

84. Based upon the foregoing, the IACHR concludes that the State’s obligation under Article 36.1 of the Vienna Convention on Consular Relations to inform Ivan Teleguz of his right to consular notification and assistance constituted a fundamental component of the due process standards to which he was entitled under the American Declaration. Therefore, the State’s failure to respect and ensure this obligation deprived the alleged victim of a criminal process that satisfied 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

85. The petitioners contend that the ineffectiveness of court-appointed counsel at both the guilt/innocence and the penalty phases of Mr. Teleguz’s trial was a significant factor leading to his being found guilty and then being sentenced to death. They argue that, had trial counsel provided competent representation, each of the key prosecution witnesses would have been subjected to impeachment and found to lack credibility.

86. Petitioners also state that had counsel performed reasonably in confronting the prosecution’s future dangerousness argument by requesting a risk assessment expert, there exists a reasonable probability that at least one juror would have refused to find that death was the appropriate

²⁹ 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 during its 131st regular period of sessions, held from March 3-14, 2008, <http://www.cidh.org/Basicos/English/Basic21.a.Principles%20and%20Best%20Practices%20PDL.htm>

³⁰ American Bar Association, *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases* (Revised Edition)(February 2003), Guideline 10.6B “Additional Obligations of Counsel Representing a Foreign National.”

penalty. Further, they contend that lead counsel absented himself from the Office of the Capital Defender for a period of three weeks, leaving the inexperience mitigation investigator and fact investigator to effectively prepare the case for trial on their own. In addition, petitioners allege that the mitigation specialist was new and inexperienced, and that she had never worked on a capital case before.

87. The Inter-American Commission has stated the following:³¹

The right to due process and to a fair trial includes the right to adequate means for the preparation of a defense, assisted by adequate legal counsel. Adequate legal representation is a fundamental component of the right to a fair trial.

[...]

The State cannot be held responsible for all deficiencies in the conduct of State-funded defense counsel. National authorities are, however, required [...] to intervene if a failure by legal aid counsel to provide effective representation is manifest or sufficiently brought to their attention. Rigorous compliance with the defendant's right to competent counsel is compelled by the possibility of the application of the death penalty.

88. The IACHR has established that "the fundamental due process requirements for capital 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."³² In this respect, it has also stated that the due process guarantees under the American Declaration:

[...] guarantee an opportunity to make submissions and present evidence as to whether a death sentence may not be a permissible or appropriate punishment in the circumstances of the defendant's case, in light of such considerations as the offender's character and record, 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 readaptation of the offender.³³

89. It may be noted that the fundamental nature of this guarantee has been reflected in practice guidelines for lawyers. The American Bar Association has prepared and adopted guidelines and related commentaries that emphasize the importance of investigating and presenting mitigating

³¹ IACHR, The death penalty in the Inter-American System of Human Rights: From restrictions to abolition, OEA/Ser.L/V/II.Doc. 68, December 31, 2011, p. 123.

³² IACHR, Report No. 90/09, Case 12.644, Admissibility and Merits (Publication), Medellín, Ramírez Cardenas and Leal García, United States, August 7, 2009, para. 134. See also IACHR, Report N° 38/00 (Baptiste), Grenada, Annual Report of the IACHR 1999, paras. 91, 92; Report N° 41/00 (McKenzie et al.) Jamaica, Annual Report of the IACHR 1999, paras. 204, 205; Case N° 12.067 (Michael Edwards *et al.*), The Bahamas, Annual Report of the IACHR 2000, paras. 151-153.

³³ IACHR, Report No. 90/09, Case 12.644, Admissibility and Merits (Publication), Medellín, Ramírez Cardenas and Leal García, United States, August 7, 2009, para. 134. See also IACHR, Report N° 38/00 (Baptiste), Grenada, Annual Report of the IACHR 1999, paras. 91, 92; Report N° 41/00 (McKenzie et al.) Jamaica, Annual Report of the IACHR 1999, paras. 204, 205; Case N° 12.067 (Michael Edwards *et al.*), The Bahamas, Annual Report of the IACHR 2000, paras. 151-153.

evidence in death penalty cases.³⁴ According to these guidelines, the duty of counsel in the United States to investigate and present mitigating evidence is now “well-established” and:

[b]ecause the sentencer in a capital case must consider in mitigation, ‘anything in the life of the defendant which might militate against the appropriateness of the death penalty for the defendant,’ “penalty phase preparation requires extensive and generally unparalleled investigation in to personal and family history.”³⁵

90. The Guidelines also emphasize that the “mitigation investigation should begin as quickly as possible, because it may affect the investigation of first phase defenses (e.g., by suggesting additional areas for questioning police officers or other witnesses), decisions about the need for expert evaluations (including competency, mental retardation, or insanity), motion practice, and plea negotiations³⁶.”

