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## **REPORT No. 79/15**

### **CASE 12.994**

REPORT ON MERITS (PUBLICATION)

BERNARDO ABAN TERCERO  
UNITED STATES

Approved by the Commission at its session No. 2054 held on October 28, 2015.  
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United States. October 28, 2015.



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\* Commissioner James Cavallaro, a U.S. national, did not participate in discussing or deciding this case, in accordance with Article 17.2.a of the IACHR’s Rules of Procedure.

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**I. SUMMARY**

1. On September 10, 2009, the Inter-American Commission on Human Rights (hereinafter, "the Inter-American Commission" or "the IACHR") received a petition lodged by Peter Bellamy (hereinafter, "the petitioner") on behalf of Bernardo Aban Tercero (hereinafter, "the alleged victim" or "Mr. Tercero"), a Nicaraguan national deprived of his liberty on death row in Texas, United States. Subsequently, Mr. Bellamy requested that Mr. Ignacio Mujica and Ms. Melissa Hooper of Human Rights First, along with Mr. Tercero's current counsel, Mr. Mike Charlton, be added as co-petitioners in this case. Mr. Tercero is scheduled to be executed on August 26, 2015.

2. The petitioners argue that Mr. Tercero was under 18 years of age at the time of the offense; that despite the alleged victim's request the State refused to notify Nicaraguan consular authorities in violation of Article 36 of the Vienna Convention on Consular Relations; and that court-appointed counsel rendered ineffective assistance because the performance of his court-appointed attorneys during a span of 15 years fell far short of a reasonable professional standard. The petitioners also argue that Mr. Tercero was never afforded an opportunity to fully develop and present his claim of ineffective assistance of trial counsel and that state and federal courts systematically rejected his requests for substitution of counsel. The petitioners argue Mr. Tercero was therefore unable to present an adequate defense in a capital case or challenge the effectiveness of his counsel, both of which prevented him from exercising his right to a fair trial and to due process.

3. The United States submits that all of Mr. Tercero's claims are inadmissible and that the IACHR should reconsider and reverse its decision on the admissibility of the case. In the alternative, it argues that the IACHR should find that no violations of the American Declaration were committed with regard to the claims that Mr. Tercero was provided ineffective assistance of counsel, that he was under the age of 18 at the time of the offense and that he was denied consular assistance.

4. On June 24, 2015, the IACHR examined the contentions of the petitioner on the question of admissibility, and without prejudging the merits of the matter, decided to admit the claims in the present petition pertaining to Articles I (Right to life, liberty and personal security), VII (Right to protection for mothers and children), XVIII (Right to a fair trial) and XXVI (Right to due process of law) of the American Declaration; and to continue with the analysis of the merits of the case. It also resolved to publish Admissibility Report N° 24/15 and to include it in its Annual Report to the General Assembly of the Organization of American States. The petition was then registered as Case No. 12.994.

5. In the instant report, after analyzing the position of the petitioners and the State, taking into account the available information, the Inter-American Commission concludes that the United States is responsible for violating Articles XVIII and XXVI of the American Declaration with respect to Bernardo Aban Tercero. Consequently, should the State carry out the execution of Mr. Tercero, it would also be committing a serious and irreparable violation of the right to life recognized in Article I of the American Declaration.

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

## **II. PROCEEDINGS SUBSEQUENT TO REPORT NO. 24/15**

6. On June 29, 2015, the IACHR forwarded Admissibility Report No. 24/15 to the State and to the petitioners. In accordance with Article 37(3) of the Rules of Procedure, the Inter-American Commission set a deadline of two weeks for the petitioners to submit additional observations on the merits and, at the same time, placed itself at the disposal of the parties to pursue a friendly settlement of the matter.

7. On July 4, 2015, the petitioners filed an application to the Legal Assistance Fund of the Inter-American Human Rights System requesting funds to “be employed to finally perform a proper investigation on the mitigating evidence for Mr. Tercero’s case [...] and further clarify the extent of the ineffective nature of Tercero’s trial and habeas counsel.” These issues, according to the request, “could substantially assist the Commission in deciding the extent to which Mr. Tercero’s basic due process rights were violated by the state party.” After analyzing the application and pursuant to Article 6 of the Rules of the Legal Assistance Fund, the Directive Council of the Fund decided to approve the request and grant the amount of US\$ 2,561.60 to cover part of the expenses of the investigation.

8. On July 10, 2015, the IACHR received additional observations on the merits of this case from the petitioners. The pertinent parts of their submissions were duly forwarded to the State on July 13, 2015, and, pursuant to Article 37(3) of the Rules of Procedure and the situation of urgency, the Inter-American Commission set a deadline of two weeks for the State to submit its observations on the merits. On July 31, 2015, the State requested an extension until August 7, 2015, which was granted by the IACHR. On August 4, 2015, the petitioners submitted information related to the findings of the investigation conducted in Nicaragua in July 2015, which was duly forwarded to the State.

9. On August 7, 2015, the IACHR received observations on the merits of this case from the United States, which were duly forwarded to the petitioners.

### **Precautionary Measures**

10. On April 4, 2013, the IACHR notified the State that precautionary measures had been granted on behalf of the alleged victim, and requested that a stay of execution be ordered until such time as it would be able to pronounce on the merits of the petition. In light of the imminent execution of Mr. Tercero, scheduled for August 26, 2015, the Inter-American Commission reiterated the request to the State by note dated July 6, 2015.

## **III. POSITIONS OF THE PARTIES**

### **A. Position of the petitioners**

11. According to the information available, on September 2, 1997, Mr. Tercero, a Nicaraguan national, was charged with capital murder in connection with the death of Mr. Robert Berger in Houston, Texas. Mr. Tercero returned to Nicaragua and was subsequently indicted for this crime in the 232nd District Court of Harris County, Texas, on October 7, 1997. In July 1999, Mr. Tercero was arrested upon returning to the United States. His capital murder trial began on October 10, 2000, and on October 19, 2000, the jury sentenced him to death.

12. The original petitioner, Mr. Bellamy, initially argued that Mr. Tercero was under 18 years of age at the time of the offense; that despite the alleged victim's request the State refused to notify Nicaraguan consular authorities that he was in custody in violation of Article 36 of the Vienna Convention on Consular Relations; and that court-appointed counsel rendered ineffective assistance. In their additional observations on the merits the petitioners address the alleged ineffective assistance of counsel and claim that, as a result of this inadequate assistance, trial records were so poorly maintained and so incomplete that there is insufficient evidence to support the claims that Mr. Tercero was under the age of 18 at the time of the offense or that he requested and was denied consular assistance. Nevertheless, the petitioners note that their determination as to the impossibility of further developing those arguments is not a reflection of their merits,

but rather of the profound gaps in the record as the result of repeated failures of counsel at each stage of Mr. Tercero's case.

### **1. Ineffective assistance of counsel**

13. The petitioners submit that Mr. Tercero was never provided with effective assistance of counsel throughout the pre-trial, trial and post-conviction stages of his case given that the performance of his court-appointed attorneys during a span of 15 years fell far short of a reasonable professional standard. The petitioners also submit that the denial of effective representation in collateral proceedings prevented Mr. Tercero from ever fully developing and presenting his claim of ineffective assistance of trial counsel and, despite the fact that Mr. Tercero's appointed counsel failed to comply with minimum standards for capital defense representation, state and federal courts systematically rejected his requests for substitution of counsel. The petitioners argue that the ineffective assistance of counsel and the State's refusal to substitute counsel prevented Mr. Tercero from mounting an adequate defense in a capital case, which constitutes a violation of his right to a fair trial and to due process.

14. Moreover, they claim that Mr. Tercero's trial fell far short of the necessary procedural guarantees required by international law, constituting a violation of Articles XVIII and XXVI of the American Declaration and rendering his death sentence unlawful. First, with regard to the pre-trial stage of Mr. Tercero's case, the petitioners submit that Mr. Tercero's trial counsel, Messrs. Gilbert Villareal and John L. Denninger, failed to investigate an enormous number of potential mitigating factors. Specifically, the petitioners argue that trial counsel ignored or failed to conduct an adequate investigation to uncover substantial and readily available evidence of Mr. Tercero's family history of mental health issues and his own risk factors for psychological illness and potentially diminished mental capacity. The petitioners argue that the right to due process in capital trials includes the right to present all mitigating evidence and that the fundamental nature of this guarantee is reflected in practice guidelines for lawyers, including in the American Bar Association Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (hereinafter "ABA Guidelines"). The petitioners affirm that the ABA Guidelines require a competent defense counsel to investigate anything in the life of the defendant which might mitigate against the appropriateness of the death penalty for the defendant and conduct extensive investigation into personal and family history, such as: i) medical history including mental health, malnutrition, developmental delays or neurological trauma; ii) family social history including poverty and family history of mental illness; iii) educational history including cognitive limitations; and iv) employment and training history including barriers to employability.

15. The petitioners also aver that mitigation investigation should begin as quickly as possible as it may affect the investigation of defenses for the first phase of trial, decisions about the need for expert evaluations, motion practice and plea negotiations. The petitioners submit, however, that Mr. Tercero's trial counsel failed to act promptly and diligently despite having been provided with ample resources and the opportunity to do so. In this regard, the petitioners submit that, despite being appointed in August 1999 and February 2000, respectively, and having a private investigator at their disposal since February 2000, Messrs. Villareal and Denninger did not begin investigations on Mr. Tercero's case until September 12, 2000, a mere three weeks before trial, when the private investigator, at their direction, conducted cursory interviews with a few potential witnesses and routine background checks. Moreover, the petitioners submit that, despite being provided \$21,670 by the District Court of Harris County, Texas, in late September 2000, to hire a private investigator in Nicaragua in order to interview character and material witnesses and to secure attendance of witnesses from Nicaragua, trial counsel failed to adequately investigate mitigating or mental health evidence. According to the petitioners, despite having the resources to hire a knowledgeable professional, Mr. Tercero's trial counsel decided to spend only \$500 on an investigator of unknown investigative experience or credentials as a mitigation expert and later returned \$8,449.42 in unused advance expenses to the Harris County Auditors Office. In addition, the petitioners argue that the investigation conducted personally by Mr. Villareal was also deficient and untimely as it was conducted only one week before trial began and his notes indicate that the interviews conducted during his trip to Nicaragua were aimed primarily at preparing witnesses to travel to the United States to testify and not to learn more about Mr. Tercero's background.

16. The petitioners argue that from the beginning of Mr. Tercero's case there was enough information to identify specific areas of mitigation that an effective capital defense team should have known to investigate. In this regard, they note that several mitigation factors were uncovered many years later in a privately-funded post-conviction investigation carried out with limited resources in May 2015 by a mitigation expert, such as: i) a family history of mental illness, including descriptions of repeated institutionalizations of paternal relatives as well as the story of Mr. Tercero's father's possible suicide by self-immolation; and ii) Mr. Tercero's likely exposure to pesticides during childhood, or even in utero, which, on the basis of the known neurological consequences of such pesticides, would have provided further support for Mr. Tercero's request that he be evaluated for cognitive impairments.

