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**REPORT No. 200/20**

**CASE 13.356**

REPORT ON ADMISSIBILITY AND MERITS (PUBLICATION)

NELSON IVAN SERRANO SAENZ  
UNITED STATES OF AMERICA

Approved electronically by the Commission on August 3, 2020

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## I. SUMMARY

1. On November 20, 2011, the Inter-American Commission on Human Rights (the “Inter-American Commission” or “IACHR”) received a petition and request for precautionary measures<sup>1</sup> presented by Francisco Serrano (the “petitioner”)<sup>2</sup> alleging the international responsibility of the United States of America (the “State” or “the United States”) for violations of the human rights of Nelson Ivan Serrano Saenz (“Mr. Serrano”), a dual citizen of Ecuador and the United States who is on death row in Florida.

2. On August 10, 2017, the Commission notified the parties of the application of Article 36(3) of its Rules of Procedure, since the petition falls within the criteria established in its Resolution 1/16, and placed itself at the disposition of the parties to reach a friendly settlement. The parties enjoyed the time periods provided for in the IACHR’s Rules to present additional observations on the merits. All the information received by the Commission was duly transmitted to the parties.

## II. POSITIONS OF THE PARTIES

### A. Petitioner

3. The petitioner alleges that in August, 2002, Mr. Serrano, a dual citizen of Ecuador and the United States, was abducted and illegally extradited from Ecuador to the United States to stand trial for four murders committed in Florida in 1997. He alleges that, despite strong exculpatory evidence, including an alibi corroborated by video evidence, inconsistent witness testimony, and the absence of any legitimate forensic evidence against him; Mr. Serrano was convicted and sentenced to death in 2007.

4. According to the petitioner, one week prior to Mr. Serrano’s illegal rendition, the U.S. sent a formal diplomatic request for his extradition under its bilateral treaty with Ecuador. In its extradition request letter to Ecuador, the U.S. stated that in exchange for Ecuador’s cooperation in Mr. Serrano’s extradition, “the death penalty will not be sought or imposed” in his case. The petitioner states that on August 31, 2002, in complete disregard of the official State Department request, Florida authorities resorted to illegal rendition. Once Mr. Serrano was abducted and illegally extradited by the United States, the prosecution sought the death penalty in defiance of the U.S.’s diplomatic assurance to Ecuador.

5. The petitioner indicates that Ecuador has taken responsibility for its role in violating Mr. Serrano’s rights and sent a note of protest to the U.S. demanding his return to Ecuador. The Florida Supreme Court instead relied on U.S. Supreme Court jurisprudence to declare that Mr. Serrano has no basis to challenge the manner in which he was brought into the country to face suit for a crime. According to the petitioner, the practice of irregular rendition is allowed in routine criminal matters under domestic law.

6. Further, the petitioner alleges that, during Mr. Serrano’s trial, the prosecution concealed exculpatory evidence, including DNA evidence and crucial knowledge regarding Mr. Serrano’s alibi that would have demonstrated his innocence. He further affirms that Mr. Serrano’s state-appointed trial attorneys negligently failed to call attention to inaccuracies in the state’s theory. According to the petitioner, this mishandling of the case is the result of collusion among an entire law enforcement division in Polk County, Florida (including the Office of the Prosecutor and the Court) allegedly committed to illegally rendering and convicting Mr. Serrano for four murders despite the complete lack of evidence against him. The petitioner alleges that the prosecutors ignored substantial exculpatory evidence, as did Mr. Serrano’s state-appointed defense attorneys.

7. With regard to the requirement of exhaustion of domestic remedies, the petitioner indicates that Mr. Serrano’s conviction and sentence were affirmed on direct appeal. In his last communication the petitioner

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<sup>1</sup> On December 15, 2011, the IACHR granted precautionary measures on behalf of Mr. Serrano pursuant to Article 25(1) of its Rules of Procedure and requested the United States to take the measures necessary to preserve his life and physical integrity so as not to hinder the processing of his case before the inter-American system. These measures are still in force.

<sup>2</sup> On March 7, 2013, the American University International Human Rights Clinic (IHRC) joined as co-petitioner. On May 16, 2013, the IHRC filed an amended petition.

stated that the U.S. Supreme Court denied Mr. Serrano’s petition for writ of certiorari on February 20, 2018, and that there are no additional remedies that are adequate and effective. With regard to the Hurst decision issued by the U.S. Supreme Court, declaring Florida’s capital sentencing scheme unconstitutional, the petitioner alleges that it does not present new domestic remedies for a determination of admissibility, because there is still the possibility that the State will execute Mr. Serrano. The petitioner concludes that the United States has violated the rights to life, to residence and movement, to a fair trial, to nationality, to protection from arbitrary arrest and to due process of law established in Articles I, VIII, XVIII, XIX, XXV and XXVI of the American Declaration.

## B. State

8. The State did not present additional observations at the merits stage. During the admissibility stage, the United States alleged that the petitioner had not exhausted domestic remedies and that he “has made no representation that these proceedings have suffered from an undue delay or any other defect that obviates the exhaustion requirement.” Specifically, the State alleged that the appeal to the post-conviction judgment of the Circuit Court of Polk County of December 29, 2014, that was pending at the time, could result in Mr. Serrano’s sentence being vacated. The State concludes that the petition is therefore inadmissible and should be dismissed. The United States has not presented any arguments related to the merits.

## III. ADMISSIBILITY

### A. Competence, duplication of procedures and international *res judicata*

<b>Competence <i>Ratione personae</i>:</b>	Yes
<b>Competence <i>Ratione loci</i>:</b>	Yes
<b>Competence <i>Ratione temporis</i>:</b>	Yes
<b>Competence <i>Ratione materiae</i>:</b>	Yes, American Declaration of the Rights and Duties of Man (deposited instrument of ratification of the OAS Charter on June 19, 1951)
<b>Duplication of procedures and international <i>res judicata</i>:</b>	No

9. According to international law and to the IACHR’s jurisprudence, although jurisdiction usually refers to authority over persons who are within the territory of a State, human rights are inherent to all human beings and are not based on their citizenship or location. The Commission has established in this regard that:

Given that individual rights inhere simply by virtue of a person’s humanity, each American State is obliged to uphold the rights of any person subject to its jurisdiction. While this most commonly refers to persons within a state’s territory, it may, under given circumstances, refer to situations where the person concerned is present in the territory of one state, but subject to the control or authority of another state, usually through the acts of the latter’s agents abroad.<sup>3</sup>

10. In light of these considerations, as U.S. authorities, in their official capacity, allegedly resorted to illegal rendition in Ecuadorian territory, the IACHR is competent *ratione loci* to analyze the alleged violations of Mr. Serrano’s rights purportedly committed by U.S. authorities in Ecuador. The IACHR notes that the other alleged violations related to the criminal proceedings and the application of the death penalty took place in U.S. territory.

### B. Exhaustion of domestic remedies and timeliness of the petition

11. According to the information available, and as established in the facts described below, Mr. Serrano was sentenced to death by the 10<sup>th</sup> Circuit Court in Polk County, Florida, on June 26, 2007. On March 17, 2011, the

<sup>3</sup> IACHR, Report No. 121/18, Case No. 10.573. Merits (Publication). Jose Isabel Salas Galindo and others. United States. October 5, 2018, para. 308.

