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**REPORT No. 210/20**

**CASE 13.361**

REPORT ON ADMISSIBILITY AND MERITS (PUBLICATION)

JULIUS OMAR ROBINSON  
UNITED STATES OF AMERICA

Approved electronically by the Commission on August 12, 2020

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## I. INTRODUCTION

1. On April 3, 2012, the Inter-American Commission on Human Rights (the “Inter-American Commission”, “Commission” or “IACHR”) received a petition and request for precautionary measures<sup>1</sup> submitted by Sean K. Kennedy from the California’s Federal Public Defender’s Office (the “petitioner”),<sup>2</sup> alleging the international responsibility of the United States of America (the “State” or “the United States”) for the violation of the rights of Julius Omar Robinson (“Mr. Robinson”), an African-American who is on death row in the state of Texas.

2. On October 2, 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. Petitioners

3. The petitioners allege that the United States has violated Mr. Robinson’s human rights in the trial that resulted in his federal sentence to death. Specifically, they raise seven claims of violations of the American Declaration of the Rights and Duties of Man (“American Declaration” or “Declaration”).

4. First, the petitioners allege that the State of Texas has a long history of racially discriminatory use of the death penalty. They indicate that while black people constitute only 11.8% of the population of Texas, they account for 36.5% of its executions. Second, petitioners argue that the prosecutors in Mr. Robinson’s case weeded out all but one black person from sitting on the jury. They state that this, coupled with the disparate impact on black defendants in Texas, evidences intentional racial discrimination sufficient to establish an equal protection violation under the American Declaration. Petitioners further allege that the use of an uncharged, unadjudicated attempted murder as evidence that Mr. Robinson posed a future danger from prison was fundamentally unfair and prejudicial to his defense. They also allege ineffective assistance of trial counsel given the failure to adequately prepare for the penalty phase.

5. According to the petitioners, Texas federal courts have a history of closing the courthouse doors to death-row inmates who seek to vindicate their constitutional rights through post-conviction. In this regard, they allege that the district court improperly denied discovery regarding Mr. Robinson’s well-pled claims of an equal protection violation and ineffective assistance of counsel. Petitioners also allege that the district court wrongfully deprived Mr. Robinson of an evidentiary hearing even though there were significant factual disputes relevant to his equal protection and ineffective-assistance claims.

6. Petitioners further argue that the U.S. Courts of Appeals for the Fifth Circuit wrongfully denied Mr. Robinson’s right to appeal the denial of his post-conviction claims. They assert that the repeated denials of any opportunity to litigate one’s claims are representative of a pattern in Texas. Finally, petitioners indicate that Mr. Robinson faces execution by lethal injection when that mode of execution as currently practiced creates an unacceptable and wholly unnecessary risk of inflicting excruciating pain and suffering. They argue that the U.S. Government designated as “confidential” the lethal injection protocol as well as critical portions of deposition testimony revealing the qualifications, training, and procedures used by personnel involved in its lethal injection process.

<sup>1</sup> On April 9, 2012, the IACHR granted precautionary measures on behalf of Mr. Robinson 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.

<sup>2</sup> On January 28, 2016, the petitioner informed that the International Human Rights Clinic at Loyola Law School joined the case as co-counsel for Mr. Robinson.

7. With regard to the requirement of exhaustion of domestic remedies, the petitioners indicate that Mr. Robinson's claims were raised and dismissed at the district court level, on direct appeal, during post-conviction and habeas proceedings, with the U.S. Supreme Court eventually denying his petitions for certiorari. The petitioners conclude that the United States has violated the rights enshrined in Articles I (right to life, liberty and personal security), II (right to equality before the law), XVIII (right to a fair trial), XXIV (right to petition) and XXVI (right to due process of law) of the American Declaration.

## **B. State**

8. The United States alleges that the petition is inadmissible because it does not state facts that tend to establish a violation of any rights in the American Declaration and because the Commission lacks competence *rationae personae* to entertain certain portions of Mr. Robinson's claims. The State additionally submits that some of the arguments are precluded by the fourth instance formula as they amount to a mere disagreement with determinations of domestic courts, rendered in compliance with the American Declaration.

9. According to the United States, Mr. Robinson's claim regarding the alleged general administration of the death penalty in a racially discriminatory manner, fails to set forth a concrete violation of rights in an individual case. The State concludes, based on IACHR's decisions, that this claim constitutes an *actio popularis* and therefore lacks competence *rationae personae*. It further alleges that the claim of discrimination during jury selection fails to establish a violation of Articles I and II of the American Declaration. It asserts that the district court analyzed the bases for all three of the preemptory strikes exercised by the prosecutor against black persons on the venire panel, and concluded that there was no basis for a claim of discrimination.

10. The United States points out that Mr. Robinson's proceedings were conducted in compliance with U.S. law and the rights set forth in the American Declaration. Although the State admits that the likelihood of Mr. Robinson's future dangerousness was one aggravating factor presented by the prosecution, it notes that it was hardly the only factor, and it was not the key factor in the jury's determination to sentence him to death. Moreover, the State indicates that numerous federal courts and the majority of the states have held that the use of unadjudicated criminal activity is constitutionally permissible in a capital sentencing hearing.

11. Regarding the ineffective assistance of counsel's claim, the United States alleges that it must be rejected because the Commission is not a court of fourth instance and the claim was previously addressed by domestic courts. It points out that the district court noted that Mr. Robinson's trial counsel employed an experienced investigator and conducted a thorough investigation. The district court took note of the evidence submitted by Mr. Robinson with his habeas petition but concluded that the failure of Mr. Robinson's trial counsel to present such evidence did not result in prejudice to Mr. Robinson as it was unlikely to have swayed the jury in light of all of the remaining evidence. Regarding petitioners' allegation that Mr. Robinson's attorney's deficient performance is evidenced by the disparity between his sentence and the sentence received by his similarly situated co-defendant, the State argues that the claim is unfounded given that, as found by the district court, he was consistently portrayed as the leader of the group, and the co-defendant was not.

12. Finally, the State claims that it has provided Mr. Robinson with a comprehensive and expansive system of review. In particular, it argues that his claims have been reviewed twice through direct appeals and the habeas procedure, by each of three levels of the federal court system. This record, according to the State, clearly demonstrates that the United States has allocated substantial time and resources to thoroughly and impartially consider Mr. Robinson's claims and afford him judicial review.

13. In its last communication dated April 3, 2019, the State alleges that the petitioners did not exhaust domestic remedies given a pending litigation before federal courts initiated in 2018.

### 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 (ratification of the OAS Charter on June 19, 1951)
<b>Duplication of procedures and international <i>res judicata</i>:</b>	No

14. The Commission notes that the United States alleges that Mr. Robinson's claim regarding the alleged general administration of the death penalty in a racially discriminatory manner fails to set forth a concrete violation of rights in an individual case. The State concludes, based on IACHR's decisions, that this claim constitutes an *actio popularis* and therefore lacks competence *rationae personae*.

15. The State refers to Inadmissibility Report No. 100/14,<sup>3</sup> in which the Commission concluded that the petition was inadmissible for lack of competence *rationae personae* given that it constituted an *action popularis* filed on behalf of an indeterminate group of persons. In the instant case, however, the allegation of racial discrimination was raised at the domestic level and before the Commission on behalf of Mr. Robinson. Therefore, the Commission has competence to decide the case.

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

16. According to the information available, and as established in the facts described below, Mr. Robinson was sentenced to death by the U.S. District Court for the Northern District of Texas on June 5, 2002. The U.S. Court of Appeals for the Fifth Circuit affirmed Mr. Robinson's conviction and sentence on April 14, 2004. On November 29, 2004, the U.S. Supreme Court denied Mr. Robinson's application for *certiorari*.

17. Mr. Robinson pursued post-conviction habeas corpus relief claiming, *inter alia*, racial discrimination, ineffective assistance of counsel, and due process violations, and also sought an evidentiary hearing on these claims. On November 7, 2008, the district court denied his motion to vacate his conviction and sentence as well as his motion for an evidentiary hearing. He then appealed the denial to the U.S. Court of Appeals for the Fifth Circuit and, on June 8, 2010, the Fifth Circuit denied this request for a Certificate of Appealability. On October 3, 2011, the Supreme Court denied an application for *certiorari*. On February 28, 2018, Mr. Robinson's counsel filed a motion to reopen the judgment of the U.S. District Court for the Northern District of Texas. The IACHR has no information regarding the outcome of this motion.

18. The IACHR notes the State's position that the petition does not comply with the requirement of prior exhaustion of domestic remedies, given that the petitioners continue to pursue domestic remedies at the federal level. The Commission reiterates in this regard that the rule requiring the 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>4</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>5</sup>

<sup>3</sup> IACHR, Report No. 100/14. Petition 11.082. Inadmissibility. International Abductions. United States. November 7, 2014.

<sup>4</sup> IACHR, Report No. 54/14, Petition 684-14. Admissibility. Russel Bucklew and Charles Warner. United States. July 21, 2014, para. 28.

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

19. Based on the available information, the IACHR notes that the alleged victim has not only exhausted all direct review proceeding, but also post-conviction proceedings. Therefore, the Inter-American Commission concludes that the petitioners 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 petition before the IACHR was presented on April 3, 2012, and the application for *certiorari* was denied by the Supreme Court on October 3, 2011. Therefore, the Commission also concludes that the requirement specified in Article 32(1) of its Rules of Procedure has been met.

### C. Colorable claim

20. 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 (right to life, liberty and personal security), II (right to equality before the law), XVIII (right to a fair trial), and XXVI (right to due process of law) of the American Declaration, to the detriment of Mr. Robinson.

21. With regard to the alleged violation of the right to petition set forth in Article XXIV of the Declaration, the Commission finds that the facts described in the petition do not tend to establish a colorable claim.