17. Moreover, the petitioners argue that the pre-trial investigation was also deficient with respect to the clinical evaluation of Mr. Tercero. They submit that Mr. Tercero's trial counsel did not take steps to have a psychologist speak to or evaluate Mr. Tercero until late September 2000 and that, in requesting the psychologist's assistance, they did not request the psychologist to provide assistance with possible mental state defenses nor did they inform the psychologist of Mr. Tercero's risk factors. The petitioners also claim that it is not known whether an evaluation of his mental health ever took place, as Mr. Tercero's trial counsel did not preserve any records of such an evaluation nor did they refer to any potential findings of the psychologist during trial.

18. Second, with respect to the trial stage of Mr. Tercero's case, the petitioners submit that trial counsel ineffectively represented Mr. Tercero during the guilt phase of the trial by calling only Mr. Tercero to testify, as opposed to 17 prosecution witnesses, despite having been provided with the financial resources to call expert or bystander witnesses to support the defense theory. The petitioners further submit that Messrs. Villareal and Denninger also failed to provide effective assistance during the penalty phase of Mr. Tercero's trial since they presented no mitigating evidence about his psychological health or mental capacity as a result of their failure to investigate such issues. The petitioners note that trial counsel did call witnesses to testify about Mr. Tercero's character and good deeds at the penalty stage of the trial but failed to explain, in the closing arguments, how Mr. Tercero's humble beginnings or good deeds reduced his moral culpability. The petitioners assert that, had trial counsel properly investigated and presented mitigating factors during the pre-trial and trial stages of Mr. Tercero's case, his moral culpability for the crime could have been reduced and would have made the jury more likely to return the alternate sentence of imprisonment for 40 years instead of a death sentence.

19. In addition, the petitioners submit that, during the prosecution's closing argument, Messrs. Villareal and Denninger failed to object to the prosecution's reference to Mr. Tercero as a "demon" and a "beast" even though the use of such abusive and dehumanizing language by the prosecution is precisely the sort of statement that courts have found to be improper in past cases. The petitioners submit that ABA Guideline 10.8 states that counsel must raise all arguably meritorious issues, thus preserving the record for future review. Petitioners note that the Commentary to Guideline 10.8 determines that one of the most fundamental duties of an attorney defending a capital case is the preservation of any and all conceivable errors for each stage of appellate and post-conviction review. Similarly, they claim that the American Bar Association's Criminal Justice Standards for the Defense states, in Standard 4-1.5, that counsel must take the steps necessary to make clear and complete record for potential review, including by making objections and placing explanations on record. The petitioners argue that an effective lawyer should have quickly objected to the use of highly inflammatory language by the prosecution and the failure to object to the prosecution's characterization of Mr. Tercero was not only prejudicial in the sentencing phase itself, but also prevented the issue from being raised on appeal.

20. Third, with respect to the post-conviction stage of Mr. Tercero's case, the petitioners submit that Mr. Tercero was ineffectively represented by several attorneys appointed to handle his motion for a new trial, his direct appeal, his state habeas petition and his federal habeas petition. With regard to the attorney appointed to handle Mr. Tercero's motion for a new trial and his direct appeal in state courts, the petitioners submit that this counsel filed a motion for a new trial based exclusively on the allegation of prosecutorial misconduct and once the motion was denied he failed to file an appeal.

21. With regard to the initial state habeas stage of Mr. Tercero's case, the petitioners argue that the Guidelines and Standards for Texas Capital Counsel (hereinafter "Texas Guidelines") note that habeas counsel has a special duty to investigate the record with respect to any potential ineffective assistance of trial counsel claims because the petitioner cannot raise such claims without a fact-intensive and exhaustive review of the proceedings as a whole. Similarly, the petitioners claim that the ABA Guidelines determine that counsel in habeas cases, as in all other stages of representation, has a duty to preserve all arguably meritorious issues and should assume that any issue not contained in the initial application will be waived or procedurally defaulted in subsequent litigation or barred by strict rules governing subsequent applications.

22. Moreover, the petitioners assert that, while the direct appeals process is record-bound and requires the attorney to raise any errors on the record, the state habeas process, on the other hand, requires counsel to undertake independent investigations into the facts of the case and the habeas petitioner's background in order to develop a complete picture of their case and client. The petitioners submit that habeas counsel must treat state habeas proceedings as both the first and last meaningful opportunity to present new evidence to challenge the conviction and sentence. The petitioners aver that as a part of his or her investigation, state habeas counsel must retain, as soon as possible after appointment, an independent mitigation specialist who must be trained to compile a comprehensive and well-documented psychosocial history of the client, including the effect of life experiences on the petitioner's psychological and cognitive development, the need for assistance from mental health experts and any other aspects of the petitioner's social history.

23. The petitioners claim, however, that the attorney appointed to file Mr. Tercero's state habeas petition, Mr. Richard Wheelan, failed to abide by the aforementioned requirements of habeas proceedings. In this regard, they submit that Mr. Wheelan failed to raise a claim of ineffective assistance of Mr. Tercero's trial counsel due to their failure to investigate mitigating evidence and thus failed to properly preserve the record for future review. Furthermore, they submit that Mr. Wheelan: i) never undertook his own investigation of the facts of Mr. Tercero's case or his trial counsel's failure to explore mitigating evidence; ii) never interviewed witnesses and jurors from Mr. Tercero's trial; iii) never investigated Mr. Tercero's school, medical or other social history records; iv) never called for psychiatric or neuropsychological examination of Mr. Tercero; and v) never requested funds to investigate Mr. Tercero's mental health or social history. Instead, petitioners submit that Mr. Tercero's state habeas counsel based the submissions in his state habeas petition exclusively on information contained in the Clerk's Record and trial transcripts and an effective counsel would have known that direct appeal-like and record-based claims are not cognizable in state habeas corpus proceedings and can be fatal to the capital client. The petitioners submit that this form of pleading was common for Mr. Wheelan, as was reported by a newspaper reviewing problems with Texas death row representation. According to this news report, Mr. Wheelan had submitted a number of habeas writs copied largely verbatim from a death row's inmate direct appeal. The petitioners conclude that Mr. Wheelan therefore prejudiced Mr. Tercero not only by failing to conduct a full investigation, but also by squandering one of Mr. Tercero's limited opportunities for judicial review on claims that were not even legally cognizable in habeas proceedings.

24. With regard to the initial federal habeas stage of Mr. Tercero's case, the petitioners repeat their submissions regarding the obligation of counsel to conduct a thorough investigation into Mr. Tercero's trial record and personal history, and concerning the requirement to raise all meritorious issues and preserve the trial record. The petitioners submit, however, that Mr. Tercero's federal habeas counsel, Mr. Donald Vernay, also failed to conduct a thorough investigation into Mr. Tercero's personal and family history, including mitigating evidence not presented at trial, despite being urged to do so by Mr. Tercero and being provided the necessary resources to conduct such an investigation, namely the assistance of a private investigator. Mr. Tercero initially filled out a printed petition by hand which contained four claims, including the novel claim that he was under the age of 18 at the time of the offense and could not be executed in light of the U.S. Supreme Court's decision in *Roper v. Simmons* (2005). His federal habeas counsel later filed an amended federal habeas petition which adopted the four issues raised in the *pro se* petition filed by Mr. Tercero and included additional issues for the first time. In light of conflicting evidence and principles of comity, on March 31, 2008, the federal District Court issued an order staying and closing federal habeas

proceedings so that Mr. Tercero could remand to state court to discuss his *Roper* claim as well as any other claims that had not been presented to state courts.

25. Mr. Tercero continued to be represented by Mr. Vernay during the state habeas remand proceedings and the petitioners submit that counsel failed to argue all meritorious issues and preserve the trial record during those proceedings. In this regard, they submit that Mr. Vernay, despite being given the opportunity to raise all claims not previously presented to state courts, inexplicably decided to raise only the *Roper* claim during remand proceedings, thus preventing state courts from hearing all the other claims initially filed in Mr. Tercero's *pro se* federal habeas petition and Mr. Vernay's amended federal habeas petition, including the claims concerning ineffective assistance of counsel. Moreover, the petitioners assert that in his eight-page state habeas petition, Mr. Vernay submitted a mere one-page briefing to support Mr. Tercero's *Roper* claim and presented virtually no evidence in support. The petitioners submit that after state courts denied Mr. Tercero habeas relief and federal habeas proceedings were reopened, Mr. Vernay sought to address all the claims made in the initial federal habeas petition, including those issues that were omitted in his state habeas petition on remand, but as a result of his omission, the federal District Court was precluded from hearing any issue that had not been fully exhausted in state court. The petitioners submit that an effective counsel would have known that the duty to argue all meritorious issues at the first opportunity is especially important in state proceedings since the failure to present an issue will prejudice the client in future federal proceedings.

26. The petitioners submit that, despite Mr. Vernay's errors, Mr. Tercero, on the basis of a narrow exception, might still have been able to overcome the procedural default on his claim that ineffective assistance of state habeas counsel prevented him from raising an ineffective assistance of trial counsel claim. The petitioners submit that, in order to do so, Mr. Tercero would have needed to show cause and actual prejudice, which required his counsel to conduct an investigation to uncover evidence that existed at the time of trial and was not presented. However, the petitioners assert that no investigation was conducted and that pleadings submitted by federal habeas counsel were so deficient that the federal District Court held that Mr. Tercero failed to establish the required elements as his claim in this regard consisted of unsubstantiated summary allegations about the State's denial of Mr. Tercero's Vienna Convention rights and his trial counsel's: i) failure to investigate Mr. Tercero's case; ii) failure to engage in mitigation investigation; and iii) failure to obtain Mr. Tercero's medical and school records. The petitioners argue that an average federal habeas lawyer could argue ineffective assistance of state habeas counsel by conducting some investigation into these matters but that Mr. Varney failed to do so and offered instead a perfunctory argument and summary allegations.

27. Finally, the petitioners submit that, aware of the ineffective assistance of counsel provided to him, Mr. Tercero filed several *pro se* motions, petitions and amendments during the state and federal habeas stages of his case. During the initial state habeas stage, Mr. Tercero sought both to amend a deficient petition filed by his counsel and to replace Mr. Wheelan as his counsel. Similarly, during the initial federal habeas stage of his case, concerned by the lack of communication with his federal habeas counsel, the lack of action taken by his counsel, and the impending deadline within which to file his federal habeas corpus petition, Mr. Tercero decided to fill out a printed petition by hand and submit it to the court. Four days later he sought to replace Mr. Vernay as his federal habeas counsel. Later, upon the reopening of federal habeas proceedings, Mr. Tercero again sought to replace Mr. Vernay as his counsel on three separate occasions. The petitioners submit that, despite his best efforts, state and federal courts rejected Mr. Tercero's requests for substitution of counsel and his amendments and told him that he should only make submissions through his counsel. The petitioners submit that it was not until Mr. Tercero's fifth motion seeking to replace Mr. Vernay as his counsel, filed after an execution date was set, that the federal District Court granted his request after Mr. Vernay himself informed the court of serious impediments to the attorney/client relationship.

28. In July 2015, two investigators hired by Mr. Tercero's new counsel travelled to Nicaragua in order to seek evidence of Mr. Tercero's personal and family history. At the time of the drafting of this report, the results of the investigation were going to be presented before the U.S. Fifth Circuit and the Texas Court of Criminal Appeals in a new successor writ of habeas corpus, in a last attempt at staying the execution of Mr. Tercero.