91. With regard to the laws of the United States, the Commission has recognized that they:

offer extensive due process protections to individuals who are the subject of criminal proceedings, including the right to effective legal representation supplied at public expense if an individual cannot afford an attorney. While it is fundamental for these protections to be prescribed under domestic law, it is also necessary for States to ensure that these protections are provided in practice in the circumstances of each individual defendant.³⁷

92. In the instant case, according to information presented by Mr. Teleguz’s post-conviction counsel before domestic courts, trial counsel never examined a portion of the file containing an assessment of a federal agent related to the credibility of one of the key witness. They also contended that trial counsel was aware of evidence that Mr. Teleguz was not present at Everhart’s party and that Mr. Everhart was willing to testify to that effect, but trial counsel did not present that testimony. Additionally, despite information in counsel’s possession that there were other possible persons who could have hired Gilkes and Hetrick, counsel allegedly did not investigate this issue.

93. Post-conviction counsel also contended that the mitigation specialist was new and inexperienced, and that she had never worked on a capital case before. Finally, they stated that counsel failed to adequately investigate the circumstances of the alleged victim’s life by neglecting to properly interview, or even contact, significant witnesses. The State has not contested the allegations presented by the petitioners and there is no information in the IACHR case file to contradict these claims.

³⁴ American Bar Association, *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases* (Revised editions) (February 2003) (<http://www.abanet.org/legalservices/downloads/sclaid/deathpenaltyguidelines.pdf>), Guideline 10.7 – Investigation.

³⁵ American Bar Association, *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases* (Revised editions) (February 2003) (<http://www.abanet.org/legalservices/downloads/sclaid/deathpenaltyguidelines.pdf>), Guideline 10.7 – Investigation, at 82.

³⁶ American Bar Association, *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases* (Revised editions) (February 2003) (<http://www.abanet.org/legalservices/downloads/sclaid/deathpenaltyguidelines.pdf>), Guideline 10.7 – Investigation, at 83.

³⁷ IACHR, Report No. 90/09, Case 12.644, Admissibility and Merits (Publication), Medellín, Ramírez Cardenas and Leal García, United States, August 7, 2009, para. 137.

94. Considering that the fundamental due process and fair trial requirements for capital trials include the obligation to afford adequate legal representation, and that the failure to develop and present potentially exculpatory evidence in a capital case would constitute inadequate representation, the Inter-American Commission concludes that the United States violated Mr. Teleguz's right to due process and to a fair trial under Articles XVIII and XXVI of the American Declaration.

3. Prosecutorial misconduct

95. The petitioners argue that prosecutors led jurors to believe that Mr. Teleguz participated in a murder in Pennsylvania that never took place. They also state that prosecutors failed to reveal extensive evidence that was material and favorable to the alleged victim. In this regard, they point out that, despite the existence of information in possession of the prosecution indicating that Mr. Teleguz had no known involvement with the Russian Mafia, the prosecutor repeatedly told jurors that he was connected in a very important way to that criminal organization.

96. The petitioners contended before the Inter-American Commission and before federal courts that prosecutors allowed Mr. Gilkes to present false testimony regarding the alleged participation of Mr. Teleguz in a murder in Pennsylvania, despite the fact that there were no records of any such murder taking place. The State has not challenged this allegation, and there is no information before the Commission that contradicts this statement.

97. The IACHR notes that, during the criminal proceedings against him, Mr. Teleguz was not convicted for the murder that, according to the testimony of Mr. Gilkes, took place in Pennsylvania. However, the Inter-American Commission must emphasize that a significant distinction exists between the introduction of evidence of mitigating and aggravating factors concerning the circumstances of an offender or his or her offense, and an effort to attribute to an offender violations of additional serious offenses that have not been charged.³⁸

98. In addition, the IACHR underscores that the State has the duty to disclose all exculpatory evidence in its possession as well as information favorable to the accused. In particular, in cases involving the death penalty, the State has an enhanced obligation to guarantee that no evidence favorable to the accused is withheld, as this could change the outcome of the trial and give rise to an arbitrary deprivation of life.