Supreme Court of Florida affirmed the conviction and sentence. A motion for rehearing was denied on June 13, 2011, and on December 5, 2011, the United States Supreme Court denied certiorari. Mr. Serrano filed a motion for post-conviction relief on November 21, 2012, which was denied on December 29, 2014. Mr. Serrano filed an appeal before the Florida Supreme Court raising the same grounds alleged in the post-conviction motion. After the U.S. Supreme Court's decision in *Hurst v. Florida* issued on January 12, 2016,<sup>4</sup> Mr. Serrano amended the appeal of his death sentence. On May 11, 2017, the Florida Supreme Court denied the appeal on the grounds originally raised but, based on *Hurst v. Florida*, the court vacated Mr. Serrano's death sentence and ordered a new penalty trial to be conducted. The U.S. Supreme Court denied Mr. Serrano's petition for writ of certiorari against the appeal denied by the Florida Supreme Court on February, 2018. As of April 10, 2018, Mr. Serrano had not yet been scheduled for a new sentencing hearing.

12. In his last communication before the IACHR, the petitioner alleges that, given the denial by the U.S. Supreme Court of Mr. Serrano's petition for writ of certiorari on February 20, 2018, there are no additional remedies that are adequate and effective. The petitioner alleges that the May, 2017, order of the Supreme Court of Florida vacating Mr. Serrano death sentence does not present new domestic remedies for a determination of admissibility, because there is still the possibility that he will be executed. The United States, in its last communication received on July 17, 2015, while the petition was at the admissibility stage, alleged that the petition was inadmissible for lack of exhaustion of domestic remedies given that the appeal filed against the denial of the motion was pending. The State also contended that an exception to the rule did not apply.

13. The IACHR notes that the rule requiring exhaustion of domestic remedies does not mean that alleged victims have to exhaust every remedy available. In this regard, the Commission has repeatedly held that "the rule which requires the prior exhaustion of domestic remedies is designed for the benefit of the State, for that rule seeks to excuse the State from having to respond to charges before an international body for acts imputed to it before it has had the opportunity to remedy them by internal means."<sup>5</sup> Therefore, if the alleged victim raised the issue by any lawful and appropriate alternative under the domestic juridical system and the State had the opportunity to remedy the matter within its jurisdiction, the purpose of the international rule has thus been served.<sup>6</sup>

14. The IACHR notes that the allegations brought before the inter-American system were raised before domestic courts. The Commission further notes that the alleged victim has not only exhausted all direct review proceedings, but also state and federal post-conviction proceedings. The IACHR also notes that the United States has not raised any argument of non-exhaustion of domestic remedies related to the decision vacating Mr. Serrano's death sentence after the *Hurst v. Florida*'s decision. Based on the above factors, the Inter-American Commission concludes that the petitioner properly exhausted domestic remedies available within the domestic legal system and, therefore, that the alleged victims' claims before the Commission are not barred from consideration by the requirement of exhaustion of domestic remedies under Article 31(1) of its Rules of Procedure. The Commission also concludes that the requirement specified in Article 32(1) of its Rules of Procedure has been met.

### **C. Colorable claim**

15. The Commission considers that, if proven, the facts alleged by the petitioner would tend to establish violations of the rights set forth in Articles I, XVIII, XXV and XXVI of the American Declaration, to the detriment of Mr. Serrano.

<sup>4</sup> In *Hurst v. Florida*, 577 U.S. \_ (2016), the U.S. Supreme Court declared that the Florida's capital sentencing scheme violated the Sixth Amendment given that it did not require a unanimous jury to sentence a defendant to death.

<sup>5</sup> IACHR, Report No. 54/14, Petition 684-14. Admissibility. Russel Bucklew and Charles Warner. United States. July 21, 2014, para. 28.

<sup>6</sup> IACHR, Report No. 54/14, Petition 684-14. Admissibility. Russel Bucklew and Charles Warner. United States. July 21, 2014, para. 28.

## IV. FINDINGS OF FACT

### A. Background

16. On March 10, 2003, the Inter-American Commission received a petition alleging the responsibility of the State of Ecuador for the illegal detention of Mr. Serrano and his immediate deportation to the United States. On July 17, 2008, the IACHR adopted Merits Report No. 29/08 concluding that:

Nelson Iván Serrano Sáenz was illegally detained by the State of Ecuador on August 31, 2002 in Quito; that the State maintained him incommunicado and in inhumane conditions; and that it deported him later in an equally illegal and expedite manner to the United States where the victim has been convicted for the murder of four people, where he pleaded not guilty, and sentenced to death.<sup>7</sup>

17. The Commission recommended the Ecuadorian State to:

1. Immediately recognize the human rights violations committed by its authorities to the detriment of Nelson Iván Serrano Sáenz, and take the necessary and timely measures, legal and diplomatic, with a view to the return of said person to his country of birth, from where he was arbitrarily deported.
2. To provide Nelson Ivan Serrano Saenz with legal assistance in accordance with international law.
3. Bring its domestic legal system into line with Article 25 of the American Convention in order to grant a simple and effective recourse in the judicial sphere to persons subjected to deportation processes.
4. Make adequate reparations to Nelson Iván Serrano Sáenz for the violation of his human rights as established in th[e] report.

18. After the notification of the report, the State engaged in discussions towards establishing mechanisms for compliance with the recommendations, in particular the hiring of specialized legal representation for the defense of Mr. Serrano in the United States. On October 8, 2008, the State adopted a decree creating a special commission for the investigation of Mr. Serrano's deportation which in its final report, dated December 8, 2008, acknowledged that the State had violated Mr. Serrano's rights. On March 6, 2009 the Ecuadorian State sent a note of protest to the Government of the United States enclosing the "Report of the Commission for the Investigation of the Deportation Process of Nelson Iván Serrano Sáenz" indicating *inter alia* that:

The Ecuadorean Government, by Resolution of the Ministry of Government, requires and demands the immediate devolution of Ecuadorean citizen Nelson Serrano to his country of origin, Ecuador, where he would be prosecuted as it should have [happened if] the legislation, the Ecuadorian Constitution and the extradition treaty signed between the United States and Ecuador, [had] been respected.<sup>8</sup>

19. In view of the measures adopted by Ecuador to comply with its recommendations, on March 6, 2009, the IACHR decided not to refer the case to the jurisdiction of the Inter-American Court of Human Rights. On August 6, 2009, the IACHR published Merits Report No. 84/09 reiterating its conclusions as well as the following recommendations to the State:

1. Continue granting legal assistance to Nelson Iván Serrano Sáenz according to international law.
2. Modify domestic legislation to ensure simple and effective recourse to courts pursuant to Article 25 of the American Convention for anyone subject to deportation proceedings.
3. Provide adequate reparations for the violations of Nelson Iván Serrano Sáenz's rights established in th[e] report.

<sup>7</sup> Merits Report No. 29/08 and its conclusions are referenced in IACHR, Report No. 84/09, Case 12.525. Merits (Publication). Nelson Ivan Serrano Saenz. United States of America. August 6, 2009, paras. 82 and 102.

<sup>8</sup> IACHR, Report No. 84/09, Case 12.525. Merits (Publication). Nelson Ivan Serrano Saenz. United States of America. August 6, 2009, para. 95.

## B. Relevant legal framework

20. The Extradition Treaty between the United States and Ecuador, which entered into force in 1873, and was later amended in 1939, contains the following procedures in Article 5 of the treaty, in order to carry out an extradition:

Requisitions for the extradition of fugitives from justice shall be made by the respective diplomatic agents of the contracting parties, or, in case of the absence of these from the country or its capital, they may be made by superior consular officers. [W]hen the fugitive is merely charged with crime, a duly authenticated copy of the warrant for his arrest in the country where the crime has been committed, and of any evidence in writing upon which such warrant may have been issued, must accompany the aforesaid requisition. The President of the United States, or the proper executive authority of Ecuador, may then order the arrest of the fugitive, in order that he may be brought before the judicial authority which is competent to examine the question of extradition. If, then, according to the evidence and the law, it be decided that the extradition is due in conformity with this treaty, the fugitive shall be delivered up, according to the forms prescribed in such cases.