29. According to the investigation, Mr. Tercero was raised by his maternal grandmother in a context of abject poverty. When not in school, he would work in farming fields, where planes sprayed toxic pesticides every two days. The investigators state that organophosphate pesticides (OP) were used extensively in the cotton field of Chinandega province where the alleged victim was born and raised. Exposure to organophosphates, which are neurotoxins that can attack the central nervous system, can allegedly be devastating to humans, especially children, causing dizziness, seizures, paralysis, loss of mental function, and even death. The investigators further assert that “in cases of violent behavior, OP exposure can, in effect, short circuit the appropriate fight or flight response, resulting in a distorted view of threats and an often violent response to ordinarily innocuous behavior.”

30. Also, according to the investigation, after the planes sprayed the fields, workers became sick and vomited, including Mr. Tercero. While everyone wore hats and long sleeves, Mr. Tercero had allegedly no gloves or mask to protect himself. He reportedly suffered severe headaches several days a week and became depressed and cried from the overwhelming pain. Mr. Tercero was allegedly the family member mostly affected by the pesticide exposure. The investigators also noted that Mr. Tercero was a young boy at the time of the Contra-Sandinista Civil War when wounded civilians and soldiers were present in the streets. Soldiers would allegedly storm villages and invade schools while the children were present. Once the war was over, Hurricane Mitch hit the region in 1998. Mr. Tercero’s home village of Posoltega was devastated and his family home and all that they owned were allegedly destroyed.

## **2. Mr. Tercero’s age at the time of the offense**

31. According to the original petitioner, Mr. Bellamy, Mr. Tercero was under 18 years of age at the time of committing the offense for which he was convicted and sentenced to death. He asserts in this regard that the imposition of the death penalty is a violation of the alleged victim’s rights under the Eighth and Fourteenth Amendments of the U.S. Constitution as ruled by the U.S. Supreme Court in *Roper v. Simmons*. The petitioner indicates that the state of Texas, the Federal District Court and prosecuting authorities have sought to undermine the legal evidentiary documents obtained from Nicaraguan authorities, in particular, a birth certificate, attested microfiche records, affidavits of Mr. Tercero’s mother and other family members and neighbors, and the affidavit of a certified defense investigator.

32. According to the information provided, Mr. Tercero’s real date of birth is August 20, 1979. He allegedly immigrated to the United States in 1994 when he was 15 years old. Given that he was an undocumented child he could not find work, had no money to obtain food, and would sometimes sleep on the street. That same year he purportedly asked his grandmother in Nicaragua to send his older brother’s birth certificate. His older brother, who reportedly was also born on August 20, but in 1976, died before Mr. Tercero was born. Following the tradition in Nicaragua, the alleged victim was reportedly given his brother’s name. Mr. Tercero allegedly used this document to obtain a Texas Identification Card in order to find a job.

33. It was allegedly on the basis of his brother’s identity and age that the presumed victim was convicted and sentenced to the death penalty. At the time of the trial in 2000 Mr. Tercero allegedly did not reveal his true identity given that it was constitutional to sentence to death persons who had committed a crime when they were under the age of 18. It was after the Supreme Court’s decision in *Roper v. Simmons* in 2005 that he revealed his true age. In November 2007 the U.S. District Court appointed investigator Norma Villanueva, who traveled to Nicaragua to conduct an investigation on the authenticity of the birth certificate. According to the affidavit submitted to the court, the investigator interviewed numerous Nicaraguan officials, reviewed the microfiche of the original birth certificate of both the alleged victim and his brother, and conducted interviews with Mr. Tercero’s family members and a close friend of his mother who had firsthand knowledge of the birth of the alleged victim. The investigator’s affidavit confirmed the authenticity of the birth certificate that indicates that Mr. Tercero was born on August 20, 1979.

34. In their additional observations on the merits, the petitioners do not develop this allegation originally presented by Mr. Bellamy. They claim that, as a result of the ineffective assistance of counsel, trial records were so poorly maintained and incomplete that there is not sufficient evidence to adequately do so. The petitioners note that their determination as to the insufficiency of the record “is not a reflection of [the] merits [of the claim], but instead of the profound gaps in the record as the result of repeated failures of counsel at each stage of Mr. Tercero’s case.”

### **3. Denial of consular assistance**

35. With regard to the alleged violation of Article 36 of the Vienna Convention on Consular Relations, the original petitioner, Mr. Bellamy, argues that the Federal Bureau of Investigation (FBI) and other agents of the state of Texas and the United States failed or refused to notify the Consulate of Nicaragua of the arrest of the alleged victim, though he reportedly requested to be provided with consular assistance.

36. In their additional observations on the merits, the petitioners do not develop this allegation. They claim that, as a result of the ineffective assistance of counsel, trial records were so poorly maintained and incomplete that there is not sufficient evidence to adequately do so. The petitioners also note that their determination “is not a reflection of [the] merits [of the claim], but instead of the profound gaps in the record as the result of repeated failures of counsel at each stage of Mr. Tercero’s case.”

## **B. Position of the State**

37. The United States submits that all of Mr. Tercero’s claims are inadmissible and that the IACHR should reconsider and reverse its June 24, 2015, decision, in which the IACHR decided his case to be admissible. In the alternative, it argues that the IACHR should find that no violations of the American Declaration were committed with regard to the claims that Mr. Tercero was provided ineffective assistance of counsel, that he was under the age of 18 at the time of the offense and that he was denied consular assistance.

### **1. Inadmissibility of this case**

38. The United States submits that the current “petition is inadmissible and does not demonstrate a breach of any commitment of the United States under the American Declaration.” It argues that the IACHR did not take into account certain material information in its admissibility decision and, in accordance with Article 34 of the IACHR’s Rules of Procedure, it should reconsider and reverse its decision and instead rule the petition inadmissible for failure to state facts that tend to establish a violation of the rights in the American Declaration.

39. The United States recognizes that the IACHR has previously taken a position that a State waives objection to admissibility based on non-exhaustion of domestic remedies if it does not raise them prior to the IACHR’s decision on admissibility. In this regard, the United States notes that the IACHR’s position is based on the Inter-American Court’s decision that an objection asserting non-exhaustion must be made at an early stage of proceedings by the State entitled to make it, lest a waiver of the requirement be presumed.<sup>1</sup> However, the United States submits that this jurisprudence should not govern procedures before the IACHR, particularly for States not subject to the jurisdiction of the Inter-American Court, because the IACHR should base its decision on its governing instruments for the proper interpretation of its authorities, not on the jurisprudence of another body.

40. The United States suggests that a proper interpretation of the IACHR’s Rules of Procedure establishes that there is no bar on reconsidering admissibility after the IACHR has issued an admissibility decision, on non-exhaustion grounds or otherwise, if it is subsequently made aware of information bearing on the case’s admissibility. In this regard, the United States claims that Article 31(a) of the IACHR’s Rules of Procedure refers to the IACHR’s assessment of the admissibility of a “matter” and not necessarily of a petition.

<sup>1</sup> I/A Court H.R., Case of Loayza-Tamayo v Peru, Judgment on Preliminary Objections of January 31, 1996, No. 25, para. 40.

It argues that the choice of the term “matter” rather than “petition” is significant and draws a comparison to the IACHR’s assessment of admissibility in *Move Organization v. United States*.<sup>2</sup> The United States submits that the term “matter” is a broader term used throughout the Rules of Procedure to encompass both petitions and cases, in circumstances where distinguishing between these later terms is unnecessary, such as in Articles 17, 25(10), 25(12), 29(2)(c), 29(d)(ii) and 40(l).

41. Moreover, the United States notes that Article 34 of the Rules of Procedure clearly establishes that the IACHR is allowed to assess the admissibility of petitions and cases. It avers that the inclusion of the words “or case” in the text of this article—which by definition is a matter already declared admissible—in juxtaposition to “petition” indicates beyond reasonable dispute that the Rules grant the IACHR the authority to reconsider the admissibility of a case previously declared admissible. The United States contends that the IACHR cannot simply ignore these careful terminological distinctions or regard them as arbitrary or inadvertent, but must instead construe the provisions of the Rules to give effect, where possible, to the words chosen, in accordance to the principle of effective construction, which is well established in U.S. and international law.

## **2. Inadequate assistance of counsel**

42. The United States submits that the petitioners do not establish a reviewable claim for ineffective assistance of counsel or violation of due process. It argues that both international and U.S. law provide for procedural fairness and due process and not a particular substantive outcome. The United States avers that Mr. Tercero received due process.

43. The United States contends that the petitioners’ arguments about supposed defects in Mr. Tercero’s case were all either raised before domestic courts, or he had the opportunity to raise them and chose not to. It claims that domestic courts gave adequate consideration to the ineffective assistance and due process claims as a federal court allowed Mr. Tercero to remand such claims and exhaust them in state courts before arguing them in federal courts, but that a strategic decision was apparently made to not raise them in his state *habeas* review on remand. The United States submits that Mr. Tercero did not comply with his own procedural obligations as he failed to exhaust the ineffective assistance of counsel and due process claims in a timely fashion in state court, thereby waiving his right to have them considered on federal *habeas* review. Nevertheless, the United States asserts that, despite being procedurally barred from addressing the merits of these arguments, a federal court still entertained such claims in the alternative and found them to lack merit.

44. The United States also submits that Mr. Tercero was afforded effective counsel as his trial counsel went to great lengths to investigate his background and arrest by: i) retaining a private investigator and a forensic psychologist to assist with the case in Texas; and ii) obtaining funds to travel to Nicaragua to interview witnesses, many of whom later appeared as character witnesses at the trial’s sentencing phase. It further submits that Mr. Tercero’s federal *habeas* counsel also secured an investigator who traveled to Nicaragua to question witnesses and review documents relating to Mr. Tercero’s claim that he was under the age of 18 at the time of the offense. Furthermore, it argues that the decision of counsel to not pursue the mitigating evidence cited by the petitioners, namely Mr. Tercero’s poverty and abandonment by his father, second-hand reports of mental illness, and the neurological effects of pesticides used on farms in the region in which Mr. Tercero grew up, falls short of Mr. Tercero’s rights under the American Declaration. The United States avers that it is not the purview of domestic courts or of the IACHR to question, in hindsight, what amounts to the strategic determination of the relative strength of various defensive arguments.

## **3. Mr. Tercero’s age at the time of the offense**

45. The United States submits that the IACHR should reject the petitioners’ claim that Mr. Tercero was under the age of 18 at the time of the offense as it is not a court of fourth instance. It contends that the petitioners contest an issue of fact that has already been resolved by competent domestic

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<sup>2</sup> IACHR, Report No. 19/92, Case 10.865, Inadmissibility, Ramona Africa, United States, October 1, 1992.

courts that extensively reviewed the evidence first hand, in full compliance with the requirements of due process. The United States asserts that the IACHR cannot take upon itself the functions of an appeals court in order to examine alleged errors of fact and law that local courts may have committed unless there is unequivocal evidence that the guarantees of due process have been violated; and there is nothing in the process by which the state and federal *habeas* courts evaluated the available evidence concerning Mr. Tercero's age or by which the appellate courts reviewed those decisions, that even approaches "unequivocal evidence" of a failure by the United States to live up to its commitment under the American Declaration.