99. Based upon the foregoing, the Inter-American Commission concludes that the State's conduct contributed to the imposition of the death penalty upon Mr. Teleguz in a manner that violated his right to a fair trial under Article XVIII of the American Declaration, as well as his right to due process of law under Article XXVI of the Declaration.

4. Right to appeal and procedural bars

100. The petitioners allege that strict procedural bars on the consideration of new evidence render the appeals process hollow and make it extremely difficult to correct errors made at trial. They assert that a great deal of substantial evidence was not even considered by the federal judge because of

³⁸ See, *mutatis mutandi*, IACHR, Report No. 90/09, Case 12.644, Admissibility and Merits (Publication), Medellín, Ramírez Cardenas and Leal García, United States, August 7, 2009, para. 147.

the procedural restrictions and excessive deference to bad state court decisions imposed by AEDPA. According to the petitioners, reviews limited only to questions of law, as opposed to examination of the law and facts, may not satisfy the requirements of the guarantee of the right to appeal to a higher court.

101. The right to appeal a judgment is a basic guarantee of due process to prevent consolidation of a situation of injustice. In this respect, the IACHR has stated that “[t]he due process guarantees should also be interpreted to include a right of effective review or appeal from a determination that the death penalty is an appropriate sentence in a given case³⁹.” The aim of the right to appeal is to protect the right of defense by creating a remedy to prevent a flawed ruling, containing errors prejudicial to a person’s interests, from becoming final. Due process of law would lack efficacy without the right of defense at trial and the opportunity to defend oneself against a sentence by means of a proper review⁴⁰.

102. According to the standards developed by the inter-American human rights system, a remedy must be effective, i.e., it must provide results or responses to the end that they were intended to serve, which is to prevent consolidation of an unjust situation. It must also be accessible, without requiring the kind of complex formalities that would render this right illusory⁴¹.

103. The efficacy of a remedy is closely linked to the scope of the review. Judicial error is not confined to the application of the law, but may happen in other aspects of the process such as the determination of the facts or the weighing of evidence. Hence, the remedy of appeal will be effective in accomplishing the purpose for which it was conceived if it makes possible a review of such issues without *a priori* limiting that review to certain aspects of the court proceedings.⁴²

104. In this respect, the IACHR has considered that:

to guarantee the full right of defense, this remedy should include a material review of the interpretation of procedural rules that may have influenced the decision in the case when there has been an incurable nullity or where the right to defense was rendered ineffective, and also with respect to the interpretation of the rules on the weighing of evidence, whenever they have led to an erroneous application or non-application of those rules.⁴³

105. With respect to the accessibility of the remedy, the Commission has considered that, in principle, the regulation of some minimum requirements for the presentation of the appeal is not incompatible with the right to appeal. Some of these requirements are, for example, the presentation of the appeal itself or the regulation of a reasonable period within which it must be filed. However, in some circumstances, rejection of appeals based on failure to comply with formal requirements

³⁹ IACHR, Report No. 48/01, Case No. 12.067 and others, Michael Edwards *et al.*, The Bahamas, April 4, 2001, para. 149.

⁴⁰ See, *mutatis mutandi*, IACHR, Report No. 55/97, Case 11.137, Merits, Juan Carlos Abella (Argentina), November 18, 1997, para. 252; and I/A Court H. R., *Case of Herrera Ulloa v. Costa Rica*. Judgment of July 2, 2004. Series C No. 107, para. 158.

⁴¹ I/A Court H. R., *Case of Herrera Ulloa v. Costa Rica*. Judgment of July 2, 2004. Series C No. 107, paras. 161 and 164.

⁴² IACHR, Letter of submission to the Court and Merits Report, Case 11.618, Oscar Alberto Mohammed, April 13, 2011, paras. 75 and 76.

⁴³ IACHR, Report No. 55/97, Case 11.137, Merits, Juan Carlos Abella, Argentina, November 18, 1997, para. 261.

established by statute or defined in the judicial practice may be a violation of the right to appeal a judgment.⁴⁴

106. Finally, the Commission must underscore that it has an enhanced obligation to ensure that any deprivation of life which may occur through the application of the death penalty is in strict compliance with the right to a timely, effective and accessible appeal.