## IV. FINDINGS OF FACT

### A. The federal death penalty system

22. In 2000, the United States Department of Justice ("DoJ") issued the report "The federal death penalty system: a statistical survey (1988-2000)".<sup>6</sup> The Commission will reproduce below parts of the report pertaining to the structure of the federal death penalty system and some statistics on race and the federal death penalty:

- In 1972, the Supreme Court invalidated capital punishment throughout the United States – both in the federal criminal justice system and in all of the states that then provided for the death penalty. The federal government revised its procedures to withstand constitutional scrutiny on November 18, 1988, when the President signed the Anti-Drug Abuse Act of 1988. A part of this law made the death penalty available as a possible punishment for certain drug-related offenses. The availability of capital punishment in federal criminal cases expanded significantly further on September 13, 1994, with the passage of the Violent Crime Control and Law Enforcement Act. A part of this law, known as the Federal Death Penalty Act (FDPA), provided that over 40 federal offenses could be punished as capital crimes. The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) added another four federal offenses to the list of capital crimes.
- On January 27, 1995, the DoJ adopted the policy still in effect today – known as the death penalty "protocol" – under which U.S. Attorneys are required to submit for review all cases in which a defendant is charged with a capital-eligible offense, regardless whether the U.S. Attorney actually desires to seek the death penalty in that case. Current DoJ policy provides that bias based on characteristics such as an individual's race/ethnicity must play no role in a U.S. Attorney's decision to recommend the death penalty. From 1995 to 2000, blacks made up 48% of the initial cases presented for review but ended up representing 68% of the death sentences imposed.
- If the defendant fails to obtain relief on direct appeal, he or she may also seek collateral review by filing a motion to vacate, set aside or correct the sentence pursuant to 28 U.S.C. § 2255. Such collateral review goes through three levels of the federal judiciary: the motion is made in the district court in which the defendant was convicted; the district court's resolution of the § 2255 motion is subject to

<sup>6</sup> The Federal Death Penalty System: a statistical survey (1988-2000). United States Department of Justice. Washington, D.C. September 12, 2000.

direct appeal by the losing party; the judgment by the Court of Appeals concerning the § 2255 motion is subject to discretionary review by the Supreme Court.

- If the defendant's sentence of death is upheld on both direct and collateral review, an execution date is set. Once the defendant has received notification of the scheduled execution date, he or she may petition the President for a grant of executive clemency.

## **B. Race and the federal death penalty in Texas**

23. According to a study of the application of the federal death penalty in Texas, while African-Americans make up 12% of the Texas population, they constitute 77% of all the federal death verdicts within the State of Texas. The study concludes that race influences each stage of the process: the federal prosecutors' request for authorization to seek the death penalty, the Attorney General's decision to grant authorization, and the jury's decision to render a death verdict. According to the study, federal prosecutors in Texas were almost six times more likely to request authorization to seek the death penalty against black defendants; authorization was almost eight times more likely to be granted in cases with black defendants; and a death verdict was about sixteen times more likely to be rendered in cases with black defendants. The study indicates that the next step in the analysis would be to control for potential cofounders in a multivariate logistic regression model that would reveal whether race-neutral factors can "account for" or "explain" the disparities. However, according to the study, the Department of Justice has declined to share the data necessary to conduct such an analysis.<sup>7</sup>

## **C. Jury selection process**

24. Under United States law, the twelve-person petit jury that hears the trial is selected from a venire panel of citizens. During *voire dire*, lawyers for each side exercise for-cause and peremptory strikes of potential jurors as they move from the venire panel to the petit jury. A "for-cause challenge" is a party's challenge supported by a specified reason, such as bias or prejudice that would disqualify that potential juror. A "peremptory challenge" is one of a party's limited number of challenges that do not need to be supported by a reason unless the opposing party makes a *prima facie* showing that the challenge used was to discriminate on the basis of race, ethnicity or sex (*Batson* challenge).<sup>8</sup>

## **D. Factual background, trial and death sentence**

25. According to the information available, in December 1998 Julius Omar Robinson, a drug dealer, killed a man he mistakenly believed responsible for an armed hijacking that cost him \$30,000. In May 1999, angered by a fraudulent drug transaction, he retaliated by killing the brother-in-law of the fraudulent seller. Mr. Robinson was later involved in a conspiracy that led to another murder.<sup>9</sup>

26. Federal prosecutors indicted Mr. Robinson for federal crimes involving conduct causing death and his case went to jury trial in the United States District Court for the Northern District of Texas ("district court"). Prior to trial, the defense filed a motion to dismiss the Government's notice of intent to seek the death penalty on the ground of racial bias and disparity in application of the federal death penalty and related discrimination. The defense alleged that the prosecution engaged in a systematic pattern of racial discrimination in requesting the death penalty. In order to demonstrate the systematic pattern of discrimination, the defense asked the court for an evidentiary hearing and to order the prosecution to produce certain information.<sup>10</sup> The motion justified the necessity of such information as follows:<sup>11</sup>

<sup>7</sup> Declaration of Scott Phillips. Chair of the Department of Sociology and Criminology and Director of Socio-Legal Studies at the University of Denver (March 29, 2011). Exhibit A, submitted with petitioners' original petition on April 3, 2012.

<sup>8</sup> Black's Law Dictionary, 9th edition, pages 261-262.

<sup>9</sup> Robinson v. United States, 2008 WL 4906272 (N.D. Tex. Nov. 7, 2008). Exhibit B, submitted with petitioners' original petition on April 3, 2012.

<sup>10</sup> United States v. Robinson, Motion to Dismiss (Dec. 21, 2001). Exhibit F, submitted with petitioners' original petition on April 3, 2012.

<sup>11</sup> United States v. Robinson, Motion to Dismiss (Dec. 21, 2001). Exhibit F, submitted with petitioners' original petition on April 3, 2012, p. 3.

[...] The necessity of such information derives from the fact, that since the re-enactment of the federal death penalty initially in [sic] 1998 for certain drug offenses, and in 1994 generally, the overwhelming majority of individuals for whom death penalty approval has been sought and issued from the Department of Justice, have been African-American. At an evidentiary hearing, Defendant would demonstrate that the percentage of African-Americans among those individuals where death penalty approval has been granted is approximately 70% of all approvals. Such figure is far in excess of the proportion of African-Americans within the population as a whole, or among defendants charged with federal offenses generally.

Defendant is aware that a racially disproportionate pattern of capital charging – standing alone – is insufficient to demonstrate purposeful discrimination on a racial basis, such as to be violative of “equal protection,” “due process,” and “cruel and unusual punishment” constitutional safeguards. [...] For such reason, Defendant will seek to demonstrate through the requested materials and evidentiary hearing, that despite knowledge of the racial imbalance in its capital charging decisions, the Department of Justice has persisted in a system of policies in capital charging decisions, which perpetuate this imbalance, thereby establishing purposeful discrimination. The Defendant respectfully asserts that the failure of the Government to take “affirmative action” to overcome this racial imbalance, despite knowledge or its existence in DOJ charging decisions, is tantamount to purposeful discrimination.

27. The district court summarily denied the motion on December 21, 2001.<sup>12</sup>

28. According to the information provided by the petitioners, not contested by the State, the venire panel in Mr. Robinson’s trial was made up of 125 persons, of which ten were African-Americans. Of the eight that were questioned on *voire dire*, only one black person was selected to serve. The prosecutors eliminated seven out of eight black potential jurors. Three of them were eliminated using peremptory strikes. The challenges of two of these peremptory strikes presented by the defense were overruled by the district court. This resulted in a sitting jury of eleven white people and one black juror who stated that she strongly supported the death penalty for any first-degree murder.<sup>13</sup>

29. The jury found Mr. Robinson guilty of two murders and of complicity in an ongoing criminal enterprise resulting in the murder of a third person. Following the trial, the same judge conducted a separate sentencing hearing to determine Mr. Robinson’s punishment.

30. Defense counsel presented numerous character witnesses and an expert witness during the penalty phase. They first called five witnesses who knew Mr. Robinson during his time at high school, where he played football, and an employee of the computer training school he attended. Then the defense called other five witnesses from the Federal Medical Center where Mr. Robinson was incarcerated before and during trial who testified about Mr. Robinson’s good behavior and positive adjustment to life in prison. The defense also called Mr. Robinson’s uncle and mother to testify on his behalf. Finally, it called as an expert witness a board-certified forensic psychologist who testified regarding risk assessment of future dangerousness.<sup>14</sup>

31. In addition to the facts of the underlying convictions introduced during the guilt/innocence phase of trial, the prosecution also relied on evidence introduced through witnesses during the penalty phase to bolster its position regarding Mr. Robinson’s likelihood of future dangerousness. Part of the evidence the jury relied on in making its sentencing decision was evidence introduced by the government that Mr. Robinson had attempted to kill an informant who testified against him before the grand jury, as well as a former high-school classmate who owed him money for crack cocaine. Regarding the latter, Mr. Robinson was ultimately convicted of deadly conduct and sentenced on March 11, 1996, to five years’ probation.<sup>15</sup>

<sup>12</sup>United States v. Robinson, Motion to Dismiss (Dec. 21, 2001). Exhibit F, submitted with petitioners’ original petition on April 3, 2012.

<sup>13</sup>Petitioners’ original petition submitted on April 3, 2012, pp. 11-12.

<sup>14</sup>Robinson v. United States, Civil No 4:05-CV-756-Y, Crim. No. 4:00-CR-260-Y-2,2008 WL 4906272 (N.D. Tex. Nov. 7, 2008), pp. 7-10. Exhibit B, submitted with petitioners’ original petition on April 3, 2012.

<sup>15</sup>Robinson v. United States, Civil No 4:05-CV-756-Y, Crim. No. 4:00-CR-260-Y-2,2008 WL 4906272 (N.D. Tex. Nov. 7, 2008), p. 5. Exhibit B, submitted with petitioners’ original petition on April 3, 2012.

32. On March 28, 2002, the jury recommended a sentence of death. The district court accepted this recommendation and sentenced Mr. Robinson to death on June 5, 2002.<sup>16</sup>

33. Mr. Robinson appealed his conviction, claiming that the indictment was constitutionally deficient, the district court impermissibly admitted certain evidence against him, his death sentence was improperly predicated on certain aggravating factors, and the Federal Death Penalty Act is unconstitutional. The U.S. Court of Appeals for the Fifth Circuit considered the claims and issued an opinion on April 14, 2014, affirming Mr. Robinson's conviction and sentence.<sup>17</sup> The court of appeals observed the following about the penalty phase:<sup>18</sup>

The jury's sentencing recommendation was based in part on (in addition to the aforementioned convictions) Robinson's criminal history. The jury learned of an incident in 1995 in which Robinson fired several shots from a handgun at a woman who had failed to pay him \$ 120 for crack cocaine. This was used to show that Robinson had a violent record before the events charged in the indictment. The jury also was told of an incident [...] in which Robinson, acting from his jail cell after his arrest in this case, arranged to have a government informant murdered. This was used to show that Robinson had a propensity to commit future acts of violence.