46. Furthermore, the United States submits that all of the evidence put forth by the petitioners as proof of Mr. Tercero's age was in his possession at the time he made the same arguments before domestic courts and both state and federal courts found such evidence to be unpersuasive for several reasons. It submits that his claims in this regard are therefore meritless and do not constitute a violation of the American Declaration. It asserts that the petitioners themselves concede that the record of Mr. Tercero's trial and subsequent proceedings does not contain sufficient evidence to support the claim that there are any violations concerning Mr. Tercero's claim that he was a minor at the time of the offense.

#### **4. Denial of consular assistance**

47. The United States submits that the petitioners' claim that it violated Mr. Tercero's rights recognized in the American Declaration by allegedly failing to notify the Nicaraguan consulate of his detention is not developed as they do not explain how this alleged failure, which is claimed to be a violation of the Vienna Convention on Consular Relations, implicates the U.S. human rights commitments under the American Declaration. The United States submits that it is a petitioner's duty to show how the petition complies with the various admissibility requirements in the Rules of Procedure, including that the facts tend to establish a violation of the rights in the American Declaration, and, as they have not done so, it is not for the Inter-American Commission to read into the petition arguments that the petitioners did not make. Additionally, the United States reiterates arguments presented in other cases concerning the IACHR's lack of jurisdiction to review issues arising under the Vienna Convention and argues that this lack of jurisdiction is not avoided by characterizing a claim as one arising under the American Declaration.

48. Furthermore, the United States submits that consular notification is not a right as the Vienna Convention's consular notification protections are based on principles of reciprocity, nationality, and function, and persons do not enjoy these protections by mere virtue of their human existence. It submits in this regard that the availability of consular notification and access is premised on the existence of consular relations between governments, and consular access and assistance is undeniably a right exercised by the detained individual's state of nationality as it is up to representatives of that state to determine whether to provide assistance, and the Vienna Convention does not provide the detained individual any right or authority to demand it.

49. The United States also asserts that consular notification is also not a necessary component of the right to due process in criminal proceedings. In this regard, it notes the International Court of Justice's decision in the *Avena* case where the court stated that neither the text, nor the object and purpose, nor the *travaux* of the Vienna Convention support the conclusion that consular notification is an essential element of due process in criminal proceedings.<sup>3</sup> The United States submits that to accept the argument that Mr. Tercero's consular notification claim amounts to a human rights violation under the American Declaration would require the untenable conclusion that any foreign national who does not receive consular assistance, because of an absence of consular relations or because his government did not provide assistance, cannot receive a fair trial or due process of law.

50. Finally, the United States avers that there is no evidence one way or the other showing whether authorities followed proper consular notification procedures and that the petitioners themselves

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<sup>3</sup> Matter of *Avena* and Other Mexican Nationals (Mexico v U.S.), March 31, 2004, I.C.J. 12, para. 124.

concede that the record of Mr. Tercero's trial and subsequent proceedings does not contain sufficient evidence to support the claim that Mr. Tercero requested consular assistance and that U.S. authorities subsequently denied to notify the consulate of Nicaragua of Mr. Tercero's detention.

#### IV. ESTABLISHED FACTS

51. In application of Article 43(1) of its Rules of Procedure, the IACHR will examine the arguments and evidence provided by the petitioners and the State. In addition, it will take into consideration publicly available information.<sup>4</sup>

##### A. Pre-trial and trial stage of Mr. Tercero's case

52. Bernardo Aban Tercero was charged and indicted for capital murder in the District Court of Harris County, Texas, on September 2, 1997, and October 7, 1997, respectively, for the death of Robert Berger, which occurred during the course of a robbery of a dry cleaner on March 31, 1997, due to injuries sustained from a gunshot.<sup>5</sup> Mr. Tercero returned to Nicaragua sometime after the death of Mr. Berger and was later arrested in July of 1999 in a town on the Texas border with Mexico.<sup>6</sup> On August 4, 1999, Mr. Gilbert Villareal was appointed by the State to serve as Mr. Tercero's counsel.<sup>7</sup> Sometime after his appointment, Mr. Villareal filed a motion requesting financial resources from the Harris County District Court to pay for the service of Rudy Vargas, a private investigator who was to assist the defense in the preparation of its case, and this motion was granted by February 3, 2000.<sup>8</sup> From September 12 to September 21 and on September 28, 2000, Mr. Vargas worked a total of 16 hours conducting background checks of and attempting to locate and interview potential witnesses for Mr. Tercero's trial.<sup>9</sup>

53. On March 27, 2000, Mr. Villareal sent a letter to the consulate of Nicaragua in Houston, Texas, to inform the consulate of Mr. Tercero's case. In his letter, Mr. Villareal informed the consulate: i) that Mr. Tercero had been charged and indicted for capital murder and that the state of Texas was seeking the death penalty; ii) that Mr. Tercero requested someone from the consulate visit him; iii) that Mr. Tercero would need assistance from the consulate to bring some of his family and friends to make the journey from Nicaragua to Houston; and iv) provided the name of the prosecutor in charge of the case and her contact information.<sup>10</sup> On August 23, 2000, Mr. Villareal wrote the Harris County Jail to request that access to Mr. Tercero be granted to the Vice Consul of Nicaragua, Ms. Maria Mercedes Beck.<sup>11</sup> After her visit, Ms. Beck contacted Mr. Tercero on September 18, 2000 and Mr. Tercero contacted Ms. Beck on September 26 and

<sup>4</sup> Article 43(1) of the Rules of Procedure of the Inter-American Commission on Human Rights provides that: "The Commission shall deliberate on the merits of the case, to which end it shall prepare a report in which it will examine the arguments, the evidence presented by the parties, and the information obtained during hearings and on-site observations. In addition, the Commission may take into account other information that is a matter of public knowledge."

<sup>5</sup> Annexes 1 and 2, Harris County District Court, Complaint (Sept. 2, 1997) and Harris County District Court, Indictment (Oct. 7, 1997), Brief from the petitioners, received on July 10, 2015.

<sup>6</sup> Annexes 35, 37 and 45, Harris County District Court, Reporter's Record 24 - Third Day of Penalty Phase (Oct. 19, 2000); Houston Chronicle, "Nicaraguan gets death in teacher's killing" (Oct. 21, 2000); Harris County District Court, *Pro Se* Motion to Amend State Petition for Habeas Corpus (Nov. 29, 2004), Brief from the petitioners, received on July 10, 2015.

<sup>7</sup> Annex 3, Harris County District Court, Order Appointing Counsel [Mr. Villareal] (Aug. 4, 1999), Brief from the petitioners, received on July 10, 2015.

<sup>8</sup> Annexes 10 and 11, Harris County District Court, Motion for the Appointment of an Investigator (Undated); Letter from Mr. Villareal to Harris County Jail Requesting Investigator Access (Feb. 3, 2000), Brief from the petitioners, received on July 10, 2015.

<sup>9</sup> Annex 38, Invoice from Investigator Rudy Vargas to Mr. Villareal (Oct. 31, 2000), Brief from the petitioners, received on July 10, 2015.

<sup>10</sup> Annex 12, Letter from Mr. Villareal to Nicaraguan Consulate (Mar. 27, 2000), Brief from the petitioners, received on July 10, 2015.

<sup>11</sup> Annex 15, Letter from Mr. Villareal to Harris County Jail Requesting Consular Access (Aug. 23, 2000), Brief from the petitioners, received on July 10, 2015.

October 3, 2000, to request the consulate's assistance in obtaining travel visas for the witnesses that he wanted to bring to the United States from Nicaragua.<sup>12</sup>

54. On July 6, 2000, Mr. Villareal filed a motion requesting the Harris County District Court to grant financial resources to the defense team so that it could hire a forensic psychologist to assist in all the multi-faceted issues raised in the capital murder case; a request that was granted by September 25, 2000, when Mr. Villareal wrote the Harris County Jail to request that Dr. Jesse Reed, Ph. D, be granted access to Mr. Tercero.<sup>13</sup> On September 29, 2000, Mr. Villareal sent Dr. Reed a letter requesting his assistance in assessing and evaluating Mr. Tercero.<sup>14</sup> In his letter, Mr. Villareal described the charges and the prosecution's case against Mr. Tercero and asked Dr. Reed what assistance he could provide during the punishment phase of the trial and requested that he meet with either of Mr. Tercero's trial counsel before rendering a written opinion.<sup>15</sup>

55. In late September 2000, Mr. Villareal filed a motion requesting that the Harris County District Court grant advance payment of pre-trial expenses in the amount of \$21,670 so that he could hire a private investigator in Nicaragua to interview numerous witnesses on Mr. Tercero's behalf and thoroughly investigate the prior unadjudicated offenses in Nicaragua, as well as cover the expenses of Mr. Villareal's trip to Nicaragua.<sup>16</sup> Mr. Villareal considered these witnesses to be crucial and necessary in answering punishment issues since they could testify as to mitigating circumstances and Mr. Tercero's background. On September 25, 2000, the Harris County District Court granted his request.<sup>17</sup> Of the amount given, \$1,543.19 were spent by Mr. Villareal on his trip to Nicaragua, \$500 were spent to hire a private investigator in Nicaragua, \$8,449.42 were returned to the Harris County Auditors Office as unused advance expenses and the remainder was used to pay for expenses associated with securing the presence of witnesses at Mr. Tercero's trial.<sup>18</sup>

56. The trial against Mr. Tercero began on October 10, 2000.<sup>19</sup> Over the course of three days, the prosecution presented its case calling on 17 witnesses to testify.<sup>20</sup> The defense presented its case on October

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<sup>12</sup> Annexes 16, 20 and 26, Letter from Nicaraguan Consulate to Mr. Villarreal (Sept. 18, 2000); Fax from Mr. Villarreal to Nicaraguan Consulate about Witness Travel Visas (Sept. 26, 2000); Fax from Mr. Villarreal to Nicaraguan Consulate about Witness Travel Visas (Oct. 3, 2000), Brief from the petitioners, received on July 10, 2015.

<sup>13</sup> Annexes 13 and 18, Harris County District Court, Motion for the Appointment of a Forensic Psychologist (July 6, 2000); Letter from Mr. Villarreal to Harris County Jail Requesting Psychologist Access (Sept. 25, 2000), Brief from the petitioners, received on July 10, 2015.

<sup>14</sup> Annex 23, Letter from Mr. Villarreal to Psychologist Requesting Client Evaluation (Sept. 29, 2000), Brief from the petitioners, received on July 10, 2015.

<sup>15</sup> Annex 23, Letter from Mr. Villarreal to Psychologist Requesting Client Evaluation (Sept. 29, 2000), Brief from the petitioners, received on July 10, 2015.

<sup>16</sup> Annex 17, Harris County District Court, Ex Parte Motion for Advance Payment of Pre-Trial Expenses to Investigate and Secure Attendance of Nicaragua Witnesses (Sept. 25, 2000), Brief from the petitioners, received on July 10, 2015.

<sup>17</sup> Annex 21, Invoice from Harris County to Mr. Villarreal for \$21,670 (Sept. 27, 2000), Brief from the petitioners, received on July 10, 2015.

<sup>18</sup> Annexes 40 and 41, Mr. Villarreal's Trial Expenses (Nov. 1, 2000); Mr. Villarreal's Return of Unused Advance Expenses to Harris County (Nov. 16, 2000), Brief from the petitioners, received on July 10, 2015.

<sup>19</sup> Annex 27, Harris County District Court, Reporter's Record 16 – First Day of Trial (Oct. 10, 2000), Brief from the petitioners, received on July 10, 2015.