107. In the instant case, Mr. Teleguz appealed his conviction and sentence to the Supreme Court of Virginia and subsequently sought a writ of certiorari from the United States Supreme Court. He then filed a state and federal habeas petition, both of which were denied. The petitioners point out that the U.S. District Court for the Western District of Virginia denied the alleged victim's federal habeas petition without a hearing and without allowing Mr. Teleguz any means for discovery.

108. According to the established facts, the federal judge, in his opinion rendered on August 1, 2011, concluded that "[a]s Congress and the Supreme Court have made abundantly clear, [his] review of a state criminal case as a federal judge is exceedingly limited, even where, as here, the case involves our society's ultimate criminal penalty." In this respect, the petitioners allege that, due to the procedural restrictions and excessive deference to bad state court decisions imposed by AEDPA, a great deal of substantial evidence was not even considered by the federal judge.

109. Before 1996, state court interpretations or applications of federal law were not binding in subsequent federal habeas proceeding. With the passage of AEDPA the exhaustion doctrine was modified to permit federal courts to dismiss groundless petitions notwithstanding the fact that state courts have not been afforded the opportunity to find them without merit.⁴⁵ Therefore, the Act "limits the introduction of evidence not previously presented to the state courts to cases where either the evidence supports a newly recognized, retroactively applicable constitutional claim or was not reasonably discoverable earlier, however only if the petitioner clearly and convincingly shows that but for the constitutional error established by the newly presented evidence no reasonable jury would have found the petitioner guilty."⁴⁶

110. Further, in *Cullen v. Pinholster*, the United States Supreme Court held that review under AEDPA sets several limits on a federal court's power to grant habeas relief to a state prisoner and that this review is limited to the record that was before the state court that adjudicated the claim on the merits. The ruling also establishes that "[a]lthough state prisoners may sometimes submit new evidence in federal court; AEDPA's statutory scheme is designed to strongly discourage them from doing so". In addition, the Supreme Court, referring to *Strickland v. Washington*, states that "[t]o overcome the strong presumption that counsel has acted competently, *id.*, at 690, a defendant must show that counsel failed to act "reasonabl[y] considering all the circumstances," *id.*, at 688, and must prove the "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different," *id.*, at 694."

⁴⁴ IACHR, Letter of submission to the Court and Merits Report, Case 11.618, Oscar Alberto Mohammed, April 13, 2011, para. 83.

⁴⁵ Antiterrorism and Effective Death Penalty Act of 1996: A Summary, Charles Doyle, Senior Specialist, American Law Division. June 3, 1996. Available at: <http://www.fas.org/irp/crs/96-499.htm>.

⁴⁶ Antiterrorism and Effective Death Penalty Act of 1996: A Summary, Charles Doyle, Senior Specialist, American Law Division. June 3, 1996. Available at: <http://www.fas.org/irp/crs/96-499.htm>.

111. In the Inter-American Commission's view, the review procedures applied in Mr. Teleguz's case failed to meet the strict standard of due process applicable in capital cases, as they permitted certain evidence to be rejected without an evidentiary hearing or without any substantive consideration such as the alleged suppression by the prosecution of evidence favorable to Mr. Teleguz and the fact that key portions of two of the prosecution witnesses' testimony were allegedly fabricated.

112. In light of the standards described above, it is incompatible with the rights to a fair trial and to due process of law set forth in the American Declaration for the review by a federal court to be "exceedingly limited", as stated by the federal judge in the instant case. Every convicted person has the right to request a review of various questions and to have them effectively analyzed by the higher court in order to correct possible errors of interpretation, weighing of evidence or analysis.

113. Considering the irreversible nature of the death penalty, a federal post-conviction review limited by state court interpretations and by the state factual determination (i.e. "a determination of a factual issue made by a State court shall be presumed to be correct")⁴⁷ does not comply with the inter-American standards, according to which the right to appeal is part of the body of procedural guarantees that ensures the due process of law.

114. The Inter-American Commission concludes that, given the limitations imposed by federal law and by the interpretation of U.S. courts, Mr. Teleguz did not get a thorough review of his conviction in order to correct possible errors, and the State therefore violated to his detriment the right established in Articles XVIII and XXVI of the American Declaration.

5. Clemency process in Virginia

115. The petitioners state that Governors in the state of Virginia have unlimited discretion to commute capital punishment sentences and to grant pardons or reprieves. They further contend that, in the instant case, the current Governor was the person who, as Attorney General, was in charge of the state's efforts to execute Mr. Teleguz. This, according to the petitioners, constitutes an unacceptable conflict of interest and renders it absolutely impossible for the alleged victim to have a clemency process that appears anything more than an empty formality. In addition, they indicate that the clemency process in Virginia is secretive, almost completely unstructured, and decided on the sole authority and discretion of the Governor.