21. At the time of Mr. Serrano's detention in Ecuador, Chapter V ("Rules for the deportation of foreign nationals") of the 1971 Immigration Law in force in Ecuador established that:

Article 19. The Minister of Government, through the Migration Service of the National Civil Police, shall deport any alien subject to the territorial jurisdiction remaining in the country covered in the following cases: [...] IV. Common criminals who could not be tried in Ecuador for lack of territorial jurisdiction.

Article 20. Police officers of the Immigration Service who have knowledge of any of the facts constituting the grounds for deportation, may make the provisional arrest of the foreigner accused so that the Intendent General of Police of the province in which the arrest was made, initiates the respective action, which will not be admitted bail prison.<sup>9</sup>

## C. Facts of the case

22. The facts described below were established by domestic courts and have not been disputed by the petitioners.

23. On December 3, 1997, George Gonsalves, Frank Dosso, Diane Patisso, and George Patisso were murdered at Erie Manufacturing and Garment Conveyor Systems in Bartow, Florida. George Gonsalves and Felice Dosso, father and father-in-law of Frank Dosso, Diane Patisso, and George Patisso, respectively, were Nelson Serrano's business partners from the mid-1980s until the summer of 1997. Numerous Erie employees testified to the strained relations between Serrano and the other two partners.

24. On the evening of the murders, most Erie employees left work at 5 p.m. or shortly thereafter. When family members began calling and could not get an answer, Felice Dosso and his wife drove to Erie and found the deceased bodies of their daughter, son, son-in-law and of George Gonsalves. The victims were shot execution-style with two firearms (.22 and .32 caliber). The investigation immediately focused on Mr. Serrano. As soon as he returned to his home from a business trip to Atlanta on December 4, 1997, detectives requested that he come to the police station for an interview. Serrano detailed his business trip itinerary, which included leaving early on the morning on December 2, flying from Orlando to Washington DC, and from Washington DC to Atlanta the evening of December 2. Mr. Serrano indicated that he remained in Atlanta until December 4, 1997.

25. Mr. Serrano's alibi in Atlanta testified that he met with him in Atlanta on December 3 at about 9:45 a.m., and that the meeting lasted approximately one hour. Investigators obtained the airport hotel's surveillance videotapes that showed Mr. Serrano in the hotel lobby at 12:19 p.m. on December 3. At 10:17 p.m., Mr. Serrano was again seen on the video, entering the hotel lobby from the outside, wearing the same sweater

<sup>9</sup> Immigration Law. Supreme Decree No. 1899 of December 30, 1971.

and jacket as earlier in the afternoon. The State theorized that on the day of the murders Mr. Serrano flew from Atlanta to Orlando under an alias and that immediately after the murders he departed on a flight back to Atlanta using another alias. Mr. Serrano's fingerprint was located on a parking garage ticket at Orlando airport, indicating, according to the State, that he departed from the Orlando airport at 3:49 p.m.

#### **D. Mr. Serrano's detention, trial and death sentence**

26. According to the proven facts established by the IACHR in its above-mentioned Report No. 84/09 with respect to the State of Ecuador, Mr. Serrano was born in Quito, Ecuador, on September 15, 1938. On December 3, 1971, he became a naturalized U.S. citizen and renounced his Ecuadorian nationality, in accordance with the Constitution then in force. After the entry into force of a new Constitution that allowed dual nationality, Mr. Serrano obtained his Ecuadorian passport at the Consulate of Ecuador in Miami and on August 21, 2000, entered Ecuador with his Ecuadorian passport. Since that date, he established residence in Ecuador as a national of that country, and exercised legal acts as an Ecuadorian.<sup>10</sup>

27. On May 17, 2001, Mr. Serrano was charged by indictment with four counts of first degree murder in Polk County, Florida.<sup>11</sup> According to information provided by the petitioner and not challenged by the State, the special agent in charge of the investigation was reassigned to a different case given the belief that Mr. Serrano was out of jurisdictional reach of the United States. After acquiring a list of contacts in Ecuador, the special agent urged his supervisors to continue with the investigation and, after being reinstated to the case, he traveled to Quito, Ecuador.<sup>12</sup> According to a U.S. Department of Justice letter dated August 23, 2002, the United States requested the extradition of Mr. Serrano in the following terms:

Nelson Ivan Serrano has been charged with four counts of First Degree Murder. Under Florida law, the sentence provided for First Degree Murder is death or life imprisonment. After due consideration, and pursuant to applicable principles of international law, the Government of the United States assures the Government of Ecuador that if Nelson Ivan Serrano is extradited by Ecuador the death penalty will not be sought or imposed in this case.<sup>13</sup>

28. The special agent spent several days visiting officials at various Ecuadorian Ministries and was told that Mr. Serrano would never be handed over. He was also told by a U.S. Drug Enforcement Agent who was present in Quito that he should return to the United States because his efforts were futile. However, the special agent stayed in Ecuador and found the legal loophole he was looking for: to show that Mr. Serrano was in fact not an Ecuadorian citizen so he could be deported instead of extradited.<sup>14</sup> The special agent later testified under oath in the 10<sup>th</sup> Circuit Court in Polk County that he paid an Ecuadorian mayor 300 dollars so he could pay off-duty Ecuadorian police officers to conduct the abduction of Mr. Serrano.<sup>15</sup>

29. On August 30, 2002, Pichincha's Intendent General of Police ordered Mr. Serrano's detention based on the Code of Criminal Procedure and the Immigration Law.<sup>16</sup> On August 31 Mr. Serrano was arrested in Quito, Ecuador. An order of deportation was issued the same day, and he was deported to the United States on September 1, 2002.<sup>17</sup>

<sup>10</sup> IACHR, Report No. 84/89, Case 12.525. Merits (Publication). Nelson Ivan Serrano Saenz. United States of America. August 6, 2009, paras. 27-29.

<sup>11</sup> State v. Serrano, Case No. CF01-003262-XX (Fla. 10th Cir. Ct. 2014), p. 2. Exhibit A submitted with petitioner's additional information on February 11, 2015.

<sup>12</sup> Amended petition submitted by the American University International Human Rights Law Clinic on May 16, 2013, pages 5-7; CBS News Transcripts, 48 Hours Mystery: to Catch a Killer. Exhibit B submitted with petitioner's amended petition on May 16, 2013.

<sup>13</sup> Letter addressed to Linda Jacobson, Assistant Legal Adviser, Law Enforcement and Intelligence, U.S. Department of State, dated August 23, 2002. Exhibit submitted with petitioner's additional information on January 20, 2014.

<sup>14</sup> Amended petition submitted by the American University International Human Rights Law Clinic on May 16, 2013, pages 5-7; CBS News Transcripts, 48 Hours Mystery: to Catch a Killer. Exhibit B submitted with petitioner's amended petition on May 16, 2013.

<sup>15</sup> Partial Transcript of Testimony of Special Agent Tommy Ray, State v. Serrano, CF01-03262A-XX (Mar. 15, 2007), pages 10-12. Exhibit C submitted with petitioner's amended petition on May 16, 2013.