<sup>20</sup> Annexes 27, 28 and 29, Harris County District Court, Reporter's Record 16 – First Day of Trial (Oct. 10, 2000); Harris County District Court, Reporter's Record 17 – Second Day of Trial (Oct. 11, 2000); Harris County District Court, Reporter's Record 18 – Third Day of Trial (Oct. 12, 2000), Brief from the petitioners, received on July 10, 2015.

13, 2000, calling Mr. Tercero as its only witness.<sup>21</sup> On October 16, 2000, a guilty verdict was rendered by the jury.<sup>22</sup>

57. The penalty phase of Mr. Tercero's trial began on October 17, 2000, when the prosecution presented its case calling on 4 witnesses to testify.<sup>23</sup> On October 18, 2000, Mr. Tercero's defense team presented its case calling on 7 witnesses to testify as to: i) Mr. Tercero's good behavior during detention at the Harris County Jail; ii) his potential for rehabilitation and non-risk to society; iii) his having come from an extremely poor family, even when compared to other poor families in Nicaragua; iv) his good behavior as a child; v) his level of education and the good grades he received; vi) the abandonment of Mr. Tercero by his biological father and how he was never able to forge a relationship with his father; vii) Mr. Tercero's work in the fields in Nicaragua as a child; and viii) his participation in the rescue of victims of hurricane Mitch in Nicaragua in 1998.<sup>24</sup> During closing arguments, Mr. Tercero's defense team argued: i) that Mr. Tercero's good behavior in detention was an indication that he could be rehabilitated and would not pose a continuous danger to society; ii) that the evidence supported that Mr. Tercero would peacefully serve a life sentence; iii) that weight should not be placed on the prosecution's evidence concerning extraneous offenses in Nicaragua; iv) that the jury should focus on the circumstances of the crime and on their claim that the shooting was accidental and occurred after a struggle; and v) that Mr. Tercero's efforts to rescue persons during hurricane Mitch constitute the type of good deeds that are mitigating.<sup>25</sup> Defense counsel also noted that Mr. Tercero comes from a very poor background and told the jury that he wasn't informing them of this fact so that they could consider it a mitigating circumstance, but rather so that they could have an idea of his background.<sup>26</sup> During the penalty phase of Mr. Tercero's trial, his counsel did not address any potential issues of mental health that could affect Mr. Tercero's cognitive abilities and no testimony was given by the forensic psychologist hired by the defense at the pre-trial stage to conduct an assessment of Mr. Tercero.<sup>27</sup> During its closing arguments, the prosecution referred to the alleged victim as a "beast" and "demon" and called for the imposition of a sentence of death.<sup>28</sup> On October 19, 2000, Mr. Tercero was sentenced to the death penalty.

## **B. Post-conviction stage of Mr. Tercero's case**

### **1. Motion for a new trial and direct appeal**

58. On October 20, 2000, Mr. Sid Crowley was appointed as Mr. Tercero's counsel on appeal.<sup>29</sup> On November 1, 2000, Mr. Tercero's trial counsel, Mr. Villareal, wrote a letter to Mr. Crowley in order to

<sup>21</sup> Annex 30, Harris County District Court, Reporter's Record 19 – Fifth Day of Trial (Oct. 16, 2000), Brief from the petitioners, received on July 10, 2015.

<sup>22</sup> Annex 31, Harris County District Court, Reporter's Record 20 – First Day of Trial (Oct. 10, 2000), Brief from the petitioners, received on July 10, 2015.

<sup>23</sup> Annex 33, Harris County District Court, Reporter's Record 22 – First Day of Penalty Phase (Oct. 17, 2000), Brief from the petitioners, received on July 10, 2015.

<sup>24</sup> Annexes 34 and 35, Harris County District Court, Reporter's Record 23 – Second Day of Penalty Phase (Oct. 18, 2000); Harris County District Court, Reporter's Record 24 – Third Day of Penalty Phase (Oct. 19, 2000), Brief from the petitioners, received on July 10, 2015.

<sup>25</sup> Annex 35, Harris County District Court, Reporter's Record 24 – Third Day of Penalty Phase (Oct. 19, 2000), Brief from the petitioners, received on July 10, 2015.

<sup>26</sup> Annex 35, Harris County District Court, Reporter's Record 24 – Third Day of Penalty Phase (Oct. 19, 2000), Brief from the petitioners, received on July 10, 2015.

<sup>27</sup> Annexes 33, 34 and 35, Harris County District Court, Reporter's Record 22 – First Day of Penalty Phase (Oct. 17, 2000); Harris County District Court, Reporter's Record 23 – Second Day of Penalty Phase (Oct. 18, 2000); Harris County District Court, Reporter's Record 24 – Third Day of Penalty Phase (Oct. 19, 2000), Brief from the petitioners, received on July 10, 2015.

<sup>28</sup> Annexes 35 and 44, Harris County District Court, Reporter's Record 24 – Third Day of Penalty Phase (Oct. 19, 2000); Court of Criminal Appeals, Order Affirming Judgment of Trial Court (Sept. 18, 2002), Brief from the petitioners, received on July 10, 2015.

<sup>29</sup> Annex 36, Harris County District Court, Order Appointing Counsel on Appeal [Mr. Crowley] (Oct. 20, 2000), Brief from the petitioners, received on July 10, 2015.

provide recommendations of arguments that should be raised in a motion for a new trial, which included the recommendation that Mr. Crowley “protect the record, by stating that [Mr. Tercero] was denied [...] the Right to Effective Counsel.”<sup>30</sup> In his motion for a new trial, which was denied on December 18, 2000, Mr. Crowley only raised arguments pertaining to alleged prosecutorial misconduct in instructing witnesses to withhold exculpatory evidence.<sup>31</sup> Mr. Crowley did not appeal the denial of his motion.<sup>32</sup>

59. Mr. Crowley also filed a direct appeal on Mr. Tercero’s conviction where he argued that: i) the trial court erred in granting the State’s challenge for cause; ii) the trial court erred in refusing to instruct the jury on the lesser-included offense of manslaughter; iii) the evidence presented at trial was legally insufficient to support the jury’s finding; iv) the trial court erred by refusing to exclude identification testimony when the identification was the result of impermissibly suggestive pretrial procedure; v) and iv) the prosecutor reversibly erred when he referred to [Mr. Tercero] as a “demon” and a “beast” during the punishment phase argument.<sup>33</sup> The direct appeal was dismissed on September 18, 2002, and the appellate court, in rejecting Mr. Crowley’s fifth and sixth argument, noted that the appellant had forfeited the right to complain about the language used by the prosecution during the penalty phase of Mr. Tercero’s trial since trial counsel had not objected to the use of such language.<sup>34</sup>

## 2. Initial state habeas corpus proceedings

60. Mr. Tercero’s state habeas petition was filed on May 18, 2002, by his newly appointed state habeas counsel Mr. Richard Wheelan on the basis of five claims, namely: i) that the trial court violated Mr. Tercero’s due process rights by admitting irrelevant and prejudicial victim impact and victim worth evidence at the penalty phase of the trial; ii) that the trial court violated Mr. Tercero’s rights by admitting irrelevant and prejudicial victim impact and victim character evidence at the guilt-innocence phase of the trial; iii) that Mr. Tercero’s right to due process was violated since the imposition of a death sentence can only be assessed when the probability of future dangerousness is proven beyond a reasonable doubt and this essential element was not charged in Mr. Tercero’s indictment; iv) that Mr. Tercero was not provided effective assistance of counsel since trial counsel failed to object to irrelevant, prejudicial victim-character evidence during the guilt-innocence phase of the trial and failed to object on due process grounds to irrelevant, excessive and prejudicial victim impact and victim character evidence during the penalty phase of the trial; that Mr. Tercero was entitled to relief as the “12-10 Rule” of Article 37.071 of the Texas Code of Criminal Procedure violates the eight amendment of the United States Constitution.<sup>35</sup>

61. Mr. Tercero, in disagreement with the limited claims filed by his state habeas counsel, filed an amended petition which was received by the District Court of Harris County, Texas, on November 29, 2004. This petition included the claim that Mr. Tercero had not been provided with effective counsel “at any and all stages” of trial and appellate proceedings in state courts.<sup>36</sup> In support of his claims, Mr. Tercero presented arguments, *inter alia*, that his counsel: i) had failed to investigate the legality of his extradition from Mexico to the United States; ii) had failed to investigate violations of his consular rights; iii) had committed serious professional errors which deprived him from receiving a fair trial; and iv) failed

<sup>30</sup> Annex 39, Letter from Mr. Villarreal to Mr. Crowley (Nov. 1, 2000), Brief from the petitioners, received on July 10, 2015.

<sup>31</sup> Annex 42, Harris County District Court, Reporter’s Record 26 – Hearing on Motion for New Trial (Dec. 18, 2000), Brief from the petitioners, received on July 10, 2015.

<sup>32</sup> Annex 55, Letter from Mr. Vernay to Mr. Tercero (July 11, 2006), Brief from the petitioners, received on July 10, 2015.

<sup>33</sup> Annex 44, Court of Criminal Appeals, Order Affirming Judgment of Trial Court (Sept. 18, 2002), Brief from the petitioners, received on July 10, 2015.

<sup>34</sup> Annex 44, Court of Criminal Appeals, Order Affirming Judgment of Trial Court (Sept. 18, 2002), Brief from the petitioners, received on July 10, 2015.

<sup>35</sup> Annex 43, Harris County District Court, Petition for Post-Conviction Relief and Writ of Habeas Corpus [with appendices] (May 18, 2002), Brief from the petitioners, received on July 10, 2015.

<sup>36</sup> Annex 45, Harris County District Court, *Pro Se* Motion to Amend State Petition for Habeas Corpus (Nov. 29, 2004), Brief from the petitioners, received on July 10, 2015.

to conduct meaningful mitigation investigation. Subsequent to mailing his amended petition, Mr. Tercero contacted his state habeas counsel informing him that he had filed an amended petition and that he was disappointed with counsel's unwillingness to raise these arguments.<sup>37</sup> In his letter, he also requested Mr. Wheelan to assist him in contacting his family so that they could provide him with documents that would attest to his diminished mental capacity.