116. According to the inter-American human rights standards, the right to apply for pardon or commutation of sentence is subject to certain minimal fairness guarantees in order for the right to be effectively respected and enjoyed.⁴⁸ These procedural protections have been held to include "the right on the part of condemned prisoners to submit a request for amnesty, pardon or commutation of sentence, to be informed of when the competent authority will consider the offender's case, to make representations, in person or by counsel to the competent authority, and to receive a decision from that

⁴⁷ Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214, Sec. 104 (e) (1).

⁴⁸ See, IACHR, Report No. 90/09, Case 12.644, Admissibility and Merits (Publication), Medellín, Ramírez Cardenas and Leal García, United States, August 7, 2009, para. 150; Case N° 12.023 (Desmond McKenzie *et al.*), Jamaica, Annual Report of the IACHR 1999, para. 228; Case N° 12.067 (Michael Edwards *et al.*), The Bahamas, Annual Report of the IACHR 2000, para. 170.

authority within a reasonable period of time prior to his or her execution⁴⁹.” In particular, the IACHR has previously held that “[i]n the case of Clemency proceedings pending the execution of a death sentence, the minimal fairness guarantees afforded to the applicant should include the opportunity to receive an impartial hearing.⁵⁰”

117. As noted in the established facts, Code of Virginia § 53.1-229 provides that “the power to commute capital punishment and to grant pardons or reprieves is vested in the Governor.” From the available information, the clemency process in Virginia does not appear to guarantee the minimal abovementioned procedural protections. In particular, the fact that the person vested with the power to commute Mr. Teleguz’s capital punishment sentence is the same person who was in charge of his prosecution, does not satisfy the minimal fairness guarantees such as the right to be heard by an impartial authority. Based upon the foregoing, the Inter-American Commission concludes that the clemency procedures in Virginia fail to guarantee the right to minimal fairness guarantees pursuant to Article XXVI of the American Declaration.

118. Finally, the petitioners contend that the death penalty is applied arbitrarily in Virginia and that prosecutorial discretion had resulted in virtual identical cases being treated differently with regard to the imposition of the death penalty. Given that this general allegation does not refer to the facts of the instant case, the IACHR lacks sufficient information to be able to analyze this claim.

C. Right to humane treatment during custody and not to receive cruel, infamous or unusual punishment (Articles XXV and XXVI of the American Declaration)

119. The third paragraph of Article XXV and second paragraph of Article XXVI of the American Declaration provide that:

Article XXV – Right of protection from arbitrary arrest

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

Article XXVI – Right to due process of law

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

120. According to the petitioners, the procedures to carry out executions by lethal injection in Virginia are both confidential and subject to arbitrary amendment. However, they indicate that there is substantial evidence that Virginia, like almost all of the states, uses the three drug protocol. In this regard, they maintain that pentobarbital, the first substance, has not been tested for use in executions and that there is no evidence that it can be safely and efficaciously used to induce an anesthetic coma in human beings. Further, petitioners contend that lethal injections are administered by individuals with

⁴⁹ See, IACHR, Report No. 90/09, Case 12.644, Admissibility and Merits (Publication), Medellín, Ramírez Cardenas and Leal García, United States, August 7, 2009, para. 150; Case N° 12.023 (Desmond McKenzie *et al.*), Jamaica, Annual Report of the IACHR 1999, para. 228; Case N° 12.067 (Michael Edwards *et al.*), The Bahamas, Annual Report of the IACHR 2000, para. 170.

⁵⁰ IACHR, Report No. 90/09, Case 12.644, Admissibility and Merits (Publication), Medellín, Ramírez Cardenas and Leal García, United States, August 7, 2009, para. 151.

no training in anesthesia and that the subsequent injections of pancuronium and potassium chloride would be excruciatingly painful in circumstances where the anesthetic fails to take effect.

121. The petitioners also argue that pancuronium creates an unacceptable risk of extreme and unnecessary suffering because it stops the prisoner from expressing or showing any pain he is consciously experiencing during the process. They indicate in this respect that the Virginia State Veterinarian does not authorize the use of pancuronium in the euthanasia of animals. Petitioners conclude that the failure to disclose the precise manner in which Mr. Teleguz is to die and the fact that he is unable to examine or challenge the nature of the punishment places him under a peculiar and terrible uncertainty.