<sup>16</sup> IACHR, Report No. 84/89, Case 12.525. Merits (Publication). Nelson Ivan Serrano Saenz. United States of America. August 6, 2009, para. 30.

<sup>17</sup> IACHR, Report No. 84/89, Case 12.525. Merits (Publication). Nelson Ivan Serrano Saenz. United States of America. August 6, 2009, paras. 30-36.



30. On October 11, 2006, the jury returned a verdict of guilty of first degree murder on all four counts and on October 24, 2006, the jury recommended by a vote of nine to three that Mr. Serrano be sentenced to death for each of the four murders. The Court followed the jury's recommendations and sentenced him to death for each of the four murders on June 26, 2007.<sup>18</sup>

31. On July 2, 2008, Mr. Serrano appealed his conviction and sentence on direct appeal.<sup>19</sup> The defense alleged that the prosecution's case was circumstantial and that circumstantial evidence is insufficient for conviction. The defense also alleged that Florida law enforcement officials kidnapped Mr. Serrano in Ecuador and forcibly brought him to the United States, violating the United States - Ecuador Extradition Treaty in violation of Mr. Serrano's right to due process.

32. On March 17, 2011, the Supreme Court of Florida affirmed the convictions and sentences. The court held that:

First, the State introduced circumstantial evidence of an elaborate plan to establish an alibi, a plan Serrano developed and began to implement ahead of time.

[...]

Second, the State introduced circumstantial evidence to place Serrano at Erie at the time of the murders. Specifically, the State presented evidence of a dislodged ceiling tile in Serrano's former office, testimony that Serrano would hide items in the ceiling tile in Serrano's former office, testimony that Serrano would hide items in the ceiling by dislodging a ceiling tile in his office, and testimony that a shoe impression on a chair below the dislodged ceiling tile was consistent with a shoe that Serrano owned. The State also introduced a composite sketch of a male seen outside the crime scene near the time of the murders. The jury was able to view the composite sketch and compare it to Serrano's appearance on the day of the murders as depicted in the Atlanta hotel's surveillance video.

[...]

Given this competent substantial evidence supporting an inference of guilt to the exclusion of all other inferences, we conclude that the evidence is sufficient to support Serrano's convictions. The trial court properly denied Serrano's motion for judgment of acquittal.<sup>20</sup>

33. With regard to the allegation of lack of jurisdiction, the court affirmed the trial court's denial of Mr. Serrano's motion to divest jurisdiction and dismiss the indictment. The court held that:

In *United States v. Alvarez-Machain*, 504 U.S. 655, 657 (1992), the United States Supreme Court held that a criminal defendant, abducted to the United States from a nation with which it has an extradition treaty, [does not] thereby acquire[...] a defense to the jurisdiction of this country's courts."<sup>21</sup>

34. The court also cited the decision in *Frisbie v. Collins*, in which the U.S. Supreme Court stated the following: "[t]here is nothing in the Constitution that requires a court to permit a guilty person rightfully convicted to escape justice because he was brought to trial against his will."<sup>22</sup>

35. Mr. Serrano filed a motion for rehearing which was denied on June 13, 2011. On December 5, 2011, the United States Supreme Court denied certiorari.<sup>23</sup>

<sup>18</sup>State v. Serrano, Case No. CF01-003262-XX (Fla. 10th Cir. Ct. 2014), p. 2. Exhibit A submitted with petitioner's additional information on February 11, 2015.

<sup>19</sup>Serrano v. State of Florida, 2008 WL 2805854 (Fla.)(Appellate Brief). Exhibit submitted with the original petition on November 20, 2011.

<sup>20</sup>Serrano v. State of Florida, 64 So. 3d 93 (2011). Exhibit submitted with the original petition on November 20, 2011.

<sup>21</sup>Serrano v. State of Florida, 64 So. 3d 93 (2011). Exhibit submitted with the original petition on November 20, 2011.

<sup>22</sup>*Frisbie v. Collins*, 342 U.S. 519 (1952) at 523.

<sup>23</sup>State v. Serrano, Case No. CF01-003262-XX (Fla. 10th Cir. Ct. 2014), p. 4. Exhibit A submitted with petitioner's additional information on February 11, 2015.

## E. Post-conviction proceedings

36. Mr. Serrano filed an “Initial Motion For Post-Conviction Relief And Incorporated Memorandum Of Law” on November 21, 2012, and five amended motions between July 3, 2013, and April 11, 2014. Mr. Serrano set forth eleven grounds for relief with numerous subclaims. The motion was denied on December 29, 2014.<sup>24</sup>

37. In his motion Mr. Serrano alleged, among others, ineffective assistance of counsel for failing to object to the admission of a prosecution witness’ testimony and to the Prosecutor’s improper comments during closing arguments; for failing to file a pre-trial motion requesting DNA testing of a plastic glove presumably left by the perpetrator of the crime; and for failing to present available testimony that the flight from Tampa to Atlanta on which the State contended that Mr. Serrano was a passenger arrived at 9:55 p.m. The court did not find that counsels’ performance fell below an objective standard of reasonableness and denied all subclaims. With regard to the DNA testing, the court concluded that trial counsel knew that there were no DNA findings that linked Mr. Serrano to the murders and tactically did not want further testing to be done on the glove for fear that further testing could have implicated him.

38. Mr. Serrano’s defense also alleged that the prosecution withheld exculpatory evidence such as the assurance by the U.S. Government that the death penalty would not be sought if Mr. Serrano was extradited. The court denied this motion based on the fact that the information would be inadmissible pursuant to Florida Statutes as a mitigating circumstance. The court also held that the evidence presented indicated that Mr. Serrano was deported from Ecuador, not extradited, and that he did not show that he was improperly removed from Ecuador.

39. The defense also alleged that jurisdiction over Mr. Serrano was barred because U.S. officials forcibly removed him from Ecuador in violation of an extradition treaty, which is the sole lawful means by which the United States would have been able to remove him from Ecuador, and that the treaty prohibits extradition in death penalty cases. Mr. Serrano also argued that a 2009 official protest letter received from the Ecuadorian government and the 2008 IACHR’s merits report were newly discovered evidence to be considered. The court concluded that “the alleged additional information [did] not change the Court’s earlier findings and th[e] Court once again conclude[d] that it had and has jurisdiction over the Defendant.”<sup>25</sup> The court also indicated in this regard that:<sup>26</sup>

While extradition proceedings had been initiated and were ongoing, it became clear that the country of Ecuador would not extradite Mr. Serrano back to the United States.

Instead, an effort was made to demonstrate that Mr. Serrano held himself out as a United States Citizen, was traveling on a United States passport, had renounced his Ecuadorian citizenship and had not regained Ecuadorian citizenship until March 27, 2003, some seven months after he was deported.

[...] the Court’s conclusion from the evidence presented is that the Defendant was not extradited but was deported from Ecuador.

40. Mr. Serrano filed an appeal against the denial of the motion for post-conviction relief before the Florida Supreme Court, which was denied on May 11, 2017. On February 20, 2018, the U.S. Supreme Court denied a petition for writ of certiorari.<sup>27</sup>

<sup>24</sup>State v. Serrano, Case No. CF01-003262-XX (Fla. 10th Cir. Ct. 2014). Exhibit A submitted with petitioner’s additional information on February 11, 2015.

<sup>25</sup>State v. Serrano, Case No. CF01-003262-XX (Fla. 10th Cir. Ct. 2014), p. 54. Exhibit A submitted with petitioner’s additional information on February 11, 2015.