62. On June 2, 2005, the District Court of Harris County, Texas, received a *pro se* motion from Mr. Tercero requesting the appointment of new state habeas counsel.<sup>38</sup> In his motion, Mr. Tercero submitted that his state habeas counsel was "evasive and ... detrimental to [his] case." Mr. Tercero submitted that his state habeas counsel had denied and refused him the opportunity to even raise issues concerning constitutional violations, such as the denial of consular access and due process violations, and requested that new counsel be appointed because he did not believe that Mr. Wheelan possessed the requisite background, knowledge or experience which would enable him to properly represent Mr. Tercero with due consideration of the seriousness of the possible penalty and the unique nature of the litigation of death penalty cases. Alternatively, Mr. Tercero requested the court to appoint a "competent co-counsel." His *pro se* motion was denied on June 7, 2005.<sup>39</sup>

63. On November 16, 2005, the Court of Criminal Appeals of Texas, having assessed the positions of the parties and the supporting evidence, including an affidavit from Mr. Villareal explaining his strategy in not objecting to victim impact and victim character evidence, denied habeas relief.<sup>40</sup> In its decision the court also dismissed Mr. Tercero's amended petition as an abuse of writ since it considered that his motion to amend the state habeas petition had been filed after the deadline for initial application for habeas corpus relief.<sup>41</sup>

### 3. Initial federal habeas corpus proceedings

64. Following the denial of state habeas relief, Mr. Wheelan filed a motion before the U.S. District Court for the Southern District of Texas requesting the appointment of new counsel and giving notice of intent to seek federal habeas relief; a motion granted by the court on February 1, 2006, when Messrs. Michael Charlton and Donald David Vernay were appointed as counsel for Mr. Tercero's federal habeas proceedings.<sup>42</sup> Mr. Charlton later filed a motion requesting the court to allow his withdrawal as counsel for Mr. Tercero as he was moving out of state and to appoint new counsel in his place; a motion granted on August 24, 2006, when Mr. John Wright was appointed as co-counsel for Mr. Tercero's federal habeas proceedings.<sup>43</sup>

65. In February 2006, Mr. Tercero wrote the Harris County district court requesting the name of his appointed counsel and on March 27, 2006, the Harris County District Clerk informed him of the

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<sup>37</sup> Annex 45, Harris County District Court, *Pro Se* Motion to Amend State Petition for Habeas Corpus (Nov. 29, 2004), Brief from the petitioners, received on July 10, 2015.

<sup>38</sup> Annex 46, Harris County District Court, *Pro Se* Motion for Appointment of New State Habeas Counsel (June 2, 2005), Brief from the petitioners, received on July 10, 2015.

<sup>39</sup> Annex 66, U.S. District Court for the Southern District of Texas, First Amended Petition for Habeas Corpus [with attachments] (Nov. 10, 2006), Brief from the petitioners, received on July 10, 2015.

<sup>40</sup> Annex 48, Court of Criminal Appeals, Order Affirming Denial of Habeas Relief (Nov. 16, 2005), Brief from the petitioners, received on July 10, 2015.

<sup>41</sup> Annex 48, Court of Criminal Appeals, Order Affirming Denial of Habeas Relief (Nov. 16, 2005), Brief from the petitioners, received on July 10, 2015.

<sup>42</sup> Annexes 49 and 50, U.S. District Court for the Southern District of Texas, Motion for Appointment of New Counsel and Notice of Intent to Seek Federal Habeas Relief (Nov. 28, 2005); U.S. District Court for the Southern District of Texas, Order Granting Motion for Appointment of New Counsel [Mr. Charlton and Mr. Vernay] (Feb. 1, 2006), Brief from the petitioners, received on July 10, 2015.

<sup>43</sup> Annexes 58 and 59, U.S. District Court for the Southern District of Texas, Motion to Withdraw as Counsel and to Appoint New Counsel [Mr. Charlton] (Aug. 16, 2006); U.S. District Court for the Southern District of Texas, Order to Appoint New Counsel [Mr. Wright] (Aug. 24, 2006), Brief from the petitioners, received on July 10, 2015.

appointment of Messrs. Charlton and Vernay.<sup>44</sup> Upon receiving this information, Mr. Tercero sent a letter to his appointed counsel on April 6 and May 30, 2006, in which: i) he asked his counsel if they were analyzing the motions on record in order to present arguments concerning the ineffective assistance provided by Mr. Wheelan and his refusal to present arguments concerning the violations of Mr. Tercero's consular rights; ii) he informed his counsel that he had a diminished mental capacity and manifested his desire to undergo testing in order to determine his IQ level; and iii) he requested his counsel to investigate why the Harris County District Court did not respond to his *pro se* motion filed on June 2, 2005, in which he requested the appointment of new counsel *in lieu* of his state habeas counsel.

66. Mr. Vernay responded to these letters on July 11, 2006, informing Mr. Tercero that the actions of his attorneys, both in his appeal and state habeas corpus proceedings, created an extremely difficult situation for bringing any claims before the United States District Court since they failed to protect the record.<sup>45</sup> Mr. Vernay explained to Mr. Tercero that there were a number of constitutional claims which could and should have been raised on his behalf, but which were not raised. In this regard, he noted that Mr. Tercero's trial attorney waited only a week before trial to go to Nicaragua and made little, if any, effort to try and obtain Mr. Tercero's social history, nor did he do any serious investigation into Mr. Tercero's background to gather information which could have been presented at the penalty phase of his trial. He also explained that Mr. Tercero's state habeas counsel, Mr. Wheelan, should have raised the ineffectiveness of Mr. Villareal in failing to conduct a proper mitigation investigation. He further explained that Mr. Wheelan should have raised the ineffectiveness of counsel appointed to file Mr. Tercero's direct appeal, Mr. Crowley, in light of his failure to raise the denial of the motion for a new trial in his appeal brief.

67. Mr. Vernay also explained that it would be hard to raise a claim of violations of Mr. Tercero's consular rights as a decision of the United States Supreme Court had established that, in order to have a post-conviction court hear a Vienna Convention claim, it must be raised either at trial or upon initial appeal, which was not done by Mr. Tercero's trial counsel or by counsel appointed to file his direct appeal.<sup>46</sup> Mr. Vernay added that Mr. Crowley's failure to include the denial of the motion for a new trial in the appeal brief barred Mr. Vernay from including this issue in the federal habeas petition. Mr. Vernay informed Mr. Tercero that he had spoken to the Nicaraguan Consul who was going to attempt to get Mr. Tercero's school records from Nicaragua so they could investigate Mr. Tercero's claim of possessing diminished mental capacity and explained that if the records supported this possibility they would request that the court authorize funds to further investigate the issue, but that it was first necessary to make an initial showing in order to secure funds. Finally, Mr. Vernay informed Mr. Tercero that he would raise the issue of the ineffectiveness of Mr. Tercero's state habeas counsel during state habeas proceedings but warned Mr. Tercero that federal courts have not been receptive to such claims.<sup>47</sup>

68. Mr. Tercero later attempted to communicate with his federal habeas counsel on July 19 and August 6, 2006, but he received no response to his letters.<sup>48</sup> On October 24, 2006, Mr. Tercero filed a *pro se* federal habeas petition claiming that: i) he was denied effective assistance of counsel in light of his trial counsel's failure to investigate the manner in which he was brought to the United States from Mexico; ii) the prosecution had illegally withheld exculpatory evidence; iii) he was unable to present evidence during his

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<sup>44</sup> Annex 52, Letter from Harris County District Court Clerk to Mr. Tercero (Mar. 27, 2006), Brief from the petitioners, received on July 10, 2015.

<sup>45</sup> Annex 55, Letter from Mr. Vernay to Mr. Tercero (July 11, 2006), Brief from the petitioners, received on July 10, 2015.

<sup>46</sup> Annex 55, Letter from Mr. Vernay to Mr. Tercero (July 11, 2006), Brief from the petitioners, received on July 10, 2015.

<sup>47</sup> Annex 55, Letter from Mr. Vernay to Mr. Tercero (July 11, 2006), Brief from the petitioners, received on July 10, 2015.

<sup>48</sup> Annexes 56, 57, 62, Letter from Mr. Tercero to Mr. Vernay (July 19, 2006); Letter from Mr. Tercero to Mr. Vernay (Aug. 6, 2006); U.S. District Court for the Southern District of Texas, *Pro Se Motion for Appointment of New Federal Habeas Counsel* [with attachments] (Oct. 30, 2006), Brief from the petitioners, received on July 10, 2015.

trial because his trial counsel refused to call a witness that he considered important; and iv) he was under the age of 18 at the time the crime was committed and that he could therefore not be sentenced to death.<sup>49</sup>

69. On October 30, 2006, Mr. Tercero filed a *pro se* motion requesting the appointment of new counsel as he was concerned with the “work ethic and negligence of legal assistance of the court appointed federal habeas counsel.”<sup>50</sup> In this regard, he submitted to the court that his appointed counsel had failed to promptly inform him of their appointment and had continuously evaded him and deliberately delayed responding to his letters.

70. Mr. Vernay responded to Mr. Tercero’s motion and informed the court that, due to heavy workload, by oversight he had indeed failed to respond to Mr. Tercero’s letter of August 6, 2006, but maintained that he had continuously been working on Mr. Tercero’s case since being appointed counsel and that he was in the process of drafting an amended habeas petition and would file it before the deadline to do so expired.<sup>51</sup>

71. The U.S. District Court for the Southern District of Texas issued an order denying the appointment of new counsel on November 6, 2006.<sup>52</sup> In its decision, while taking note of Mr. Tercero’s arguments, the court also noted that the U.S. Supreme Court had previously rejected “the claim that the Sixth Amendment guarantees a ‘meaningful relationship’ between an accused and his counsel” and that, while counsel admitted some laxity in communications with Mr. Tercero, counsel nevertheless assured the court that they were making zealous efforts to prepare and present valid constitutional claims on Mr. Tercero’s behalf. The court further noted that counsel had assured the court that they were “preparing to file a petition before the expiration of the AEDPA’s limitation period and that they [would] move to amend Mr. Tercero’s *pro se* petition.”

72. In its decision the court also noted that Mr. Tercero had alerted the court of several claims that he wished to advance on federal review, but it reasoned that until counsel amended Mr. Tercero’s petition, it would not be possible to assess which claims would be filed and that, in any case, the evidence did not suggest that court-appointed federal habeas counsel would not seriously consider and evaluate the merits of Mr. Tercero’s claims since his pleadings did not suggest a complete breakdown of the lawyer/client relationship.<sup>53</sup> The court also stated that Mr. Tercero “must understand that, as on direct appeal, an habeas attorney is not required to raise every potential ground for relief” and that “a competent attorney will sort through many potentially viable claims to present only those most favorable to his client’s interests.”<sup>54</sup> The court further noted that “the process of winnowing out weaker arguments on appeal and focusing on those more likely to prevail, far from being evidence of incompetence, is the hallmark of effective appellate advocacy.”<sup>55</sup>

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<sup>49</sup> Annex 60, U.S. District Court for the Southern District of Texas, *Pro Se* Petition for Habeas Corpus (Oct. 24, 2006), Brief from the petitioners, received on July 10, 2015.

<sup>50</sup> Annex 62, U.S. District Court for the Southern District of Texas, *Pro Se* Motion for Appointment of New Federal Habeas Counsel [with attachments] (Oct. 30, 2006), Brief from the petitioners, received on July 10, 2015.

<sup>51</sup> Annex 63, U.S. District Court for the Southern District of Texas, Response to Motion for Appointment of New Counsel (Nov. 2, 2006), Brief from the petitioners, received on July 10, 2015.

<sup>52</sup> Annex 64, U.S. District Court for the Southern District of Texas, Order Denying Motion for Appointment of New Counsel (Nov. 6, 2006), Brief from the petitioners, received on July 10, 2015.

<sup>53</sup> Annex 64, U.S. District Court for the Southern District of Texas, Order Denying Motion for Appointment of New Counsel (Nov. 6, 2006), Brief from the petitioners, received on July 10, 2015.

<sup>54</sup> Annex 64, U.S. District Court for the Southern District of Texas, Order Denying Motion for Appointment of New Counsel (Nov. 6, 2006), Brief from the petitioners, received on July 10, 2015.

<sup>55</sup> Annex 64, U.S. District Court for the Southern District of Texas, Order Denying Motion for Appointment of New Counsel (Nov. 6, 2006), Brief from the petitioners, received on July 10, 2015.