34. On November 29, 2004, the U.S. Supreme Court denied Mr. Robinson's application for *certiorari*.<sup>19</sup>

#### **E. Post-conviction proceedings**

35. Mr. Robinson's defense filed a motion to vacate his conviction and sentence under 28 U.S.C. § 2255 alleging ineffective assistance of trial counsel at the penalty phase for failure to investigate and rebut prosecution's aggravating evidence and for failure to thoroughly prepare and present mitigating evidence; and racial discrimination. On November 7, 2008, the district court denied the motion. The court concluded that Mr. Robinson failed to establish that his trial counsel's performance fell below an objectively reasonable professional standard and that it prejudiced his case.<sup>20</sup> The IACHR will summarize below the conclusions of the court regarding the main allegations raised by Mr. Robinson.

- Ineffective assistance of trial counsel:

36. Regarding trial counsel's alleged failure to hire a skilled investigator, the district court noted that trial counsel hired a licensed investigator who had been involved in hundreds of criminal-defense investigations, including several capital-murder cases. It also noted that the investigator spoke directly with Mr. Robinson in order to determine potential witnesses, most of which testified on Mr. Robinson's behalf as indicated *supra*.

37. Mr. Robinson also alleged trial counsel's failure to adequately investigate and rebut the government's evidence of the aggravating factor of future dangerousness, in particular, evidence regarding: (i) an attempt on the life of a drug dealer who had testified against Mr. Robinson before the grand jury and had given information to the Drug Enforcement Agency; and (ii) an attempted murder of a woman who owed him \$ 120 for crack cocaine.<sup>21</sup>

38. Regarding the first evidence, while Mr. Robinson acknowledged that his trial counsel moved *in limine* to exclude evidence that he had orchestrated the abduction, he claimed that his trial counsel did not investigate the incident and thus were unaware that all the persons involved in the incident denied any connection to a

<sup>16</sup>United States v. Robinson, No. 4:00-CR-260-Y-2 (N.D. Tx. June 5, 2002).

<sup>17</sup>U.S. v. Robinson, 367 F.3d 278 (2004). Exhibit 1, submitted with the State's response on September 8, 2016.

<sup>18</sup>Robinson v. United States, Civil No 4:05-CV-756-Y, Crim. No. 4:00-CR-260-Y-2, 2008 WL 4906272 (N.D. Tex. Nov. 7, 2008), p. 4. Exhibit B, submitted with petitioners' original petition on April 3, 2012.

<sup>19</sup>Robinson v. United States, 543 U.S. 1005 (2004).

<sup>20</sup>Robinson v. United States, Civil No 4:05-CV-756-Y, Crim. No. 4:00-CR-260-Y-2, 2008 WL 4906272 (N.D. Tex. Nov. 7, 2008). Exhibit B, submitted with petitioners' original petition on April 3, 2012.

<sup>21</sup>Robinson v. United States, Civil No 4:05-CV-756-Y, Crim. No. 4:00-CR-260-Y-2, 2008 WL 4906272 (N.D. Tex. Nov. 7, 2008), pp. 17-21. Exhibit B, submitted with petitioners' original petition on April 3, 2012.

life attempt. The district court agreed with the government that the varying versions of events contained in the new declarations Mr. Robinson relied upon did not establish the falsity of corroborating versions given at trial.

39. With regard to the second evidence, Mr. Robinson did not deny that he was convicted for his involvement in the shooting. However, he claimed that his actions were unfairly characterized as attempted murder and that his trial counsel failed to adequately investigate and rebut the government's evidence. The court agreed with the government that Mr. Robinson's plea to "deadly conduct" was not persuasive, as pleas to lesser offenses are commonplace and do not indicate that the factual basis of the original offense is incorrect, and that the police reports corroborated the pre-plea charge of attempted murder.

40. Mr. Robinson next claimed that trial counsel failed to conduct an adequate investigation of mitigation factors affecting the punishment phase, including failure to hire a mitigation expert. He faulted trial counsel for not presenting additional evidence of mental-health issues and of negative childhood circumstances at the punishment phase. The court noted that trial counsel reviewed Mr. Robinson's high-school records as well as his academia records from college. Given the information contained in these records as well as the information provided by educators and coaches, the court concluded that there was no reason for counsel to review Mr. Robinson's lower-school records as he argued.

41. Mr. Robinson further asserted that trial counsel failed to adequately assess the effect of childhood pesticide exposure. The court noted that the examination conducted post-trial concluded that Mr. Robinson's mental profile was "consistent with *subtle* cognitive deficits associated with chronic exposure to organophosphate pesticides combined with general learning disabilities" and did not opine on the likelihood that these subtle cognitive defects would affect Mr. Robinson's ability to plan and implement the murder of three individuals.<sup>22</sup>

42. Regarding the alleged failure to hire a mental-health expert and discover evidence of *in utero* exposure to drugs and alcohol during his mother's pregnancy, the Court concluded that the expert opinion presented by Mr. Robinson indicating that his "mental and social history made him more vulnerable to psychological and emotional problems throughout his life," would have not persuaded the jury, in light of all evidence to the contrary, that Mr. Robinson was less culpable for the murders.

43. Mr. Robinson also claimed that trial counsel failed to sufficiently look for mitigating evidence in his social history, including declarations from his relatives and neighbors during the time he lived in Arkansas. The court noted in this regard that much of the substance of these declarations covered periods before Mr. Robinson's births. As to the declarations regarding Mr. Robinson's involvement with gangs during his youth in Arkansas, the court noted that counsel strategically chose not to emphasize this information at trial because of fear that it would harm Mr. Robinson's case more than it would help.

44. The district court concluded that Mr. Robinson's counsel employed an experienced investigator, conducted a thorough investigation, and presented evidence from numerous positive character witnesses. In particular, it noted that:<sup>23</sup>

[...] even if the new declarations provide evidence that his home life may have been less positive than was portrayed at trial and that he had some difficulty with school, that evidence does not demonstrate prejudice. It is clearly established that in order to prevail on his claim of insufficiency of counsel based on failure to investigate, Robinson "must allege with specificity what the investigation would have revealed and how it would have altered the outcome of the trial."

<sup>22</sup>Robinson v. United States, Civil No 4:05-CV-756-Y, Crim. No. 4:00-CR-260-Y-2,2008 WL 4906272 (N.D. Tex. Nov. 7, 2008), p. 26. Exhibit B, submitted with petitioners' original petition on April 3, 2012.

<sup>23</sup>Robinson v. United States, Civil No 4:05-CV-756-Y, Crim. No. 4:00-CR-260-Y-2,2008 WL 4906272 (N.D. Tex. Nov. 7, 2008), p. 31. Exhibit B, submitted with petitioners' original petition on April 3, 2012.

45. In his last claim for relief based on ineffective assistance of trial counsel, Mr. Robinson alleged failure to raise a *Batson* challenge on direct appeal in light of racial discrimination in the selection of the jury. After analyzing the situation of the three venire members at issue, the district court concluded that Mr. Robinson failed to demonstrate that his counsel performed below a reasonable professional standard, and therefore denied the claim of ineffective assistance of counsel on this basis.

- Racial discrimination

46. Mr. Robinson alleged that racial discrimination permeated his entire trial, and that the prosecution exercised peremptory challenges during jury selection in a racially discriminatory manner. In its opinion, the district court referred to the jurisprudence of the U.S. Supreme Court of Justice on this issue, as follows:<sup>24</sup>

In *Strauder v. West Virginia*, 100 U.S. 303 (1880), the United States Supreme Court held that when a black defendant has been tried by a jury from which members of his own race have been purposely excluded, he has been denied equal protection of the law. In *Batson*, the Court reaffirmed this holding and further held that the Equal Protection Clause forbids a prosecutor from using his peremptory challenges to challenge potential jurors solely on account of their race. See 476 U.S. at 88. The Court also held that, in order to establish a claim of purposeful racial discrimination in the jury-selection process by the prosecutor's use of peremptory challenges, a criminal defendant must first make out a prima-facie case of purposeful discrimination by first showing that he is a member of a racial group capable of being singled out for differential treatment and that the prosecutor has exercised peremptory challenges to remove from the jury panel members of his race. A defendant must then show that these facts and other circumstances would support an inference that the prosecutor used the practice to exclude venire members based on their race. Once this showing has been made, the burden then shifts to the government to provide a race-neutral explanation for challenging the jurors. *Id.* at 96. If the government presents a racially neutral explanation for a strike, the trial court must decide whether the defendant has carried his burden of proving purposeful racial discrimination. *Id.* at 98; *Purkett v. Elem*, 514 U.S. 765, 767-68 (1995). In making the decision as to whether the defendant has met his burden of proof, the truthfulness of the prosecutor's explanation must be determined by assessing the credibility and demeanor of the government's attorney. *Hernandez v. New York*, 500 U.S. 352, 365 (1991). This judgment is one that lies "peculiarly within a trial judge's province." *Id.* The standard of review is "clear error," and a trial court's ruling should not be considered clearly erroneous unless a reviewing court has the firm conviction that a mistake has been committed. *United States v. Cobb*, 975 F.2d 152, 154-56 (5<sup>th</sup> Cir. 1992), citing *Hernandez*, 500 U.S. at 369.

47. The district court went on to examine the peremptory challenges against the three black venire members at issue in Mr. Robinson's motion. Regarding the first venire member, the court noted that both the prosecutor and defense counsel exercised peremptory challenges. With regard to the second member, the court concluded that the explanations for the peremptory strike given by the prosecution (that the member's husband and brother were involved in drug trafficking) were race-neutral. In light of this and the fact that there was no similarly situated non-black venire member whom the prosecution chose not to strike, the court concluded that Mr. Robinson did not demonstrate that his counsel committed error in choosing not to raise this issue on appeal.

48. The third peremptory strike at issue was against venire member Ms. Amarh. According to the district court:<sup>25</sup>

Upon questioning during voir dire, Amarh indicated that she was generally not in favor of the death penalty, commenting that she just did not "agree with it." [...] Her questionnaire also indicated that she had mixed feelings about the death penalty. [...] But she indicated when questioned that she believed that there are some circumstances that warrant the death penalty. [...] When asked by the prosecutor if she likened her position to that of a conscientious objector [...], Amarh responded:<sup>26</sup>

<sup>24</sup>Robinson v. United States, Civil No 4:05-CV-756-Y, Crim. No. 4:00-CR-260-Y-2,2008 WL 4906272 (N.D. Tex. Nov. 7, 2008), pp. 33-34. Exhibit B, submitted with petitioners' original petition on April 3, 2012.

<sup>25</sup>Robinson v. United States, Civil No 4:05-CV-756-Y, Crim. No. 4:00-CR-260-Y-2,2008 WL 4906272 (N.D. Tex. Nov. 7, 2008), p. 36. Exhibit B, submitted with petitioners' original petition on April 3, 2012.