122. The IACHR notes that the Code of Virginia § 53.1-234 establishes that “[e]xecution by lethal injection shall be permitted in accordance with procedures developed by the Department”. According to the petitioners, these procedures are confidential and can be amended on an ad hoc case by case basis. No information in the file before the Inter-American Commission contradicts this allegation.

123. The IACHR notes that the due process requirement is not limited to the conviction and post-conviction proceedings. The accused or convicted person has the right to challenge every aspect of the procedure that affects a right guaranteed by the American Declaration, including the manner in which the penalty is going to be applied. In relation to this right to challenge the procedure, in capital cases the State has an enhanced obligation to ensure that the person sentenced to death has access to all the relevant information regarding the manner in which he or she is going to die. In particular, the convicted person must have access to information related to the precise procedures to be followed, the drugs and doses to be used in case of executions by lethal injection, and the composition of the execution team as well as the training of its members. In addition, every person subjected to the death penalty must have the opportunity to challenge every aspect of the execution procedure.

124. Given that the protocol to be applied in Mr. Teleguz’s execution is confidential, the alleged victim was deprived of his right to challenge the manner in which he is planned to be executed, in violation of his rights to petition authorities and to due process under Articles XXIV and XXVI of the American Declaration. In addition, by refusing to reveal the execution protocol, the State is exposing Mr. Teleguz to terrible anguish and fear that amount to a violation of his right to humane treatment and not to receive cruel, infamous or unusual punishment set forth in Articles XXV and XXVI of the Declaration.

D. Right to life (Article I of the American Declaration)

125. Article I of the American Declaration provides that:

Article I - Right to life, liberty and personal security

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

126. Petitioners allege that there remains serious doubt about Mr. Teleguz’s guilt. According to the record before the IACHR, there is no evidence physically linking the alleged victim to the murder of Ms. Sipe. The main evidence upon which Mr. Teleguz’s conviction was based was the

testimony of three witnesses, two of them accomplices to the murder, who agreed to testify in exchange for substantial reductions in their sentences related to this or other offenses.

127. Further, investigation conducted post-conviction revealed that two of the prosecution witnesses later admitted that key portions of their testimony implicating Mr. Teleguz were false. In this regard, petitioners submit an affidavit of Mr. Gilkes in which he admits that most of his testimony was fabricated for fear of being sentenced to the death penalty ("I did what I did to stay alive and made up testimony against Teleguz)."⁵¹ In addition, as stated above, the alleged victim was denied a hearing and any means for discovery in federal habeas proceedings.

128. According to the "fourth instance formula", in principle, the Inter-American Commission will not review the judgments issued by the domestic courts acting within their competence and with due judicial guarantees. This is because in principle, the IACHR does not have the authority to superimpose its own interpretations on evaluations of facts by domestic organs. However, the fourth instance formula does not preclude the Inter-American Commission from considering a case where the petitioner's allegations entail a possible violation of any of the rights set forth in the American Declaration.⁵² This exception is enhanced in cases involving the imposition of the death penalty given its irreversible nature.

129. The Inter-American Commission notes that it is the competence of domestic courts, and not of the Commission, to interpret and apply domestic law, and, in the instant case, to determine whether the alleged victim is innocent or guilty. However, as noted above, the IACHR must ensure that any denial of life that may arise from the enforcement of the death penalty strictly abides by the requirements set forth in the American Declaration.

130. In evaluating the information on the record, the Inter-American Commission concludes that the manner in which certain evidence directly pertinent to the basis for Mr. Teleguz's capital conviction was treated in the course of his criminal proceedings failed to meet the rigorous standard of due process applicable in capital cases and amounted to a denial of justice contrary to the fair trial and due process standards. This includes in particular the revelations during post-conviction proceedings regarding the testimony of the prosecution witnesses, information that could very well raise a reasonable doubt as to Mr. Teleguz's guilt.⁵³

131. When a convicted prisoner's right to a fair trial has been violated in proceedings through which the death penalty was imposed, the IACHR has maintained that executing the person under such a sentence would be an extremely grave and deliberate violation of the right to life set forth in Article I of the American Declaration.⁵⁴ Therefore, the IACHR concludes that the imposition of the death penalty in such circumstances would constitute a grave violation of Mr. Teleguz's right to life recognized under Article I of the American Declaration.