73. On November 10, 2006, Mr. Vernay filed an amended federal habeas petition claiming, *inter alia*, that: i) the actions of Mr. Tercero's trial counsel in failing to properly investigate his case, failing to do a proper mitigation investigation, failing to obtain his school and medical records, failing to obtain a psychological evaluation and failing to investigate and present the claim of denial of consular assistance under Article 36 of the Vienna Convention on Consular Relations fell so far below the standard of care required of counsel trying capital cases as to constitute ineffective assistance of counsel and denial of Mr. Tercero's constitutional rights; ii) the petitioner was under 18 years of age at the time of the offense and the imposition of a death sentence violated his constitutional rights; iii) the actions of agents of the United States Government and State of Texas in failing and/or refusing to notify the Nicaraguan Consulate of Mr. Tercero's detention, despite his request for consular assistance constituted a violation of Article 36(1)(b) of the Vienna Convention on Consular Relations and resulted in a violation of his constitutional rights; iv) the failure of Mr. Crowley, counsel of record in Mr. Tercero's motion for a new trial and counsel on the appeal of his conviction and death sentence, to raise the issue of the trial court's denial of the motion for a new trial based upon prosecutorial misconduct fell so far below the standard of care required of counsel handling appeals in capital cases as to constitute ineffective assistance of counsel and a denial of Mr. Tercero's constitutional rights; v) the actions of Mr. Wheelan, state habeas counsel for Mr. Tercero, in failing to conduct an investigation of any of the facts of Mr. Tercero's case, failing even to attempt to interview any of the witnesses or potential witnesses involved in his case, failing to investigate the facts pertaining to the actions of trial and appellate counsel, potential mitigation, and potential prosecutorial misconduct and withholding of evidence and failing even to attempt to secure funds for investigation or to obtain any records pertaining to Mr. Tercero's background, including birth records, school records and medical records fell so far below the standard care required of the Texas Court of Criminal Appeals for counsel doing state habeas corpus work in capital cases as to constitute ineffective assistance of counsel and a denial of Mr. Tercero's constitutional rights; and vi) the failure of the Texas Court of Criminal Appeals to take steps to ensure that Mr. Tercero be provided competent counsel constituted a violation of Mr. Tercero's right to due process of law.<sup>56</sup>

74. In late 2007, investigator Norma Villanueva travelled to Nicaragua to investigate the claim that Mr. Tercero was under the age of 18 at the time of the offense.<sup>57</sup> During her trip, Ms. Villanueva collected affidavits from Maria Lidia Tercero, Saturino Antonio Huete Tercero, Arnulfo Ponce Gomez, Maria Furgencia Martinez Medina, Maria Auxiliadora Herrera Montalvan, and Maria de Jesús Gomez Soriano, who provided evidence with regard to Mr. Tercero having had an older brother who was born in 1976 and later died from a scorpion sting when he was young, and to Mr. Tercero being given the exact same name as his older brother when he was born in 1979 in order for him to replace his older brother within the family in line with local traditions.<sup>58</sup> On January 8, 2008, counsel for Mr. Tercero filed their reply to the state's response to their federal habeas petition and attached to their brief: i) the affidavits collected by Ms. Villanueva; ii) an affidavit from Ms. Villanueva in which she explained her investigation conducted in Nicaragua; iii) a document indicated to be a birth certificate for Mr. Tercero recording his date of birth to be August 20, 1979; and iv) a certificate of authenticity of the birth certificate as an official document.<sup>59</sup>

75. On March 31, 2008, the U.S. District Court for the Southern District of Texas reviewed Mr. Tercero's federal habeas petition and the state's arguments and issued an order staying federal habeas proceedings so that Mr. Tercero could file a new state habeas petition.<sup>60</sup> In its order, the court noted that Mr. Tercero had not presented to state courts the argument that he was under the age of 18 at the time of the

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<sup>56</sup> Annex 66, U.S. District Court for the Southern District of Texas, First Amended Petition for Habeas Corpus [with attachments] (Nov. 10, 2006), Brief from the petitioners, received on July 10, 2015.

<sup>57</sup> Annex 68, Affidavits Collected by Investigator Norma Villanueva (Dec. 31, 2007), Brief from the petitioners, received on July 10, 2015.

<sup>58</sup> Annex 68, Affidavits Collected by Investigator Norma Villanueva (Dec. 31, 2007), Brief from the petitioners, received on July 10, 2015.

<sup>59</sup> Annex 69, U.S. District Court for the Southern District of Texas, Petitioner's Reply to Respondent's Answer, Including Villanueva Affidavits as Exhibits (Jan. 8, 2008), Brief from the petitioners, received on July 10, 2015.

<sup>60</sup> Annex 70, U.S. District Court for the Southern District of Texas, Order Staying and Administratively Closing the Federal Case (Mar. 31, 2008), Brief from the petitioners, received on July 10, 2015.

offense and that, while federal law does not favor the adjudication of unexhausted claims, a federal court should stay adjudication of a mixed petition to allow state review when the petitioner shows: i) good cause for failing to exhaust the claim; ii) the claim is not plainly meritless; and iii) he has not intentionally engaged in dilatory tactics. The court found that Mr. Tercero met these requirements and considered that state courts must be given the first opportunity to consider his claim of being under the age of 18 at the time of the offense. The court also stated that this would allow Mr. Tercero to exhaust the other claims he had not presented to state courts and had raised for the first time in his *pro se* federal habeas petition and amended federal habeas petition.

#### 4. State habeas corpus proceedings on remand

76. On October 29, 2008, the Court of Criminal Appeals of Texas accepted the successor application for writ of habeas corpus that had been filed by Mr. Vernay on May 5, 2008, in which he had raised the claim that Mr. Tercero was under the age of 18 at the time of the offense and that this claim had not been presented in his initial state habeas petition since the United States Supreme Court decision prohibiting the imposition of a death sentence on a minor had not yet been issued by the time Mr. Tercero filed his initial state habeas petition.<sup>61</sup> As evidence supporting this claim, Mr. Vernay presented a document indicated to be a birth certificate showing as August 20, 1979, date of birth for Mr. Tercero, which, if accepted, would establish that he was a minor at the time of the offense, and the transcript from Mr. Tercero's mother's trial testimony.<sup>62</sup>

77. The Court of Criminal Appeals ordered that the issue be remanded to the trial court to further develop the record and consider Mr. Tercero's claim.

78. On August 7, 2009, having found that no controverted, previously unresolved factual issues material to the legality of Mr. Tercero's confinement existed, the District Court of Harris County, Texas, ordered the parties to submit their proposed findings of fact and conclusions of law on the matter of Mr. Tercero's age at the time of the offense.<sup>63</sup> On November 13, 2009, the court issued a decision adopting the state's proposed findings of fact and conclusions of law, concluding that Mr. Tercero had failed to show by a preponderance of the evidence that he was under the age of 18 at the time of the offense.<sup>64</sup> In its decision, the District Court found unpersuasive and not credible the alleged birth record provided by Mr. Tercero asserting a birthdate of August 20, 1979, in light of the ample documentation of and Mr. Tercero's prior continuous assertion of a birthdate establishing that he was over the age of 18 at the time of the offense. In making this finding, the court noted, *inter alia*, that several witnesses, including Mr. Tercero, offered testimony at his trial indicating that he was over the age of 18 and documents from Nicaraguan police showed Mr. Tercero's age as 22 in 1998 in accordance with prior birth records provided by him. On March 3, 2010, the Court of Criminal Appeals of Texas adopted the findings and conclusions of the District Court of Harris County, Texas, and denied habeas relief to Mr. Tercero.<sup>65</sup>

<sup>61</sup> Annexes 71 and 73, Harris County District Court, Successor Application for Writ of Habeas Corpus [with exhibits] (May 5, 2008); Court of Criminal Appeals, Order Granting Successor Status and Remanding to District Court (Oct. 29, 2008), Brief from the petitioners, received on July 10, 2015.

<sup>62</sup> Annexes 71, 73 and 96, Harris County District Court, Successor Application for Writ of Habeas Corpus [with exhibits] (May 5, 2008); Court of Criminal Appeals, Order Granting Successor Status and Remanding to District Court (Oct. 29, 2008); U.S. Court of Appeals for the Fifth Circuit, Opinion Denying Certificate of Appealability (Dec. 18, 2013), Brief from the petitioners, received on July 10, 2015.

<sup>63</sup> Annexes 74 and 78, Harris County District Court, Order Directing Parties to Submit Proposed Findings of Fact and Conclusions of Law (Aug. 7, 2009); U.S. District Court for the Southern District of Texas, Unopposed Motion to Reopen Case and for Scheduling Order (Mar. 8, 2010), Brief from the petitioners, received on July 10, 2015.

<sup>64</sup> Annex 75, Harris County District Court, Order Adopting Respondent's Findings of Facts and Conclusions of Law and Denying Habeas Relief (Nov. 13, 2009), Brief from the petitioners, received on July 10, 2015.

<sup>65</sup> Annex 77, Court of Criminal Appeals, Order Denying Habeas Relief (Mar. 3, 2010), Brief from the petitioners, received on July 10, 2015.

## 5. Re-opening of federal habeas corpus proceedings

79. On March 8, 2010, Mr. Vernay filed a motion requesting that federal habeas proceedings be re-opened; a request granted by the U.S. District Court for the Southern District of Texas on March 9, 2010.<sup>66</sup>

80. On April 26, 2010, Mr. Tercero filed a *pro se* motion requesting an evidentiary hearing and the appointment of new counsel.<sup>67</sup> In his motion, Mr. Tercero argued that he had received ineffective assistance of counsel from Messrs. Vernay and Wright, the appointed counsel to handle his federal habeas petition and state habeas petition on remand. In this regard, he submitted that counsel possessed evidence which would have shown to the District Court of Harris County, Texas, and the Court of Criminal Appeals of Texas, that Mr. Tercero was under the age of 18 at the time of the offense and that, after misleading Mr. Tercero to believe that this evidence would be presented in court, counsel changed his mind and failed to present it. Mr. Tercero argued that because of this he failed to show the state courts a preponderance of evidence on the issue of his age at the time of the offense. Mr. Tercero informed the U.S. District Court for the Southern District of Texas that evidentiary issues remained unresolved and that it was necessary to permit discovery in the form of interrogatories and requests for production of depositions and to subsequently hold an evidentiary hearing. In light of his counsel's alleged failure to present evidence, Mr. Tercero requested the court to appoint new counsel or allow him to represent himself.

81. Mr. Vernay responded to Mr. Tercero's *pro se* motion and acknowledged that he was aware of the evidence referred to by Mr. Tercero in his motion as this evidence had previously been mentioned in conversations with his client.<sup>68</sup> Mr. Vernay claimed that he had told Mr. Tercero that he would do his best to present Mr. Tercero's arguments and evidence to state courts but that despite his best efforts, he was denied the opportunity to do so as the District Court of Harris County, Texas, did not grant him an evidentiary hearing. Mr. Vernay also informed the court that he had informed his client that he would attempt to present the evidence to federal courts since he had been denied such an opportunity by state courts. On May 17, 2010, the U.S. District Court for the Southern District of Texas denied Mr. Tercero's motion as premature since his counsel had not yet filed the amended federal habeas petition.<sup>69</sup>

82. On July 14, 2010, Mr. Vernay filed a second amended federal habeas petition in which he incorporated all claims originally raised by Mr. Tercero in his *pro se* federal habeas petition and in counsel's first amended federal habeas petition.<sup>70</sup> Mr. Vernay also amended the claim concerning Mr. Tercero's age at the time of the offense to include new evidence and to assert that the decision of the state court denying his request for an evidentiary hearing and the subsequent denial of his claim that he was under the age of 18 at the time of the offense resulted in an unreasonable determination of the facts in light of the substantial evidence he produced in state court proceedings.