<sup>26</sup>Robinson v. United States, Civil No 4:05-CV-756-Y, Crim. No. 4:00-CR-260-Y-2,2008 WL 4906272 (N.D. Tex. Nov. 7, 2008), pp. 36-39. Exhibit B, submitted with petitioners' original petition on April 3, 2012.

It's kind of hard to say. If I have to do it, you know, as a duty, I will do it. But I just don't like, you know, the death penalty. I don't know exactly how to say, but I feel strongly against the death penalty. But if for some – it depends on the circumstances. The circumstances would have to be very strong if I have to do jury duty.

[...] the prosecution [...] chose to exercise a peremptory strike against her, and defense counsel objected under Batson. [...] The Court [...] asked the prosecutor to provide a race-neutral reason for striking her, and the prosecution responded that she had “expressed great reluctance concerning the death penalty” and pointed out that the prosecution had earlier struck a white venire member with similar views on the death penalty. Accepting the prosecutor’s explanation as valid, the Court overruled the Batson challenge. A later review of the questions posed to Broadwell reveals that she did not have similar views to Amarh, but Schattman [the prosecutor] was apparently reviewing the wrong questionnaire when interviewing her. Regardless of that mistake, however, this Court accepted Shattman’s race neutral explanation for striking Amarh based on her answers in her questionnaire and *voir dire* regarding the death penalty.

[...] the Court does not accept Robinson’s argument that white jurors with similar backgrounds were not struck. The prosecution struck a number of white venire members with similar views. [...] Robinson charges that the government chose to keep venirewoman Broome, a white juror whom Robinson claims shared Amarh’s views [...] Likewise white venirewoman Mills stated that she could impose the death penalty, but noted that it would be a hard decision. And, unlike Amarh, she did not provide any answers in her questionnaire indicating that she opposed the death penalty. [...] Banser’s questionnaire answers likewise revealed that she was in favor of the death penalty. She did state, however, that if a sentence of life without release was available, she could not recommend a death sentence, but she [later] clarified that if the facts justified a sentence of death that she could impose it.

49. Mr. Robinson also alleged that the prosecution used race as a basis for seeking the death penalty against African-Americans like himself. He based his claim on statistics to show that the government has sought the death penalty against African-Americans with disproportionate frequency as compared to defendants of other races. Although the district court found that the claim was procedurally barred, it went on to analyze it and concluded that the selective-prosecution claim failed on the merits. Citing the U.S. Supreme Court, the district court asserted that, in order to establish that a criminal defendant has been selectively prosecuted on the basis of his race, “he must show that the federal prosecutorial policy had a discriminatory effect and that it was motivated by a discriminatory purpose. And, in order to establish a discriminatory effect, the defendant must show that similarly situated individuals of a different race were not prosecuted.”<sup>27</sup> The court concluded that, without meritorious *Batson* challenges to rely upon; Mr. Robinson was left only with statistics to support his argument, evidence that is not considered sufficient to establish a prima-facie case.

50. Mr. Robinson sought a certificate of appealability (“COA”) to appeal the denial of post-conviction, alleging that he received ineffective assistance of counsel at sentencing and that the district court erred by denying his claim without a hearing.<sup>28</sup> He presented two bases for his claim: (i) failure to adequately investigate and rebut the prosecution’s evidence regarding future dangerousness; and (ii) failure to adequately investigate his life history, which would have uncovered additional mitigating evidence. To prove his claim, Mr. Robinson was required to show that, but for counsel’s unprofessional errors, there was a reasonable probability that the outcome of the proceeding would have been different. Mr. Robinson produced declarations of the three persons involved in the alleged attempt on the life of an informant, and all three denied that they were acting under Mr. Robinson’s orders.

51. On June 8, 2010, the U.S. Court of Appeals for the Fifth Circuit denied the request for a COA. The court concluded, *inter alia*, that Mr. Robinson was not prejudiced by counsel’s deficiencies and, even if he had introduced all of the newfound evidence, the jury would have been left with plausible evidence regarding the unadjudicated offenses. On October 3, 2011, the U.S. Supreme Court denied Mr. Robinson’s application for *certiorari*.

<sup>27</sup> Robinson v. United States, Civil No 4:05-CV-756-Y, Crim. No. 4:00-CR-260-Y-2, 2008 WL 4906272 (N.D. Tex. Nov. 7, 2008), p. 41. Exhibit B, submitted with petitioners’ original petition on April 3, 2012.

<sup>28</sup> United States v. Robinson (Fifth Circuit Court of Appeals 2010). Exhibit 3, submitted with the State’s response on September 8, 2016.

52. On February 28, 2018, Mr. Robinson's counsel filed a motion to reopen the judgment of the U.S. District Court for the Northern District of Texas pursuant to Federal Rule of Civil Procedure 60(b)(6). On June 20, 2018, the District Court issued an opinion and order transferring the motion to the U.S. Court of Appeals for the Fifth Circuit. Mr. Robinson's counsel filed a brief on November 2, 2018. There is no information regarding the outcome of that motion.

#### **F. Legal proceedings regarding the lethal injection protocol**

53. On November 28, 2007, Mr. Robinson and other federal death row inmates filed a federal civil lawsuit in the U.S. District Court for the District of Columbia claiming that the means by which the government sought to implement the death penalty would violate the U.S. Constitution as well as federal law. On January 13, 2012, the District Court for the District of Columbia ordered that the case be stayed pending the Bureau of Prisons' issuance of a revised lethal injection protocol.<sup>29</sup>

54. According to publicly available information, since then activity in the case has been limited to the government filing status reports as it continues the process to determine what drug combination will be used.<sup>30</sup> Also, in July, 2019, the Justice Department announced that the federal government will resume its executions using a single drug (pentobarbital).<sup>31</sup>

### **V. ANALYSIS OF LAW**

#### **A. Preliminary considerations**

55. Before embarking on its analysis of the merits in the case of Julius Omar Robinson, 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.

56. 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>32</sup> and it has been set out and applied by the Inter-American Commission in previous capital cases brought before it.<sup>33</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>34</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>29</sup> Robinson v. Mukasey et al., No. 1:07-cv-02145-RWR, U.S. District Court for the District of Columbia.

<sup>30</sup> Roane v. Leonhart, 741 F.3d 147 (D.C. Cir. 2014); Roane v. Holder, Civil Action No. 05-2337 (D.D.C. 2016). See also, JUSTIA Dockets & Filings. Available at: <https://dockets.justia.com/docket/district-of-columbia/dcdce/1:2019mc00145/210604>

<sup>31</sup> NPR. Lethal Injection Drug's Efficacy and Availability For Federal Executions. July 26, 2019. Available at: <https://www.npr.org/2019/07/26/745722219/lethal-injection-drugs-efficacy-and-availability-for-federal-executions>

<sup>32</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>33</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>34</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>35</sup>

57. 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, not to receive cruel, infamous or unusual punishment, to 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>36</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.

58. 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 criminal proceedings in a case involving the application of the death penalty.

## **B. Right to equality before the law<sup>37</sup> and access to an effective remedy<sup>38</sup>**

### **1. General considerations regarding equality before the law**

59. The principles of equality before the law, equal protection, and non-discrimination are among the most basic human rights, and are in fact recognized as *jus cogens* norms, "because the whole legal structure of national and international public order rests on it."<sup>39</sup> In line with the Human Rights Committee, the Commission has further understood "discrimination" to mean "any distinction, exclusion, restriction, or preference which is based on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms."<sup>40</sup> The Commission has also pointed out that discrimination can manifest itself either directly (intentional or "targeted") or indirectly (involuntary or "by outcome"), and the latter can be *de facto*, when it manifests itself in practice, or *de iure*, when it emanates from a law or provision.<sup>41</sup>

60. The principle of equality and non-discrimination incorporates both "the prohibition of arbitrary differences of treatment," and "the obligation of States to create conditions of real equality for groups that have been historically excluded or that are at greater risk of being discriminated against."<sup>42</sup> With regard to the former, while Article II of the American Declaration does not prohibit all distinctions in treatment in the enjoyment of protected rights and freedoms, it does require that any permissible distinctions be based on an objective and reasonable justification, that they further a legitimate objective, "regard being had to the

<sup>35</sup> IACHR, Report No. 78/07, Case 12.265, Merits (Publication), Chad Roger Goodman, The Bahamas, October 15, 2007, para. 34.

<sup>36</sup> IACHR, Report No. 44/14, Case 12,873, Report on Merits (Publication), Edgar Tamayo Arias, United States, July 17, 2014, para. 214.

<sup>37</sup> Article II of the American Declaration provides: "All persons are equal before the law and have the rights and duties established in this Declaration, without distinction as to race, sex, language, creed or any other factor."

<sup>38</sup> Article XVIII of the American Declaration provides: "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>39</sup> See I/A Ct. H.R. *Juridical Condition and Rights of Undocumented Migrants*, Advisory Opinion OC-18/03 of Sept. 17, 2003, para. 101. See also IACHR, Report No. 50/16, Case 12.834, Merits (Publication), Undocumented Workers, United States, Nov. 30, 2016, para. 72.

<sup>40</sup> IACHR, Report No. 50/16, Case 12.834, Merits (Publication), Undocumented Workers, United States, Nov. 30, 2016, para. 75.

<sup>41</sup> IACHR, Report No. 5/14, Case 12,841, Merits. Angel Alberto Duque. Colombia. April 2, 2014, para. 67.

<sup>42</sup> See, e.g., I/A Ct. H.R. *Furlan and family Vs. Argentina*. Judgment of Aug. 31, 2012, para. 267.

principles which normally prevail in democratic societies, and that the means are reasonable and proportionate to the end sought.”<sup>43</sup> Further, distinctions based on grounds explicitly enumerated under pertinent articles of international human rights instruments are subject to a particularly strict level of scrutiny whereby States must provide an especially weighty interest and compelling justification for the distinction.<sup>44</sup>

61. Therefore, arbitrary treatment and distinctions on the basis of race are prohibited under international human rights law, and should be prevented. Race-based restrictions must be based on very compelling reasons; on this issue, there is a “presumption of invalidity” and the burden of proof rests with the State. The Commission has underscored that laws and policies should be examined to ensure that they comply with the principles of equality and non-discrimination; this analysis should assess the potential discriminatory effect of even facially neutral provisions. This, in light of the fact that States are not only obligated to provide for equal protection of the law, but must also adopt the legislative, policy and other measures necessary to guarantee the effective enjoyment of the rights protected under Article II of the American Declaration.<sup>45</sup>

## 2. Race and equality before the law in the application of the death penalty in the United States

62. With regard to the death penalty applied to African-Americans in the United States, in the case of Willie L. Celestine decided in 1989, the Inter-American Commission was faced for the first time with the question of whether statistics alone are sufficient to prove racial discrimination in a capital case.<sup>46</sup> The IACHR declared the case inadmissible because the petitioner failed to present sufficient evidence that the sentence resulted from racial discrimination. The Commission found that this was a “poor case” and pointed out to the fact that the crime was sufficiently heinous and that several members of the jury which unanimously voted to convict and sentence him to death were black.