<sup>26</sup>State v. Serrano, Case No. CF01-003262-XX (Fla. 10th Cir. Ct. 2014), pages 55-56. Exhibit A submitted with petitioner’s additional information on February 11, 2015.

<sup>27</sup>Serrano v. State, Docket No. 17-6928

## F. Hurst v. Florida

41. A decision by the U.S. Supreme Court in *Hurst v. Florida* issued on January 12, 2016, addressed whether the Florida death sentencing scheme, which did not require a unanimous jury to sentence a defendant to death, violated the Sixth Amendment of the Constitution of the United States. The Supreme Court described the Florida's capital sentencing scheme as follows:<sup>28</sup>

Under Florida law, the maximum sentence a capital felon may receive on the basis of a conviction alone is life imprisonment. He may be sentenced to death, but only if an additional sentencing proceeding results in findings by the court that such person shall be punished by death." [...] In that proceeding, the sentencing judge first conducts an evidentiary hearing before a jury. Next, the jury, by majority vote, renders an "advisory sentence." [...] Notwithstanding that recommendation, the court must independently find and weigh the aggravating and mitigating circumstances before entering a sentence of life or death.

42. The Supreme Court held that the Florida's capital sentencing scheme, where the jury made recommendations and the judge must still independently find and weigh aggravating and mitigating circumstances before entering a sentence of life or death, was unconstitutional.

43. Because Mr. Serrano was sentenced to death by a jury vote of 9-3 in 2007, he amended the appeal of his death sentence following the *Hurst* decision. In May 2017, the Supreme Court of Florida vacated Mr. Serrano's death sentences and ordered a new penalty trial to be conducted. At the time of the filing of his last communication before the IACHR on April 10, 2018, the petitioner indicated that Mr. Serrano had not yet been scheduled for a new sentencing hearing.

## V. ANALYSIS OF LAW

### A. Preliminary considerations

44. Before embarking on its analysis of the merits in the case of Nelson Ivan Serrano Saenz, 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.

45. 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,<sup>29</sup> and it has been set out and applied by the Inter-American Commission in previous capital cases brought before it.<sup>30</sup> 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 guarantees, among others.<sup>31</sup> In the words of the Commission:

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

<sup>28</sup> *Hurst v. Florida*, 577 U.S. \_ (2016), p. 1.

<sup>29</sup> 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; United Nations Human Rights Committee, *Baboheram-Adhin et al. v. Suriname*, Communications Nos. 148-154/1983, adopted on April 4, 1985, para. 14.3; *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), para. 378.

<sup>30</sup> 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.

<sup>31</sup> 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.

particularly stringent need for reliability in determining whether a person is responsible for a crime that carries a penalty of death.<sup>32</sup>

46. The Inter-American Commission will therefore review the petitioner's allegations in the present case with a heightened level of scrutiny, to ensure in particular that the rights to life, due process, and to a fair trial as prescribed under the American Declaration have been respected by the State. With regard to the legal status of the American Declaration, the IACHR reiterates that:<sup>33</sup>

[t]he American Declaration is, for the Member States not parties to the American Convention, the source of international obligations related to the OAS Charter. The Charter of the Organization gave the IACHR the principal function of promoting the observance and protection of human rights in the Member States. Article 106 of the OAS Charter does not, however, list or define those rights. The General Assembly of the OAS at its Ninth Regular Period of Sessions, held in La Paz, Bolivia, in October 1979, agreed that those rights are those enunciated and defined in the American Declaration. Therefore, the American Declaration crystallizes the fundamental principles recognized by the American States. The OAS General Assembly has also repeatedly recognized that the American Declaration is a source of international obligations for the member states of the OAS.

47. Finally, the Commission recalls that its review does not consist of determining that the death penalty in and of itself violates the American Declaration. What this section addresses is the standard of review of the alleged human rights violations in the context of a trial culminating in the death penalty.

## **B. Extra-territorial international responsibility**

48. As indicated in Section III of this report, jurisdiction is not exclusively territorial. States have the duty to respect the rights of all persons within its territory and of those present in the territory of another State but subject to the control of its agents. The IACHR has stressed that, when analyzing the scope of jurisdiction of the American Declaration, it is necessary to determine whether there is a causal nexus between the extraterritorial conduct of a State through the acts or omissions of its agents and/or of persons who have acted under its command or acquiescence, and the alleged violation of the rights and freedoms of a person.<sup>34</sup>

49. Other international bodies, when analyzing the scope of application of international human rights instruments, have also considered their possible extraterritorial application.<sup>35</sup> The European Court of Human Rights has determined that the term "jurisdiction" is not limited to the national territory of a State party, as responsibility may arise for acts of its authorities which produce effects outside its territory.<sup>36</sup> The exercise of jurisdiction is a necessary condition for holding a State responsible for acts or omissions attributable to it that result in an infringement of protected rights and freedoms.<sup>37</sup> Similarly, in its decision in *Bankovic et al. v. Belgium*, the European Court held that the meaning of the term "jurisdiction" derives from international law and is primarily, but not exclusively territorial.<sup>38</sup> Subsequently, in the case of *Issa and others v. Turkey*, the European Court reiterated that a State may be held accountable for the violation of rights and freedoms of persons who are in the territory of another State, but who were under the control and authority of agents of the former State who operated, lawfully or unlawfully, in the territory of the latter.<sup>39</sup>

<sup>32</sup> IACHR, Report No. 78/07, Case 12.265, Merits (Publication), Chad Roger Goodman, The Bahamas, October 15, 2007, para. 34.

<sup>33</sup> IACHR, Report No. 44/14, Case 12,873, Report on Merits (Publication), Edgar Tamayo Arias, United States, July 17, 2014, para. 214.

<sup>34</sup> IACHR, Report No. 112/10, Inter-state petition PI-02. Admissibility. Case Franklin Guillermo Aisalla Molina, Ecuador v. Colombia. October 21, 2010, para. 99.

<sup>35</sup> IACHR, Report No. 121/18, Case No. 10.573. Merits (Publication). Jose Isabel Salas Galindo and others. United States. October 5, 2018, para. 309.

<sup>36</sup> ECHR. *Drozd and Janousek v. France and Spain*, Judgment of June 26, 1992, para. 91. See also the decisions of the European Commission of Human Rights on the Admissibility of Petition 1611/62, *X v. the Federal Republic of Germany*, September 25, 1965; Petition No. 6231/73, *Hess v. United Kingdom*, May 28, 1975; petitions 6780/74 and 6950/75, *Cyprus v. Turkey*, May 26, 1975; petitions 7289/75 and 7349/76, *X and Y v. Switzerland*, July 14, 1977; Petition 9348/81, *W. v. United Kingdom*, February 28, 1983.

<sup>37</sup> ECHR. *Ilascu and others v. Moldova and Russia*, [GC] Application No. 48787/99. Judgment of July 8, 2004, para. 311.

<sup>38</sup> ECHR. *Bankovic and others v. Belgium and others*. Judgment of December 12, 2001, paras. 59-61.

<sup>39</sup> ECHR. *Issa and others v. Turkey*. Judgment of November 16, 2004, para. 71.