⁵¹ Affidavit of Edwin Gilkes of the 24th September 2010. Annex D. Communication from the petitioners received on November 11, 2012.

⁵² See, *mutatis mutandi*, IACHR, Report No. 57/96, Case 11.139, William Andrews, United States, December 6, 1996, para.

⁵³ See, in this respect, IACHR, Report No. 97/03, Case 11.193, Gary Graham/Shaka Sankofa, United States, December 29, 2003, paras. 44 and 45.

⁵⁴ IACHR, Report No. 81/11, Case 12.776, Merits, Jeffrey Timothy Landrigan, United States, July 21, 2011, para. 55.

VI. ACTIONS SUBSEQUENT TO REPORT N° 74/12

132. On July 20, 2012, the Inter-American Commission approved Report No. 74/12 on the merits of this matter, which comprises paragraphs 1 to 131 *supra*, with the following recommendations to the State:

1. Grant Ivan Teleguz effective relief, including the review of his trial in accordance with the guarantees of due process and a fair trial enshrined in Articles I, XVIII, XXIV and XXVI of the American Declaration;
2. Review its laws, procedures, and practices to ensure that people accused of capital crimes are tried and, if convicted, sentenced in accordance with the rights established in the American Declaration, including Articles I, XVIII, XXIV, XXV and XXVI thereof;
3. 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; and
4. 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.

133. 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."⁵⁵

134. On July 24, 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.

135. On July 27, 2012, the petitioners acknowledged receipt of the Inter-American Commission's communication. No response was received from the State on the measures taken to comply with the recommendations set forth in Report No. 74/12.

136. 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 23, 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. No response was received within the stipulated period.

⁵⁵ 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.

VII. FINAL CONCLUSIONS AND RECOMMENDATIONS

137. 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 right to life, liberty and personal security (Article I), right to a fair trial (Article XVIII), right of petition (Article XXIV), right of protection from arbitrary arrest (Article XXV) and right to due process of law (Article XXVI) guaranteed in the American Declaration, with respect to Ivan Teleguz. Consequently, should the State carry out the execution of Mr. Teleguz, it would be committing a serious and irreparable violation of the basic right to life enshrined in Article I of the American Declaration.

138. Ivan Teleguz is the beneficiary of precautionary measures adopted by the Inter-American Commission under Article 25 of its Rules of Procedure. The Inter-American Commission must remind the State that carrying out a death sentence in such circumstances would not only cause irreparable harm to the person but would also deny his right to petition the inter-American human rights system, and that such a measure is contrary to the fundamental human rights obligations of an OAS member state pursuant to the Charter of the Organization and the instruments deriving from it.⁵⁶

139. On the basis of the facts and information provided, 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. Grant Ivan Teleguz effective relief, including the review of his trial in accordance with the guarantees of due process and a fair trial enshrined in Articles I, XVIII, XXIV and XXVI of the American Declaration;
2. Review its laws, procedures, and practices to ensure that people accused of capital crimes are tried and, if convicted, sentenced in accordance with the rights established in the American Declaration, including Articles I, XVIII, XXIV, XXV and XXVI thereof;
3. 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; and
4. 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.

⁵⁶ See: IACHR, Report No. 81/11, Case 12.776, Merits, Jeffrey Timothy Landrigan, United States, July 21, 2011, para. 66; Report No. 52/01, Case No. 12.243, Juan Raúl Garza, United States, Annual Report of the IACHR 2000, para. 117; IACHR, *Fifth Report on the Situation of Human Rights in Guatemala*, Doc.OEA/Ser.L/V/II.11doc.21rev. (April 6, 2001) paras. 71 and 72. See also: International Court of Justice, *Case re. the Vienna Convention on Consular Relations (Germany v. United States of America)*, Request for the Indication of Provisional Measures, Order of March 3, 1999, General List, No. 104, paras. 22-28; United Nations Human Rights Committee, *Dante Piandiong et al. v. Philippines*, Communication No. 869/1999, UN Doc. CCPR/C/70/D/869.

140. 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 is recommending to the United States that it adopt a moratorium on executions of persons sentenced to death.⁵⁷

VIII. PUBLICATION

141. 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): José de Jesús Orozco Henríquez, President; Tracy Robinson, First Vice-President; Rosa Maria Ortiz, Second Vice-President; Felipe González, Rodrigo Escobar Gil, and Rose-Marie Antoine, Commissioners.

⁵⁷ 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.