63. In the case of William Andrews decided in 1997, the IACHR found that the existence of “a reasonable appearance of “racial bias” by some members of the jury” that tainted the trial and resulted in the death sentence, constituted a violation of the right to an impartial trial and to equality before the law.<sup>47</sup> In this case, the record before the Commission reflected ample evidence of “racial bias.”<sup>48</sup> A napkin had been found among the jurors during a recess of the trial, which stated “Hang the Nigger’s” and a request filed by defense counsel for a mistrial and a right to question jurors concerning the note was denied by the trial judge.<sup>49</sup> The Commission ruled that “the international standard on the issue of “judge and juror impartiality” employs an objective test based on “reasonableness, and the appearance of impartiality” and that a reasonable suspicion of bias is sufficient for juror disqualification.<sup>50</sup>

64. In the case of Kevin Cooper decided in 2015, the petitioners did not question the composition of the jury, its conduct, or the manner in which the members of the jury were chosen.<sup>51</sup> The point at stake was the deficiencies in due process that had left the possibility of racial discrimination unresolved. The Commission noted the special seriousness of the fact that the United States Government’s own studies demonstrate that the race of defendants and the race of victims of crimes has an undeniable influence on conviction and sentencing patterns and that this is not a recent finding.<sup>52</sup>

<sup>43</sup> IACHR, Report No. 50/16, Case 12.834, Merits (Publication), Undocumented Workers, United States, Nov. 30, 2016, para. 74; IACHR, Report No. 51/01, Case 9903, *Rafael Ferrer-Mazorra et al.*, United States, Apr. 4, 2001, para. 238.

<sup>44</sup> IACHR, Report on Terrorism and Human Rights (2002), para. 338.

<sup>45</sup> IACHR, Police Violence Against Afro-descendants in the United States. November 26, 2018, para. 195.

<sup>46</sup> IACHR, Resolution No. 23/89, Case 10.031, Willie L. Celestine, United States, September 28, 1989.

<sup>47</sup> IACHR, Report No. 57/97, Case No. 11.139, William Andrews, Merits, United States, December 6, 1996, para. 165.

<sup>48</sup> IACHR, Report No. 57/97, Case No. 11.139, William Andrews, Merits, United States, December 6, 1996, para. 165.

<sup>49</sup> IACHR, Report No. 57/97, Case No. 11.139, William Andrews, Merits, United States, December 6, 1996, para. 4.

<sup>50</sup> IACHR, Report No. 57/97, Case No. 11.139, William Andrews, Merits, United States, December 6, 1996, para. 159.

<sup>51</sup> IACHR, Report No. 78/15, Case 12.831, Merits (Publication), Kevin Cooper, United States, October 28, 2015

<sup>52</sup> IACHR, Report No. 78/15, Case 12.831, Merits (Publication), Kevin Cooper, United States, October 28, 2015, paras. 140 and 141.

65. Given this accepted existence of statistical disparities based on race at all stages of the criminal justice process, and that the Cooper case presented both of the variables cited in such disparities (an African-American defendant and white victims), the Commission considered the following:<sup>53</sup>

[...] the courts were on notice of this context and had the obligation to complete a full and fair inquiry into the possibility of evidence tampering and failure to fully investigate other hypotheses that pointed to the perpetrators having been white. While the Commission does not have before it the elements necessary to establish that racial discrimination in fact produced a tainted investigation, it does have before it elements sufficient to determine that this possibility was not fully investigated. The Commission must make clear that the questions of due process and possible racial discrimination cannot be considered in isolation; it is precisely the deficiencies in due process that have left the possibility of racial discrimination unresolved. It is on that basis that the United States is responsible for failing to fully respond to the allegations, information and proof concerning possible racial discrimination raised throughout this process pursuant to its obligations under Article II of the American Declaration.

66. In its report on The Situation of People of African Descent in the Americas, the IACHR, based on the General Recommendation No. XXXI issued by the United Nations Committee on the Elimination of Racial Discrimination ("CERD"),<sup>54</sup> indicated that "offences involving members of stigmatized or marginalized groups are more severely punished and that whatever the legal and procedural system in force in a given country, the structural inequalities, stereotypes and prejudices are mirrored in the criminal justice system."<sup>55</sup> The Commission also observed "the impact of racism in the criminal justice systems in the region" and reiterated that "the use of race and skin color as grounds to set and adjust a criminal sentence are banned by the inter-American system of human rights protection."<sup>56</sup>

67. Later, in its report on Police Violence Against Afro-descendants in the United States, the Commission echoed "the concerns of the CERD that African Americans continue to be disproportionately arrested, incarcerated, and subjected to harsher sentences, including life imprisonment without parole and the death penalty, and that this situation is exacerbated by the exercise of prosecutorial discretion, and the application of mandatory minimum drug-offenses sentencing policies and repeat offender laws."<sup>57</sup> The IACHR observed that "while the United States' legal framework effectively prohibits facial discrimination in law, it largely does not prohibit the disparate impact of facially neutral policies except in very limited legal circumstances. In general, measures to prevent, protect against, and remedy the effects of indirect discrimination exist only where provided for by statute, including for claims of employment, housing, and age discrimination."<sup>58</sup> In this regard, the IACHR stressed the urgency in bringing U.S. domestic law "in line with international standards in order to effectively prevent and sanction cases of disparate impact."<sup>59</sup> Implementing the provisions of the American Declaration includes the obligation to organize the entire State administrative and legal structure to enable the full exercise of human rights. Such actions may include reforms and reparations intended to transform the existing situation, as well as the adoption of special measures and affirmative actions aimed at effectively promoting those rights.<sup>60</sup>

68. The Commission also expressed deep concern that U.S. law does not prohibit disparate impact in the criminal justice system. In this regard, it has considered the U.S. Supreme Court's decision in *McCleskey v. Kemp* illustrative, as follows:<sup>61</sup>

In *McCleskey*, the Supreme Court held that the "racially disproportionate impact" of the application of the death penalty in Georgia, which the Court accepted as proven by a comprehensive scientific study, was not sufficient to overturn a death sentence without additionally proving a "discriminatory purpose" - that is, evidence of

<sup>53</sup> IACHR, Report No. 78/15, Case 12.831. Merits (Publication). Kevin Cooper. United States. October 28, 2015, para. 146.

<sup>54</sup> CERD, General Recommendation No. XXXI, U.N. Doc. CERD/C/GC/31/Rev.4 (2005).

<sup>55</sup> IACHR, The Situation of People of African Descent in the Americas, OEA/Ser.L/V/II. Doc. 62, December 5, 2011, para. 184.

<sup>56</sup> IACHR, The Situation of People of African Descent in the Americas, OEA/Ser.L/V/II. Doc. 62, December 5, 2011, para. 189.

<sup>57</sup> IACHR, Police Violence Against Afro-descendants in the United States. November 26, 2018, para. 136.

<sup>58</sup> IACHR, Police Violence Against Afro-descendants in the United States. November 26, 2018, para. 196.

<sup>59</sup> IACHR, Police Violence Against Afro-descendants in the United States. November 26, 2018, para. 7.

<sup>60</sup> IACHR, Police Violence Against Afro-descendants in the United States. November 26, 2018, para. 42.

<sup>61</sup> IACHR, Police Violence Against Afro-descendants in the United States. November 26, 2018, para. 197.

conscious, intentional bias. This holding, which moreover involves the fundamental right to life subject to the imposition of the death penalty, directly contradicts the international standard, which does not require discrimination to be purposive, conscious or intentional to violate human rights. In light of the state of federal law on this issue, the Commission notes as a positive approach the example of North Carolina’s Racial Justice Act (introduced in 2011 and subsequently repealed in 2013), which permitted capital defendants to challenge their sentences on grounds of racial bias. The Commission recalls that the obligation to guarantee equality and non-discrimination, as with all human rights norms, applies to all levels of government—federal, state, and local.

69. In a recent decision in a case of racial discrimination in jury selection in a death penalty case, the U.S. Supreme Court of Justice noted that “in the real world of criminal trials against black defendants, both history and math tell us that a system of race-based peremptories does not treat black defendants and black prospective jurors equally with prosecutors and white prospective jurors.”<sup>62</sup> This troubling conclusion of the highest court of the United States coincides with findings of various studies. A study conducted by Equal Justice Initiative in 2010 looked closely at jury selection procedures in eight states in the southern United States and uncovered shocking evidence of racial discrimination in jury selection in every state. It identified counties where prosecutors have excluded nearly 80% of African Americans qualified for jury service, as well as majority-black counties where capital defendants nonetheless were tried by all-white juries. The study also found that some prosecutors employed by state and local governments actually have been trained to exclude people on the basis of race and instructed on how to conceal their racial bias.<sup>63</sup>

### 3. Analysis of the case

70. According to the facts established in this report, prior to trial, defense counsel filed a motion to dismiss the Government’s notice of intent to seek the death penalty on the ground of racial bias and disparity in the application of the federal death penalty and related discrimination. In order to demonstrate the alleged systematic prosecutorial pattern of racial discrimination, the defense requested an evidentiary hearing. The defense also asked the court to order the prosecution to produce certain information.

71. Defense counsel justified the necessity of such information in order to demonstrate that the overwhelming majority of individuals for whom death penalty approval has been sought and issued from the Department of Justice, have been African-American. Given the jurisprudence establishing that a racially disproportionate pattern of capital charging, standing alone, is insufficient to demonstrate purposeful discrimination on a racial basis, the defense sought to demonstrate, “through the requested materials and evidentiary hearing, that despite knowledge of the racial imbalance in its capital charging decisions, the Department of Justice has persisted in a system of policies [...], which perpetuate this imbalance, thereby establishing purposeful discrimination.” The defense asserted that the failure to take “affirmative action” to overcome this racial imbalance, despite knowledge of its existence, is tantamount to purposeful discrimination. The district court summarily denied the motion.