50. According to the International Court of Justice, while the jurisdiction of States is primarily territorial, it may sometimes be exercised outside the national territory and, in those cases, State parties to the International Covenant on Civil and Political Rights should be bound to comply with its provisions.<sup>40</sup> The Human Rights Committee has also deemed the Covenant's extraterritorial application admissible on the basis of the requirement of authority or control.<sup>41</sup>

### C. Right of protection from arbitrary arrest<sup>42</sup> of the American Declaration

#### 1. General considerations regarding the protection from illegal and arbitrary arrest

51. Article XXV of the American Declaration provides for guarantees aimed at protecting persons from unlawful or arbitrary interference with their liberty by the State. The IACHR has established in this regard that, "[a]mong the protections guaranteed are the requirements that any deprivation of liberty be carried out in accordance with pre-established law, that a detainee be informed of the reasons for the detention and promptly notified of any charges against them, that any person deprived of liberty is entitled to juridical recourse, to obtain, without delay, a determination of the legality of the detention, and that the person be tried within a reasonable time or released pending the continuation of proceedings."<sup>43</sup>

52. According to inter-American human rights standards, no one shall be subjected to arrest or imprisonment for reasons or by methods that – although classified as legal – may be incompatible with the fundamental rights of the individual because they are, *inter alia*, unreasonable, unpredictable or disproportionate.<sup>44</sup> Further, according to the United Nations Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment "any form of detention or imprisonment and all measures affecting the human rights of a person under any form of detention or imprisonment shall be ordered by, or be subject to the effective control of, a judicial or other authority."<sup>45</sup>

53. According to the IACHR, the analysis of the compatibility of the deprivation of liberty with the prohibition of illegal and arbitrary detention should be done in three phases. The first consists of determining the legality of the detention from a material and formal standpoint. To do so, it must be determined whether the action is compatible with the domestic legislation of the State in question. The second step involves the analysis of these domestic provisions within the context of the guarantees established by inter-American human rights instruments, in order to determine whether they are arbitrary. Finally, even if the detention meets the requirements of a domestic legal provision that is compatible with said instruments, it should be determined whether the application of the law in the specific case was arbitrary.<sup>46</sup>

#### 2. Analysis of the case

54. The Commission will now examine if Mr. Serrano's arrest was compatible with the prohibition of illegal and arbitrary detention and the extent to which there was participation of U.S. agents in their official capacity.

<sup>40</sup> ICJ, Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, July 9, 2004, para. 109.

<sup>41</sup> CCPR, López Burgos v. Uruguay, Doc. UN CCPR/C/13/D/52/1979, July 29, 1981; Celiberti v. Uruguay, Doc. UN CCPR/C/13/D/56/1979, 29 July 1981; Final observations on Cyprus, Doc. UN CCPR/C/79/Add.39, September 21, 1994, para. 3; Final observations on Israel, Doc. UN CCPR/C/79/Add.93, August 18, 1998, para. 10; Final observations on Israel, Doc. UN CCPR/CO/78/ISR, August 21, 2003, para.11; Final observations on Belgium, Doc. UN CCPR/C/79/Add.99, November 19, 1998, para. 14; Final observations on the Netherlands, Doc. UN CCPR/CO/72/NET, August 27, 2001, para. 8; and Final observations on Belgium, Doc. UN CCPR/CO/81/BEL, August 12, 2004, para. 6.

<sup>42</sup> Article XXV of the American Declaration establishes: No person may be deprived of his liberty except in the cases and according to the procedures established by pre-existing law. [...]

<sup>43</sup> IACHR, Report on Terrorism and Human Rights, OEA/Ser.L/V/II.116.Doc.5 rev.1, October 22, 2002, para. 120.

<sup>44</sup> IACHR, Application to the Inter-American Court of Human Rights in the case of Juan Carlos Chaparro and Freddy Hernan Lapo. Case 12.091. Ecuador. June 23, 2006, para 59.

<sup>45</sup> United Nations, Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, adopted by the General Assembly in Resolution 43/173 of 9 December 1988, Principle 4.

<sup>46</sup> IACHR, Application to the Inter-American Court of Human Rights in the case of Juan Carlos Chaparro and Freddy Hernan Lapo. Case 12.091. Ecuador. June 23, 2006, para. 72.

55. According to the proven facts described above, in 1971 Mr. Serrano became a naturalized U.S. citizen and renounced his Ecuadorian nationality. After the entry into force of a new Constitution that allowed dual nationality, he obtained his Ecuadorian passport and on August 21, 2000, entered Ecuador with his Ecuadorian passport. Since that date, he established residence in Ecuador as a national of that country, and exercised legal acts as an Ecuadorian.

56. After Mr. Serrano was charged with four counts of first degree murder in Polk County, Florida, in 2001, the United States requested his extradition and assured the Government of Ecuador that “the death penalty [would] not be sought or imposed.” The special agent in charge of the investigation traveled to Quito, Ecuador, and spent several days visiting officials at various Ecuadorian Ministries and was told that Mr. Serrano would never be handed over.

57. The special agent, however, stayed in Ecuador looking for a legal loophole to arrest Mr. Serrano. Knowing that Mr. Serrano would never be extradited by his country of origin, he sought a way to demonstrate that Mr. Serrano was a U.S. citizen and because he had renounced his Ecuadorian citizenship, he therefore should not be extradited but rather deported. Paying off-duty police officers, he managed to detain Mr. Serrano on August 31, 2002, and obtain his deportation within 24 hours. The United States has not controverted that the special agent was in Ecuador acting in his official capacity.

58. According to Article XXV of the American Declaration and the above-mentioned inter-American standards, the right to personal freedom can only be affected in accordance with pre-existing law. Therefore, any requirement established by domestic law that is not complied with when depriving a person of his or her liberty, will result in such deprivation being illegal and therefore contrary to the American Declaration.

59. With regard to the legality of Mr. Serrano’s detention, the IACHR notes that at the time of his arrest Ecuadorian law established that deportations applied to “any alien subject to the territorial jurisdiction” of the State. At the time of his arrest, however, Mr. Serrano was an Ecuadorian citizen. As a result, his detention was not compatible with the domestic legislation and was therefore illegal. The Commission notes that the arrest of a national for the purpose of deportation from his own country in the face of obstacles to the use of the regular channel, namely extradition, is clearly unpredictable and abusive, and therefore arbitrary.

60. Although Mr. Serrano’s detention was carried out by Ecuadorian authorities, according to the findings of facts established above, the U.S. investigator in charge of Mr. Serrano’s case played an active and determining role in his arrest. He not only traveled to Ecuador, but also found a way to circumvent the obstacles faced by U.S. authorities to bring Mr. Serrano to justice.

61. Therefore, considering the international standards set out in the section on extraterritorial responsibility of the State, and the fact that the special agent was acting in his official capacity, the Commission concludes that there is a causal nexus between the extraterritorial conduct of the United States through the acts of its agent in Ecuador and the violation of Mr. Serrano’s right of protection from illegal and arbitrary arrest set forth in Article XXV of the American Declaration.

**D. Rights to a fair trial<sup>47</sup> and to due process of law,<sup>48</sup> in relation to the right to life, liberty and personal security,<sup>49</sup> and the right of protection from arbitrary arrest of the American Declaration**

62. Once the extraterritorial responsibility of the United States in the illegal and arbitrary detention of Mr. Serrano has been established, it is necessary to analyze how this act was assessed by U.S. courts in the

<sup>47</sup> Article XVIII of the American Declaration establishes: 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.

<sup>48</sup> Article XXVI of the American Declaration establishes: Every accused person is presumed to be innocent until proved guilty. Every person accused of an offense has the rights 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.

<sup>49</sup> Article I of the American Declaration establishes: Every human being has the right to life, liberty and the security of his person.

framework of the criminal trial that ended in Mr. Serrano's sentence to the death penalty. The Commission is not competent to review judgments handed down by domestic courts acting within their spheres of competence and with due judicial guarantees. In principle that is because the IACHR does not have the authority to superimpose its own interpretations on the assessment of facts made by national courts. The fourth instance formula, however, does not preclude the Commission from considering a case in which the petitioner's allegations entail a possible violation of any of the rights set forth in the Declaration. This authority is heightened in cases involving imposition of the death penalty, given its irreversibility.

63. As previously mentioned, after Mr. Serrano's indictment the United States requested his extradition and assured the Government of Ecuador that the death penalty would not be sought or imposed in his case. However, the formal process established in Article 5 of the Extradition Treaty between the United States and Ecuador was circumvented by the United States and, as a result, Mr. Serrano was deported in an illegal and expedited manner as it was found by the IACHR in its Report No. 84/09.

64. According to the procedures described above, Mr. Serrano filed a motion before the trial court to divest jurisdiction and dismiss the indictment arguing that law enforcement officials kidnapped him in Ecuador and forcibly brought him to the United States, in violation of the U.S. – Ecuador Extradition Treaty that prohibits extradition in death penalty cases. The trial court denied the motion and the Supreme Court of Florida affirmed the denial in direct appeal based on U.S. Supreme Court jurisprudence establishing that a criminal defendant who was abducted from a country with which the United States has an extradition treaty cannot allege lack of jurisdiction. Mr. Serrano's motion for post-conviction relief on the same grounds was also denied. The court held that "[w]hile extradition proceedings had been initiated and were ongoing, it became clear that the country of Ecuador would not extradite Mr. Serrano [...], an effort was made to demonstrate that Mr. Serrano held himself out as a United States Citizen," and concluded that he "was not extradited but was deported from Ecuador." The court also held that Mr. Serrano "had renounced his Ecuadorian citizenship and had not regained Ecuadorian citizenship until March 27, 2003, some seven month after he was deported." As it has been proven, on August 21, 2000, Mr. Serrano entered Ecuador with his Ecuadorian passport and established residence in Ecuador as a national of that country.

65. From the information available the IACHR notes that U.S. courts did not assess the fact that the Extradition Treaty, and therefore the diplomatic assurance, was circumvented because United States authorities actively participated in changing the avenue used to bring Mr. Serrano to the United States. Considering that U.S. agents acted illegally in order to bring Mr. Serrano to justice, the diplomatic assurance of non-application of the death penalty should have been respected in his case. The IACHR also notes that, according to the information available, the illegal actions of the U.S. agent in Ecuador were never investigated.

66. The Commission considers that a serious and exhaustive determination by the U.S. judicial authorities of the legal status by which Mr. Serrano was brought to its jurisdiction was fundamental, taking into account that, if it were determined that he could not be deported because he was an Ecuadorian national, the only other acceptable avenue was extradition, under which the United States had already provided diplomatic assurances not to impose the death penalty. In that sense, it was an analysis directly linked to the right to life of the victim and not only to issues related to the legality or arbitrariness of his arrest or to due process.

67. In light of the above considerations, the IACHR concludes that the failure of the courts to respect the diplomatic assurance of non-application of the death penalty in the specific case amounts to a violation of Mr. Serrano's rights under Articles XVIII, XXVI and I of the American Declaration.

68. With regard to the alleged lack of effective assistance of state-appointed trial counsel, the Commission notes that, during trial, Mr. Serrano's counsel argued, *inter alia*, that the prosecution's case was circumstantial, that circumstantial evidence is insufficient for convictions, and that the indictment should be dismissed based on lack of jurisdiction. It also notes that in direct appeal the defense raised nine issues. Post-conviction counsel alleged ineffective assistance of trial counsel and the court, after analyzing the merits of each of the subclaims, found that counsels' performance did not fall below an objective standard of reasonableness. The Commission has no information to arrive to a different conclusion.

### **E. Right of protection against cruel, infamous or unusual punishment<sup>50</sup>**

69. In both international human rights law and comparative law, the issue of long term deprivation of liberty on death row, known as the “death row phenomenon,” has been developed for decades, in light of the prohibition of cruel, inhuman or degrading punishment in Constitutions and in multiple international treaties, including the American Declaration (Articles XXV and XXVI).<sup>51</sup> Based on those standards, in the case of Russell Bucklew the IACHR found that “the very fact of spending 20 years on death row is, by any account, excessive and inhuman.”<sup>52</sup>

70. As established in this report, Mr. Serrano has been deprived of his liberty on death row for 17 years. The Commission notes that the time spent on death row exceeds the length of time that other international and domestic courts have characterized as cruel, inhuman and degrading treatment. The very fact of spending 17 years on death row is, by any account, excessive and inhuman, and is aggravated by the prolonged expectation that the death sentence could be executed. This is also aggravated by the fact that Mr. Serrano is currently 80 years old and is therefore in a situation of vulnerability. Consequently, the United States is responsible for violating, to the detriment of Mr. Serrano, the right to humane treatment, and not to receive cruel, infamous or unusual punishment established in the American Declaration.

### **F. The right to life and the right to protection against cruel, infamous or unusual punishment with respect to the eventual execution of Nelson Ivan Serrano Saenz**

71. As indicated above, the Inter-American Commission considers that it is incumbent upon the national courts, not the Commission, to interpret and apply national law. Nevertheless, the IACHR must ensure that any deprivation of life resulting from imposition of the death penalty complies with the requirements of the American Declaration.<sup>53</sup>

72. Throughout this report, the Commission established that Mr. Serrano was subjected to illegal and arbitrary arrest, that domestic courts failed to respect the diplomatic assurance of non-application of the death penalty, and that the 17 years that Mr. Serrano has been on death row constitute cruel and inhumane treatment.

73. Under these circumstances, the IACHR has maintained that executing a person after proceedings that were conducted in violation of his rights would be extremely grave and constitute a deliberate violation of the right to life established in Article I of the American Declaration.<sup>54</sup> Further, based on the conclusions regarding the deprivation of liberty on death row, the eventual execution of Mr. Serrano would constitute, by any account, a violation of the right to protection against cruel, infamous or unusual punishment. In light of the foregoing and taking into account the determinations made throughout this report, the IACHR concludes that the execution of Mr. Serrano would constitute a serious violation of his right to life established in Articles I of the American Declaration.

## **VI. ACTIONS SUBSEQUENT TO REPORT No. 153/19**

74. On September 28, 2019, the Commission adopted Report No. 153/19 on the merits of the instant case, which encompasses paragraphs 1 to 73 *supra*, and issued the following recommendations to the State:

1. Grant Nelson Ivan Serrano Saenz effective relief, including the review of his trial and sentence in accordance with the guarantees of fair trial and due process set forth in Articles XVIII, XXV and XXVI of

<sup>50</sup> Article XXV of the American Declaration provides: “[...] Every individual who has been deprived of his liberty has the right [...] to humane treatment during the time he is in custody.”

<sup>51</sup> IACHR, Report No. 71/18, Case 12.958. Merits. Russell Bucklew. United States, May 10, 2018, paras. 86-90. In this report the Commission has cited a number of developments in the inter-American and other protections systems, including the regional and United Nations systems.

<sup>52</sup> IACHR, Report No. 71/18, Case 12.958. Merits. Russell Bucklew. United States, May 10, 2018, para. 83.

<sup>53</sup> IACHR, Report No. 53/13, Case 12.864, Merits (Publication), Ivan Teleguz, United States, July 15, 2013, para. 129.

<sup>54</sup> IACHR, Report No. 11/15, Case 12.833, Merits (Publication), Félix Rocha Díaz, United States, March 23, 2015, para. 106.



the American Declaration, and the payment of pecuniary compensation. Taking into account the conclusions of the IACHR on the time Nelson Ivan Serrano Saenz has been held on death row, the Commission recommends that his sentence be commuted.