72. The venire panel in Mr. Robinson’s trial was made up of 125 persons, of which ten were African-Americans. Eight were questioned on *voire dire* and the prosecution eliminated seven of them. Three of these were eliminated using peremptory strikes, that is, without a reason, against which the defense raised *Batson* challenges. Regarding the first venire member, the court noted that both the prosecutor and defense counsel exercised peremptory challenges. With regard to the second, the court concluded that the explanations given by the prosecution were race-neutral and that there was no similarly situated non-black venire member whom the prosecution chose not to strike.

73. When asked to provide a race-neutral reason for striking the third venire member, Ms. Amarh, the prosecutor responded that she “expressed great reluctance concerning the death penalty” and that they had earlier struck Ms. Broadwell, a white venire member with similar views on the death penalty. A later review of the questions posed to Ms. Broadwell, however, revealed that the prosecutor had reviewed the wrong questionnaire and that she did not have similar views to Ms. Amarh. Regardless of that mistake, however, the

<sup>62</sup> *Flowers v. Mississippi*, No. 17-9572, 588 U.S. \_\_ (2019), p. 15.

<sup>63</sup> Equal Justice Initiative. *Illegal Racial Discrimination in Jury Selection: A Continuing Legacy*. August 2010. Available at: <https://eji.org/sites/default/files/illegal-racial-discrimination-in-jury-selection.pdf>

court accepted the prosecutor's race-neutral explanation for striking Ms. Amarh as valid, based on her answers regarding the death penalty. The record before the Commission shows that, although Ms. Amarh was generally not in favor of the death penalty, she stated that there were some circumstances that warranted the death penalty.

74. The district court overruled the three *Batson* challenges raised by defense counsel. This resulted in a sitting jury of eleven white people and one black juror who stated that she strongly supported the death penalty for any first-degree murder.

75. According to the 5-4 U.S. Supreme Court's opinion in *McCleskey*, the existence of proven racially disproportionate impact in the imposition of the death penalty is not sufficient to overturn a death sentence. The Court further requires evidence of intentional bias. As previously indicated, this Commission has expressed deep concern with regard to this standard of proof. Beyond this concern, the IACHR notes that in the instant case, defense counsel asked the district court to request specific information to the prosecution, in order to prove the existence of a discriminatory purpose in compliance with the requirement set by the Supreme Court. As noted, the district court summarily denied the request, as well as the request for a hearing. Therefore, the possibility of racial discrimination in the capital charging decision process was left unresolved.

76. Based on the above-mentioned inter-American human rights standards, the Commission reiterates that distinctions based on race are subject to a particularly strict level of scrutiny whereby States must provide an especially weighty interest and compelling justification for the distinction. This level of scrutiny is even stricter in this case, given the application of the death penalty.

77. In addition to the unresolved possibility of racial discrimination in the capital charging decision, there is the question about the alleged racial discrimination in the selection of the jury. As previously recognized by the CERD and this Commission, structural inequalities, stereotypes and prejudices are mirrored in the criminal justice system. Hence the importance of ensuring that juries' composition reflects the racial diversity of the communities they represent.

78. In *Batson* the U.S. Supreme Court of Justice established that, once a defendant has made a showing that the prosecution excluded a member of the jury based on race, the government must provide a race-neutral explanation. In Mr. Robinson's case, the prosecution explained the peremptory strike used against a black venire member on two factors, one of which, that a white member with similar views on the death penalty had also been struck, was proven wrong. Regardless the prosecutor's mistake, the district court accepted the explanation for striking Ms. Amarh, based solely on her answers about the death penalty. The court, however, did not assess how her views were or not similar to those of Ms. Broadwell. This, according to the Commission, was essential to establish if there was a difference in treatment that amounted to racial discrimination. Considering the particularly strict level of scrutiny required in cases of possible racial discrimination, especially in death penalty cases, the Commission considers that such an error tainted the prosecutor's explanation and therefore the peremptory strike should have been the object of a thorough review.

79. The Commission emphasizes the fact that these deficiencies in the proceedings that lead to the imposition of the death penalty in Mr. Robinson's case, took place in a proven context of structural racial discrimination in the U.S. criminal justice system. Given the accepted existence of statistical disparities based on race at all stages of the criminal justice process, the Commission considers that the courts were on notice of this context and had the obligation to complete a full and fair inquiry into the possibility of racial discrimination in the capital charging decision and the jury selection.

80. As this Commission has already found, the questions of due process and possible racial discrimination cannot be considered in isolation; it is precisely the deficiencies in due process that have left the possibility of racial discrimination unresolved. The Commission recalls that the obligation to guarantee the human rights of individuals implies the obligation of the State to take all necessary measures to remove the obstacles that may exist for individuals to enjoy the rights recognized in the American Declaration.

81. In its report on Police Violence Against Afro-descendants in the United States mentioned above, the Commission noted and echoed “concerns by the CERD about the limited scope and applicability of the disparate impact doctrine in the U.S.; in particular, that it is out of line with the State’s duty to “prohibit and eliminate racial discrimination in all its forms, including practices and legislation that may not be discriminatory in purpose, but are discriminatory in effect.”” The Commission reiterates the United States’ obligation to adopt all legal and administrative measures necessary in order to recognize and guarantee the effective equality of all persons before the law.

82. It is on that basis that the IACHR concludes that the United States is responsible for failing to fully respond to the allegations of racial discrimination raised throughout Mr. Robinson’s proceedings pursuant to its obligations under Article II of the American Declaration. The IACHR also finds that Mr. Robinson’s lack of access to an effective remedy with regard to the allegations of racial discrimination amounts to a violation of Article XVIII of the American Declaration.

### **C. Right to a fair trial<sup>64</sup> and right to due process of law<sup>65</sup>**

#### **1. Use of unadjudicated offenses and future dangerousness in the imposition of the death penalty**

83. In the case of Juan Raul Garza, who was tried and convicted by a jury in Texas under federal law on three counts of killing in a continuing criminal enterprise, the IACHR found that the State’s conduct in introducing evidence of unadjudicated crimes during the capital sentencing hearing was contrary to Mr. Garza’s right to a fair trial, as well as his right to due process of law under Articles XVIII and XXVI of the American Declaration.<sup>66</sup> This was the first case in which the Commission considered the compatibility with the American Declaration of the use of evidence of unadjudicated offenses during the punishment phase of capital proceedings.

84. The IACHR established that “a significant and substantive distinction exists between the introduction of evidence of mitigating and aggravating factors concerning the circumstances of an offender or his or her offense” and the introduction of evidence designed to demonstrate dangerousness based on culpability for prior offenses that were never adjudicated.<sup>67</sup> The Commission recommended the United States to prohibit the introduction of evidence of unadjudicated crimes during the sentencing phase of capital trials. In the cases of Javier Suarez Medina, Humberto Leal Garcia, Bernardo Aban Tercero, who were convicted and sentenced to the death penalty in Texas, the IACHR reached the same conclusion.<sup>68</sup>

85. Texas is one of two states in the United States in which capital sentencing juries are required to find that defendants pose a continuing threat to society before they may impose the death penalty. As this Commission has noted, studies point to the lack of reliability of predictions of future dangerousness.<sup>69</sup> The IACHR has also stated that future dangerousness may prove problematic given its discretionary nature and the risk of considerations based on factors such as race:<sup>70</sup>

<sup>64</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>65</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 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.

<sup>66</sup> IACHR. Report No. 52/01. Case 12.243. Juan Raul Garza. United States. April 4, 2001, para. 110.

<sup>67</sup> IACHR. Report No. 52/01. Case 12.243. Juan Raul Garza. United States. April 4, 2001, para. 103-112.

<sup>68</sup> IACHR. Report No. 91/05. Case 12.421. Javier Suarez Medina. United States. October 24, 2005; IACHR. Report No. 90/09. Case 12.644. Admissibility and Merits (Publication), Medellín, Ramírez Cardenas and Leal García, United States, August 7, 2009; and IACHR. Report No. 79/15. Case 12.994. Bernardo Aban Tercero. United States. October 28, 2015.

<sup>69</sup> Deadly Speculation: Misleading Texas Capital Juries with False Predictions of Future Dangerousness 34 (2004) [http://texasdefender.org/wp-content/uploads/TDS\\_Deadly-Speculation.pdf](http://texasdefender.org/wp-content/uploads/TDS_Deadly-Speculation.pdf); Thomas J. Reidy, Jon R. Sorenson & Mark D. Cunningham, Probability of Criminal Acts of Violence: A Test of Jury Predictive Accuracy, 31 Behav. Sci. L. 286, 289 (2013).

<sup>70</sup> IACHR, Report No. 24/17, Case 12.254. Merits. Victor Saldaño. United States. March 18, 2017, para. 184.

[t]he element of future dangerousness accords the jury a high degree of discretionary authority to impose the harshest possible penalty and may prove problematic, given the likelihood that a future act will occur, exceeding the scope of the crime actually committed by the person in question. Accordingly, the Commission considers that, given that this is a matter of a criterion that depends on a subjective and speculative decision by the jury, the mere fact that it is required under internal law of the State of Texas constitutes a permanent risk that human rights violations could be committed against the person convicted and in consequence, that the death penalty could be imposed arbitrarily. This may include the undue consideration of such factors as race or mental health [...]

86. The Inter-American Court has ruled that the consideration of future dangerousness constitutes an infringement of the principle of legality established in Article 9 of the American Convention. The Court indicated that “it clearly constitutes an expression of the exercise of the State’s *ius puniendi* on the basis of the personal characteristics of the person and not of the act committed, that is, it substitutes the criminal law of act or fact, characteristic of the criminal system of a democratic society, for the criminal law of the author, which opens the door to authoritarianism precisely in a matter in which the legal assets of the highest hierarchy are at stake.”<sup>71</sup> The Court also pointed out that the assessment of dangerousness:<sup>72</sup>

[...] implies the judge’s appreciation of the probabilities that the accused will commit criminal acts in the future, that is, it adds to the indictment for the acts committed, the forecast of future act that will probably occur [...] In the end, the individual would be sanctioned - including the possibility of the application of the death penalty - not based on what he has done, but based on what he or she is. There is no need to ponder the implications, which are evident, of this return to the past, which is absolutely unacceptable from a human rights perspective.

87. The Commission notes that in 2016 the Constitutional Court of Guatemala ruled that the use of future dangerousness in the imposition of the death penalty was unconstitutional as it violated the principle of legality.<sup>73</sup>

88. According to the facts established in this report, the prosecution relied on evidence introduced through witnesses during the capital sentencing hearing to demonstrate its position that Mr. Robinson posed a future threat to society. As stated above, future dangerousness may prove problematic given its discretionary nature and the risk of considerations based on factors such as race.