2. Review its laws, procedures, and practices at the state, and if applicable, at the federal level to ensure that persons accused of capital crimes are tried and, if convicted, sentenced in accordance with the rights established in the American Declaration, including Articles I, XVIII, XXV and XXVI thereof, and, in particular, that defendants residing abroad are brought to the United States according to due process guarantees and that diplomatic assurances of non-application of the death penalty are respected.
3. Ensure that conditions on death row are compatible with international human rights standards in accordance with the right of protection against cruel, infamous or unusual punishment.
4. Given the violations of the American Declaration the IACHR has established in the present case and in others involving application of the death penalty, the Inter-American Commission also recommends to the United States that it adopt a moratorium on executions of persons sentenced to death.<sup>55</sup>

75. On November 21, 2019, the Commission transmitted the report 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 IACHR notified the petitioners about the adoption of the report. To date, the IACHR has not received any response from the United States regarding Report No. 153/19.

## VII. ACTIONS SUBSEQUENT TO REPORT No. 24/20

76. On April 22, 2020, the Commission approved Final Merits Report No. 24/20, which encompasses paragraphs 1 to 75 *supra*, and issued its final conclusions and recommendations to the State. On April 24, 2020, the Commission forwarded the report to the State and the petitioner with a time period of one month to inform the Inter-American Commission on the measures taken to comply with its recommendations. On June 22, 2020, the IACHR received the petitioner's observations. To date, the IACHR has not received any response from the United States regarding Report No. 24/20.

77. The petitioner informs that the Florida Supreme Court issued a decision in 2020 that calls into question the *Hurst v. State* decision. The petitioner indicates that in *State v. Poole*, the Florida Supreme Court detailed what it considered to be several errors in the remanded case of *Hurst v. State*, holding that a jury's selection of whether to sentence a defendant to life imprisonment or death "... is not a 'fact' that exposes the defendant to a greater punishment than that authorized by the jury's guilty verdict, it is not an element. And because it is not an element, it need not be submitted to a jury." According to the petitioner, the Court further stated "... lest there be any doubt, we hold that our state constitution's prohibition on cruel and unusual punishment, article I, section 17 does not require a unanimous jury recommendation—or any jury recommendation—before a death sentence can be imposed."

78. Furthermore, the petitioner states that the serious consequences Mr. Serrano faces in light of this reversal is further evidenced by the Florida Supreme Court's June 2020 hearings to reinstate the death sentences of two defendants whose sentences had previously been vacated after the *Hurst v. State* decision.

## VIII. FINAL CONCLUSIONS AND RECOMMENDATIONS

79. As indicated in this report, following the *Hurst v. State* decision, Mr. Serrano amended the appeal of his death sentence given that he had been sentenced to death by a jury vote of 9-3 in 2007. The IACHR finds that the 4-1 opinion issued on January 23, 2020, by the Florida Supreme Court in *State v. Poole* creates uncertainty about the status of Mr. Serrano's appeal as he has not yet been scheduled for a new sentencing hearing.

<sup>55</sup> 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.

80. The IACHR also notes that, according to the American Bar Association “every death penalty state -except Alabama- as well as the federal death penalty system requires that the jury unanimously recommend a death sentence.”<sup>56</sup> Further, in his dissent in *Poole*, Justice Jorge Labarga emphasized this discrepancy, writing that Florida had returned “to its status as an absolute outlier among the jurisdictions in this country that utilize the death penalty. The majority gives the green light to return to a practice that is not only inconsistent with laws of all but one of the 29 states that retain the death penalty, but inconsistent with the law governing the federal death penalty.”

81. The American Bar Association also expressed its concern regarding the creation of several arbitrary distinctions between which prisoners can obtain relief from non-unanimous death sentences and which cannot. In this regard, the ABA noted the following:<sup>57</sup>

Some prisoners have already received *Hurst* relief and have been resentenced; some were about to begin resentencing hearings when *Poole* was decided; and some that were awaiting their turn in line as courts worked through judicial dockets. Where any particular prisoner falls within these categories is largely a matter of chance—influenced by factors such as weather delays, illness of court officers, and other issues well beyond the prisoners’ control and unrelated to the nature of the underlying criminal case.

82. The Commission notes in this regard that Mr. Serrano’s resentencing hearing has been repeatedly rescheduled since 2017. Therefore, for reasons beyond his control, Mr. Serrano has fallen in the category of prisoners who were about to begin resentencing hearings and who might not obtain relief from the non-unanimous death sentence given the Florida Supreme Court’s reversal.

83. Based on this information, the Commission finds that the Florida Supreme Court’s decision in *Poole* creates greater uncertainty in Mr. Serrano’s situation with respect to his chances of being resentenced in accordance with the guarantees of fair trial and due process.

84. On the basis of determinations of fact and law, the Inter-American Commission concludes that the State is responsible for the violation of Articles I (life, liberty, and security), XVIII (fair trial), XXV (protection from arbitrary detention), and XXVI (due process) of the American Declaration.

**THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS REITERATES THAT THE UNITED STATES OF AMERICA,**

1. Grant Nelson Ivan Serrano Saenz effective relief, including the review of his trial and sentence in accordance with the guarantees of fair trial and due process set forth in Articles XVIII, XXV and XXVI of the American Declaration, and the payment of pecuniary compensation. Taking into account the conclusions of the IACHR on the time Nelson Ivan Serrano Saenz has been held on death row, the Commission recommends that his sentence be commuted.
2. Review its laws, procedures, and practices at the state, and if applicable, at the federal level to ensure that persons accused of capital crimes are tried and, if convicted, sentenced in accordance with the rights established in the American Declaration, including Articles I, XVIII, XXV and XXVI thereof, and, in particular, that defendants residing abroad are brought to the United States according to due process guarantees and that diplomatic assurances of non-application of the death penalty are respected.
3. Ensure that conditions on death row are compatible with international human rights standards in accordance with the right of protection against cruel, infamous or unusual punishment.

<sup>56</sup> American Bar Association. Death Penalty Representation Project. Florida Supreme Court “Recedes” from Major Death Penalty Decision Creating Uncertainty About Status of Dozens of Cases. March 11, 2020. Available at: [https://www.americanbar.org/groups/committees/death\\_penalty\\_representation/project\\_press/2020/spring/florida-supreme-court-state-v-poole/](https://www.americanbar.org/groups/committees/death_penalty_representation/project_press/2020/spring/florida-supreme-court-state-v-poole/)

<sup>57</sup> *Idem*.

4. Given the violations of the American Declaration the IACHR has established in the present case and in others involving application of the death penalty, the Inter-American Commission also recommends to the United States that it adopt a moratorium on executions of persons sentenced to death.<sup>58</sup>

#### **XIX. PUBLICATION**

85. 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.

Approved by the Inter-American Commission on Human Rights on the 3 day of the month of August 2020. (Signed): Joel Hernández García, President; Antonia Urrejola Noguera, First Vice President; Flávia Piovesan, Second Vice President; Esmeralda E. Arosemena Bernal de Troitiño and Julissa Mantilla Falcón, Commissioners.

The undersigned, Marisol Blanchard, Assistant Executive Secretary of the Inter-American Commission on Human Rights, in keeping with Article 49 of the Commission's Rules of Procedure, certifies that this is an accurate copy of the original deposited in the archives of the IACHR Secretariat.

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<sup>58</sup> 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.