89. Further, as previously stated, in similar cases regarding the application of the death penalty in Texas, the IACHR ruled that the introduction of evidence of unadjudicated crimes during the capital sentencing hearing was contrary to the rights to a fair trial and to due process of law. In the instant case, part of the evidence the jury relied on in making its sentencing decision was evidence introduced by the prosecution that Mr. Robinson had attempted to kill an informant who testified against him before the grand jury, as well as a former high-school classmate who owed him money for crack cocaine. Regarding the latter, the Commission notes that, although Mr. Robinson was ultimately sentenced to five years’ probation, he was convicted of deadly conduct and not of attempted murder. The Commission further notes that, according to the information available, Mr. Robinson was never charged for the supposed attempt to kill the informant. As the court of appeals noted, this evidence was used to show that Mr. Robinson had a propensity to commit future acts of violence.

90. Therefore, given that the likelihood of future dangerousness played an essential part in the determination of the death penalty, coupled with the fact that evidence of unadjudicated crimes was introduced during the capital sentencing hearing, the IACHR concludes that the United States violated Mr. Robinson’s rights to a fair trial and to due process of law set forth in Articles XVIII and XXVI of the American Declaration.

<sup>71</sup> Corte IDH. Caso Fermín Ramírez vs. Guatemala. Fondo, Reparaciones y Costas. Sentencia de 20 de junio de 2005. Serie C No. 126, para. 94.

<sup>72</sup> Corte IDH. Caso Fermín Ramírez vs. Guatemala. Fondo, Reparaciones y Costas. Sentencia de 20 de junio de 2005. Serie C No. 126, para. 94.

<sup>73</sup> Decision of the Constitutional Court of Guatemala. February 11, 2016. Available at: <http://181.174.117.21/cc/wp-content/uploads/2016/11/1097-2015.pdf>.

## 2. Ineffective assistance of court-appointed counsel

91. Adequate legal representation is a fundamental component of the right to a fair trial. The IACHR has found that “[t]he 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.”<sup>74</sup> According to the Commission, “[t]he 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.”<sup>75</sup>

92. The appointment of an attorney by the state does not, in and of itself, ensure effective assistance of counsel. At the same time, while the State is responsible for ensuring that such assistance is effective, it is not responsible for what may be understood as decisions of strategy or for every possible shortcoming. Rather, the Commission must evaluate whether the assistance of counsel was effective in the overall context of the process and taking into account the specific interests at stake.<sup>76</sup>

93. The Commission 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.”<sup>77</sup> The Commission has also indicated that due process protections, under the 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.<sup>78</sup>

94. 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 evidence in death penalty cases.<sup>79</sup> 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 into personal and family history.<sup>80</sup> 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

<sup>74</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, p. 123.

<sup>75</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, p. 123.

<sup>76</sup> IACHR, Report No. 79/15, Case 12.994. Merits (Publication). Bernardo Aban Tercero. United States. October 28, 2015, para. 111.

<sup>77</sup> IACHR, Report No. 90/09, Case 12.644, Admissibility and Merits (Publication), Medellín, Ramírez Cárdenas and Leal García, United States, August 7, 2009, para. 134.

<sup>78</sup> IACHR, Report No. 90/09, Case 12.644, Admissibility and Merits (Publication), Medellín, Ramírez Cárdenas and Leal García, United States, August 7, 2009, para. 134.

<sup>79</sup> American Bar Association, *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases* (Revised editions) (February 2003), Guideline 10.7 – Investigation. Available at: <http://www.abanet.org/legalservices/downloads/scldid/deathpenaltyguidelines.pdf>

<sup>80</sup> American Bar Association, *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases* (Revised editions) (February 2003), Guideline 10.7 – Investigation, at 82.

evaluations (including competency, mental retardation, or insanity), motion practice, and plea negotiations.”<sup>81</sup>

95. The petitioners allege ineffective assistance of trial counsel given the failure to adequately prepare for the penalty phase. In the post-conviction proceedings, Mr. Robinson’s counsel claimed, *inter alia*, failure to investigate and rebut prosecution’s aggravating evidence and failure to thoroughly prepare and present mitigating evidence. The district court concluded that Mr. Robinson failed to establish that his trial counsel’s performance fell below an objectively reasonable professional standard and that it prejudiced his case.

96. The IACHR notes that the information on the record shows that trial counsel hired a licensed investigator who had been involved in hundreds of criminal-defense investigations, including several capital-murder cases. Trial counsel also called ten positive character witnesses, in addition to the declaration of Mr. Robinson’s mother and uncle, as well as an expert witness. Based on these elements, the district court concluded that trial counsel conducted a thorough investigation. It also concluded that there was no reason for counsel to review Mr. Robinson’s lower-school records as he argued, given that counsel had reviewed his more recent high-school and college records.

97. The Commission also notes that post-conviction examinations concluded that Mr. Robinson had subtle cognitive deficits, general learning disabilities, and was more vulnerable to psychological and emotional problems. The district court ruled that, even if the new declarations provided evidence that Mr. Robinson’s life “may have been less positive than was portrayed at trial,” that evidence did not demonstrate how it would have altered the outcome of the trial. According to the court, this information would have not persuaded the jury, in light of all evidence to the contrary, that Mr. Robinson was less culpable for the murders. Regarding Mr. Robinson’s claim that trial counsel failed to sufficiently look for mitigating evidence in his social history, such as his involvement with gangs during his youth, the district court noted that counsel strategically chose not to emphasize this information because of fear that it would harm Mr. Robinson’s case more than it would help.

98. As previously indicated, while States are responsible for ensuring the effective assistance of court-appointed counsel, they are not responsible for what may be understood as decisions of strategy or for every possible shortcoming. Regarding the above-mentioned claims, the IACHR does not have sufficient factual elements to determine that trial counsel failed to adequately prepare for the penalty phase in detriment of Mr. Robinson’s right to effective legal representation.

99. With regard to the investigation of the prosecution’s evidence of future dangerousness, the record before the Commission shows that trial counsel failed to interview the persons involved in the incident that gave rise to the alleged attempt on the life of an informant. In post-conviction, defense counsel interviewed the three persons involved, who denied having acted under Mr. Robinson’s orders. The district court ruled that it was unlikely that the punishment would have been different if the jury had been presented with these versions of the events, versions that the court considered contradictory.

100. The Commission notes that trial counsel’s failure to investigate resulted in an inability to rebut evidence of future dangerousness. As indicated above, capital sentencing juries in Texas are required to find that defendants pose a continuing threat to society before they may impose the death penalty. Therefore, any rebuttal of such evidence introduced by the prosecution might in practice have an impact in the imposition of the death penalty. Had trial counsel interviewed the three persons involved in the incident who denied having acted under Mr. Robinson’s orders, they could have persuaded the jurors that Mr. Robinson did not pose a continuing threat to society so they could spare Mr. Robinson’s life notwithstanding the seriousness of his crime. Given the strict scrutiny applied in death penalty cases and the interests at stake, the sole possibility of a different outcome warrants that such failure should have been corrected by the courts.

<sup>81</sup> American Bar Association, *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases* (Revised editions) (February 2003), Guideline 10.7 – Investigation, at 83.

101. Finally, the Commission notes that Mr. Robinson's counsel chose not to raise *Batson* as a ground in direct appeal. As it has already been established, defense counsel raised *Batson* challenges against the elimination of three black venire members. The court accepted the prosecutor's race-neutral explanation for striking the third venire member, notwithstanding a mistake in the review of a questionnaire. The IACHR concluded that, considering the particularly strict level of scrutiny required in cases of possible racial discrimination, especially in death penalty cases, such an error tainted the prosecutor's explanation and therefore the peremptory strike should have been the object of a thorough review.

102. 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 adequately investigate and rebut the prosecution's evidence and to adequately appeal the death sentence would constitute inadequate representation, the Inter-American Commission concludes that the United States violated Mr. Robinson's right to due process and to a fair trial under Articles XVIII and XXVI of the American Declaration. The Commission also concludes that Mr. Robinson's lacked an effective remedy to assert his claim of failure to investigate and rebut the prosecutor's evidence regarding future dangerousness.

#### **D. The right to access to information<sup>82</sup> with respect to the death penalty decision-making process and the lethal injection protocol**

103. The Commission notes that Mr. Robinson was twice denied access to relevant information during the proceedings. First, a request for discovery regarding the government's decision-making in death-penalty cases was denied by the district court. This information was necessary to know the arguments presented by the government to seek the death penalty and identify any possible racial bias. Second, the petitioners argue that the U.S. Government designated as "confidential" the lethal injection protocol as well as critical portions of deposition testimony revealing the qualifications, training, and procedures used by personnel involved in its lethal injection process. The State does not dispute this information.

104. The right to access to information is a fundamental right protected by Article IV of the American Declaration, and the States have the obligation to guarantee the full exercise of this right.<sup>83</sup> The IACHR's Declaration of Principles on Freedom of Expression establishes in Principle 3 that every person has the right to access to information about himself or herself in an expeditious manner.<sup>84</sup>

105. With regard to access to information relating to judicial proceedings, although the State is allowed to reserve the proceedings at the initial stage to safeguard the investigation, it must substantiate the legitimate aim pursued and demonstrate that it is a suitable, necessary and strictly proportional means for the purpose sought. The State, however, cannot invoke the reservation to prevent the accused from having access to the judicial file since this is a basic requirement of the right to an effective defense. In the instant case, the discovery request was denied by the district court and there is no information before the IACHR on the reasons stated by the court to deny the request. This information was essential to establish whether Mr. Robinson's race had any bearing on the government's decision to seek the death penalty and thus had an impact on his right to due process and judicial protection.

<sup>82</sup>Article IV of the American Declaration provides: "Every person has the right to freedom of investigation, of opinion, and of the expression and dissemination of ideas, by any medium whatsoever."

<sup>83</sup> See generally IACHR, The Inter-American Legal Framework Regarding the Right to Access to Information. December 30, 2009.

<sup>84</sup> IACHR. Declaration of Principles on Freedom of Expression, Principle 3, October 20, 2000.

106. With regard to the confidentiality of the lethal injection protocol, the IACHR recalls that 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 the case of execution by lethal injection, and the composition of the execution team as well as the training of its members.<sup>85</sup>

107. Any person subjected to the death penalty must have the opportunity to challenge every aspect of the execution procedure and such information is necessary to file a challenge. The IACHR notes in this regard that the obligation of the State to provide due process is not limited to the conviction and post-conviction proceedings.<sup>86</sup> Accordingly, the State has the duty to inform the person sentenced to death, in a timely manner, about the drug and method of execution that will be used, so he or she is not precluded from litigating the right to be executed in a manner devoid of cruel and unusual suffering.

108. Based on the above considerations, the IACHR concludes that, by refusing to provide information on the arguments presented by the government to seek the death penalty and to reveal the execution protocol, the State has violated Mr. Robinson's right to access to information set forth in Article IV of the American Declaration, in connection to Mr. Robinson's right to fair trial and due process of law set forth in Articles XVIII and XXVI of the Declaration.

## **E. Right not to receive cruel, infamous or unusual punishment**

### **1. Method of execution**

109. 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.<sup>87</sup>

110. Any person subjected to the death penalty must have the opportunity to challenge every aspect of the execution procedure and such information is necessary to file a challenge. The IACHR notes in this regard that the due process requirement is not limited to the conviction and post-conviction proceedings.<sup>88</sup> Therefore, the State has the duty to inform the person sentenced to death, in a timely manner, about the drug and method of execution that will be used, so he or she is not precluded from litigating the right to be executed in a manner devoid of cruel and unusual suffering.

111. Further, the IACHR highlights the reinforced special duty of the State to ensure that the method of execution does not constitute cruel, infamous or unusual punishment. In this regard, the U.N. Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment stated that "[t]he fact that a number of execution methods have been deemed to constitute torture or CIDT, together with a growing trend to review all methods of execution for their potential to cause severe pain and suffering, highlights the increasing difficulty with which a state may impose the death penalty without violating international law."<sup>89</sup>

<sup>85</sup> IACHR, Report No. 44/14, Case 12.873, Merits (Publication), Edgar Tamayo Arias, United States, July 17, 2014, para. 189.

<sup>86</sup> IACHR, Report No. 44/14, Case 12.873, Merits (Publication), Edgar Tamayo Arias, United States, July 17, 2014, para. 190.

<sup>87</sup> IACHR, Report No. 44/14, Case 12.873, Merits (Publication), Edgar Tamayo Arias, United States, July 17, 2014, para. 189.

<sup>88</sup> IACHR, Report No. 44/14, Case 12.873, Merits (Publication), Edgar Tamayo Arias, United States, July 17, 2014, para. 190.

<sup>89</sup> The death penalty and the absolute prohibition of Torture and Cruel, Inhuman, and Degrading Treatment or Punishment, Juan E. Mendez, Human Right Brief, Volume 20, Issue 1, Article 1, p. 3.

112. The IACHR also notes that the United Nations Committee Against Torture received substantiated information indicating that executions in the United States can be accompanied by severe pain and suffering and requested the State to “carefully review its execution methods, in particular lethal injection, in order to prevent severe pain and suffering.”<sup>90</sup>

113. In 2007, Mr. Robinson and other federal death row inmates filed a federal civil lawsuit in the U.S. District Court for the District of Columbia claiming that the means by which the government sought to implement the death penalty would violate the U.S. Constitution as well as federal law. In 2012, the District Court for the District of Columbia ordered that the case be stayed pending the Bureau of Prisons’ issuance of a revised lethal injection protocol. According to publicly available information, in July, 2019, the Justice Department announced that the federal government will resume its executions using a single drug (pentobarbital). However, as of the time of adoption of the present report, there is no information regarding Mr. Robinson’s possible execution. There is also no information regarding the origins of the drugs that will be used, the composition of the execution team or the training of its members.

114. Based on the above considerations, and the uncertainty surrounding death penalty executions in Texas, the IACHR concludes that the State is exposing Mr. Robinson to 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.

## **2. The deprivation of liberty on death row and the right of protection against cruel, infamous or unusual punishment**

115. 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>91</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>92</sup>

116. Specifically, regarding the matter of prolonged solitary confinement on death row, the Inter-American Commission has determined that deprivation of liberty under certain conditions on death row, including solitary confinement for four years, constituted inhuman treatment.<sup>93</sup>

117. The UN Special Rapporteur on Torture has found that:

Individuals held in solitary confinement suffer extreme forms of sensory deprivation, anxiety and exclusion, clearly surpassing lawful conditions of deprivation of liberty. Solitary confinement, in combination with the foreknowledge of death and the uncertainty of whether or when an execution is to take place, contributes to the risk of serious and irreparable mental and physical harm and suffering to the inmate. Solitary confinement used

<sup>90</sup> Committee Against Torture, Considerations of Reports submitted by State Parties under Article 19 of the Convention, United States, CAT/C/USA/CO/2, July 25, 2006, para. 31.

<sup>91</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>92</sup> IACHR, Report No. 71/18, Case 12.958. Merits. Russell Bucklew. United States, May 10, 2018, para. 83.

<sup>93</sup> IACHR, Report No. 24/17, Case 12.254. Merits. Victor Saldaño. United States. March 18, 2017, para. 246, citing IACHR, Report No. 58/02. Merits. Case 12.275. Denton Aitken. Jamaica. October 21, 2002, paras. 133 and 134.

on death row is by definition prolonged and indefinite and thus constitutes cruel, inhuman or degrading treatment or punishment or even torture.<sup>94</sup>

118. As established in this report, Mr. Robinson has been deprived of his liberty on death row for 20 years. The Commission notes that the very fact of spending 20 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. Consequently, the United States is responsible for violating, to the detriment of Mr. Robinson, the right to humane treatment, and not to receive cruel, infamous or unusual punishment established in Articles XXV and XXVI of the American Declaration.

**F. Right to life<sup>95</sup> and to protection against cruel, infamous or unusual punishment with respect to the eventual execution of Julius Omar Robinson**

119. 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>96</sup>

120. Throughout this report, the Commission established that, *inter alia*, the United States failed to fully respond to the claims of racial discrimination raised in Mr. Robinson's proceedings, that the prosecution introduced evidence of unadjudicated crimes during the capital sentencing hearing, that Mr. Robinson was not afforded with adequate legal representation on direct appeal, and the 20 years that he has been on death row constitute cruel and inhumane treatment.

121. 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>97</sup> Further, based on the conclusions regarding the deprivation of liberty on death row, the eventual execution of Mr. Robinson 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. Robinson would constitute a serious violation of his right to life established in Articles I of the American Declaration.

**VI. REPORT No. 162/19 AND INFORMATION ABOUT COMPLIANCE**

122. On November 9, 2019, the Commission approved Report No. 162/19 on the merits of the instant case, which encompasses paragraphs 1 to 121 supra, and issued the following recommendations to the State:

1. Grant Julius Omar Robinson 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 Julius Omar Robinson has been held on death row, the Commission recommends that if the new trial results in a conviction, that his sentence be commuted.

<sup>94</sup> United Nations. Interim report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment of punishment. 9 August 2012. A/67/279. para 48.

<sup>95</sup> Article I of the American Declaration establishes: Every human being has the right to life, liberty and the security of his person.

<sup>96</sup> IACHR, Report No. 53/13, Case 12.864, Merits (Publication), Ivan Teleguz, United States, July 15, 2013, para. 129.

<sup>97</sup> IACHR, Report No. 11/15, Case 12.833, Merits (Publication), Félix Rocha Díaz, United States, March 23, 2015, para. 106.

2. Review its laws, procedures, and practices 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,<sup>98</sup> including Articles I, II, IV, XVIII, XXV and XXVI thereof, and, in particular that:
  - a. claims of racial discrimination are thoroughly and fully investigated;
  - b. defense counsel have access to information in the framework of the criminal proceedings;
  - c. trial and appellate court-appointed counsel provide adequate legal representation in death penalty cases, including claims regarding racial discrimination; and
  - d. evidence of unadjudicated offenses are not introduced during capital sentencing.
3. Review its laws, procedures, and practices to ensure that persons sentenced to the death penalty have access to effective judicial remedies to challenge the possible impact of the method of execution on their fundamental rights in accordance with the standards set forth in this merits report.
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>99</sup>

123. On December 11, 2019, the Commission transmitted the report to the State with a time period of two months to inform 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 the date of approval of this report, the IACHR has not received any response from the United States regarding Report No. 162/19.

124. On May 18, 2020, petitioners informed the Commission that so far, they have not received any communication from any United States Government agency regarding measures taken to implement the Commission's recommendations. Petitioners also informed that on January 6, 2020, they contacted the U.S. Department of State to speak with counsel of the United States in this matter and that on February 4, 2020 it replied that it was waiting for a response from the DoJ. Petitioners requested the Department of State that it expedite its internal review process such that the parties could attempt to work out a settlement. Since 4 February 2020, they have heard nothing further from the Government.

## **VII. REPORT No. 199/20 AND INFORMATION ABOUT COMPLIANCE**

125. On July 31, 2010, the Commission approved Final Merits Report No. 199/20 in which the Commission reiterated all of its recommendations to the State. On the same day, the IACHR transmitted the report to the State and the petitioners with a time period of one week to inform the Commission on the measures taken to comply with its recommendations. To date, the Commission has not received any response from the United States or the petitioners regarding report No. 199/20.

## **VIII. FINAL CONCLUSIONS AND RECOMMENDATIONS**

126. 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 personal security), II (equality before the law), IV (freedom of expression), XVIII (fair trial), XXV (protection from arbitrary detention), and XXVI (due process of law) of the American Declaration.

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

<sup>98</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.

<sup>99</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.

1. Grant Julius Omar Robinson 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 Julius Omar Robinson has been held on death row, the Commission recommends that if the new trial results in a conviction, that his sentence be commuted.

2. Review its laws, procedures, and practices 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, II, IV, XVIII, XXV and XXVI thereof, and, in particular that:

- a. claims of racial discrimination are thoroughly and fully investigated;
- b. defense counsel have access to information in the framework of the criminal proceedings;
- c. trial and appellate court-appointed counsel provide adequate legal representation in death penalty cases, including claims regarding racial discrimination; and
- d. evidence of unadjudicated offenses are not introduced during capital sentencing.

3. Review its laws, procedures, and practices to ensure that persons sentenced to the death penalty have access to effective judicial remedies to challenge the possible impact of the method of execution on their fundamental rights in accordance with the standards set forth in this merits report.

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.

## **IX. PUBLICATION**

127. 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 12 day of the month of August 2020. (Signed): Joel Hernández García, President; Antonia Urrejola Noguera, First Vice President; Flávia Piovesan, Second Vice President and Julissa Mantilla Falcón, Commissioner.

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.