83. On July 16, 2010, Mr. Tercero filed a *pro se* motion to request a hearing to present evidence and to express conflict of interest with his counsel.<sup>71</sup> In his motion Mr. Tercero informed the U.S. District Court for the Southern District of Texas that he had written to his counsel requesting that they withdraw from

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<sup>66</sup> Annexes 78 and 79, U.S. District Court for the Southern District of Texas, Unopposed Motion to Reopen Case and for Scheduling Order (Mar. 8, 2010); U.S. District Court for the Southern District of Texas, Order Granting Motion to Reopen Case (Mar. 9, 2010), Brief from the petitioners, received on July 10, 2015.

<sup>67</sup> Annex 80, U.S. District Court for the Southern District of Texas, *Pro Se* Motion for an Evidentiary Hearing and Appointment of New Counsel (Apr. 26, 2010), Brief from the petitioners, received on July 10, 2015.

<sup>68</sup> Annex 81, U.S. District Court for the Southern District of Texas, Response to Motion for an Evidentiary Hearing and Appointment of New Counsel (Apr. 30, 2010), Brief from the petitioners, received on July 10, 2015.

<sup>69</sup> Annex 82, U.S. District Court for the Southern District of Texas, Order Denying Motion to Appoint New Counsel (May 17, 2010), Brief from the petitioners, received on July 10, 2015.

<sup>70</sup> Annex 83, U.S. District Court for the Southern District of Texas, Second Amended Petition for Habeas Corpus (July 14, 2010), Brief from the petitioners, received on July 10, 2015. See also *supra*, paras. 68, 73.

<sup>71</sup> Annex 84, U.S. District Court for the Southern District of Texas, *Pro Se* Motion for Hearing to Present Evidence and to Express Conflict with Current Counsel (July 16, 2010), Brief from the petitioners, received on July 10, 2015.

his case and that they had refused to do so by stating that no conflict of interest existed. In light of this refusal to withdraw, Mr. Tercero asked the court to find that counsel were providing ineffective assistance as they refused to present evidence he had referenced in his *pro se* motion filed on April 26, 2010.<sup>72</sup> Mr. Tercero also informed the court that, despite being given the opportunity to raise all claims previously not raised in state courts, his counsel decided to only raise the claim concerning his age at the time of the offense in the state habeas petition on remand. In his motion, Mr. Tercero also recounted several alleged errors committed by previous counsel at various stages of his case.

84. In his response to Mr. Tercero's *pro se* motion, Mr. Vernay informed the court that he did not present some of the evidence referenced by Mr. Tercero on the basis that there were doubts about the veracity of that evidence.<sup>73</sup> In this regard, Mr. Vernay submitted that he was only made aware of certain affidavits, including an affidavit from Mr. Tercero's grandmother, when they were filed by Mr. Tercero in his *pro se* motion filed on April 26, 2010, and that upon consulting with his investigator on this matter, he was informed by her that she had never met with the persons who had given the statements and that she did not recognize the signature attributed to her on these documents. Mr. Vernay submitted that these documents were therefore not presented. Mr. Vernay informed the court that counsel had exerted their best efforts in presenting Mr. Tercero's claims in state and federal courts, but that in light of continued client dissatisfaction they would defer to the court's discretion as to whether they should be removed as Mr. Tercero's counsel.

85. On August 12, 2010, the U.S. District Court for the Southern District of Texas denied Mr. Tercero's *pro se* motion to appoint new counsel, reasoning that:

[Mr.] Tercero's attorneys ha[d] extensively investigated his habeas claims, litigated the issues in state and federal court, and otherwise actively represented him. That broad background provided them a basis to question the authenticity of the evidence Tercero ha[d] produced. They made a strategic decision not to rely on evidence they believed to be false. Tercero's attorneys have not only a duty of zealous representation to him, but a duty of candor and professionalism to the Court. The withholding of unreliable evidence is characteristic of admirable attorney advocacy. [Mr.] Tercero has provided no basis to call his attorneys' representation into question. *See Nix v. Whiteside*, 475 U.S. 157, 173 (1986) ("[T]he right to counsel includes no right to have a lawyer who will cooperate with planned perjury").<sup>74</sup>

86. On February 15, 2012, the U.S. District Court for the Southern District of Texas noted that there were many issues not developed or addressed in the second amended habeas petition and the respondent's brief to that petition and ordered the parties to provide briefing on those issues and any others needing additional development.<sup>75</sup> In its order, the court noted that the AEDPA bars relitigation of any claim adjudicated on the merits in state courts and stated that the parties had not sufficiently discussed how the AEDPA applied to the decision of state courts in this case. The court also noted that under the AEDPA, a determination of a factual issue made by a State court shall be presumed correct and that a petitioner shall have the burden of rebutting the presumption of correctness by clear and convincing evidence, which had not been done by Mr. Tercero as he had summarily argued that, given the superficial nature of the state court disposition, the AEDPA should not govern his claims. Moreover, in its order, the court informed the parties that they should discuss whether the state courts satisfied Mr. Tercero's rights by denying relief without holding a hearing, or even addressing much of the evidence he had adduced in federal court during the presentation of his initial federal habeas petition. Additionally, the court ordered the respondent to file

<sup>72</sup> See *supra*, para 80.

<sup>73</sup> Annex 85, U.S. District Court for the Southern District of Texas, Response to Motion for Hearing to Present Evidence and to Express Conflict with Current Counsel [with exhibits] (July 31, 2010), Brief from the petitioners, received on July 10, 2015.

<sup>74</sup> Annex 86, U.S. District Court for the Southern District of Texas, Order Denying Motion for New Counsel (Aug. 12, 2010), Brief from the petitioners, received on July 10, 2015.

<sup>75</sup> Annex 89, U.S. District Court for the Southern District of Texas, Order Requiring Additional Briefing (Feb. 15, 2012), Brief from the petitioners, received on July 10, 2015.

submissions regarding the petitioner's request for an evidentiary hearing for factual development. On February 27, 2012, one of Mr. Tercero's federal habeas counsel, Mr. Wright, requested to withdraw from the case and on that same day the U.S. District Court for the Southern District of Texas granted his request.<sup>76</sup>

87. On February 7, 2013, after receiving supplemental briefs from Mr. Vernay and from the state of Texas, the U.S. District Court for the Southern District of Texas denied habeas relief to Mr. Tercero after concluding that it was prevented from reviewing the majority of Mr. Tercero's claim because they had not been raised at the required opportunity and dismissing his claim concerning his age at the time of the offense for finding no error in the decisions of the state courts.<sup>77</sup> The court did not issue a certificate of appealability.

88. In its decision, the court noted that AEDPA precludes federal review over unexhausted claims for any purpose other than to deny their merits and that Mr. Tercero raised several claims for the first time in his *pro se* federal habeas petition and in the first amended federal habeas petition filed by Mr. Vernay. The court also noted that none of those claims, with the exception of the claim concerning Mr. Tercero's age at the time of the offense, were advanced in state courts despite the fact that Mr. Tercero had been given the opportunity to do so when federal habeas proceedings were stayed. The court concluded that in light of this failure, the AEDPA precluded the court from affording habeas relief on those issues.

89. The court also noted that several claims had been raised for the first time in Mr. Tercero's *pro se* state habeas petition, which was dismissed by the Court of Criminal Appeals of Texas as an abuse of the writ, and federal practice limits habeas review to those claims that an inmate presents in compliance with state procedural law. The court therefore concluded that Mr. Tercero's failure to present his claims to the state courts in a procedurally adequate manner barred federal courts from considering their merits. Similarly, the court explained that a petitioner's failure to exhaust his claims results in a federal procedural bar and that since Mr. Tercero had never presented his unexhausted claims in his previous state habeas applications, Texas procedural law would prohibit the state courts from considering them in a subsequent application. Texas' abuse-of-the-writ doctrine, therefore, foreclosed federal review.

90. The court also addressed Mr. Tercero's claim that ineffective representation by his state habeas attorney should forgive the procedural impediments to federal review and concluded that the well-settled jurisprudence of the Fifth Circuit held that state habeas counsel's representation could not constitute cause. The court noted that the United States Supreme Court decision in *Martinez v. Ryan* found that deficient performance by a state habeas attorney may amount to cause under some circumstances, namely:

Where, under state law, claims of ineffective assistance of trial counsel must be raised in an initial-review collateral proceeding, a procedural default will not bar a federal habeas court from hearing a substantial claim of ineffective assistance at trial if, in the initial-review collateral proceeding, there was no counsel or counsel in that proceeding was ineffective.<sup>78</sup>

91. However, the court also noted that it was still unclear whether *Martinez* would apply to federal habeas cases arising from Texas convictions as the United States Supreme Court had not yet made such a finding and the Fifth Circuit had held that *Martinez* did not apply to federal habeas cases arising from Texas convictions. In light of this conflict, the court concluded that Fifth Circuit precedent remained binding until the United States Supreme Court provided contrary guidance.

92. With regard to proving actual prejudice, the court noted that Mr. Tercero had to show more than a possibility of prejudice, by establishing that the errors worked to his actual and substantial

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<sup>76</sup> Annexes 90 and 91, U.S. District Court for the Southern District of Texas, Motion to Withdraw as Counsel [Mr. Wright] (Feb. 27, 2012); U.S. District Court for the Southern District of Texas, Order Granting Mr. Wright's Motion to Withdraw as Counsel (Feb. 27, 2012), Brief from the petitioners, received on July 10, 2015.

<sup>77</sup> Annex 94, U.S. District Court for the Southern District of Texas, Memorandum and Order Denying Habeas Relief (Feb. 7, 2013), Brief from the petitioners, received on July 10, 2015.

<sup>78</sup> *Martinez v. Ryan* (2012) 132 (U.S. S.Ct.) at 1320.

disadvantage, infecting his entire trial with error of constitutional dimensions. The court concluded that, for the same reasons that he had not shown cause, Mr. Tercero's cursory arguments could not prove actual prejudice.

93. The U.S. District Court for the Southern District of Texas also considered the claim of Mr. Tercero's age at the time of the offense, which had been previously addressed by state courts, and affirmed the decision of state courts. With regard to the request for an evidentiary hearing, the court found that Mr. Tercero did not signal to the state courts that the federal evidence adduced in his first amended federal habeas petition needed airing in a state hearing. The court noted that, while asking the state courts to provide resources to establish his claims, Mr. Tercero never gave the state courts any indication that he wished to resolve inconsistencies between the various birth certificates and the unusual story about his older brother. The court considered that state courts had given Mr. Tercero an opportunity to be heard, and he chose to limit what the courts would consider; the fact that he failed to take advantage of the opportunity to present evidence did not mean he was denied that possibility.

94. With respect to possible errors of fact committed by state courts in assessing the evidence pertaining to Mr. Tercero's age at the time of offense, the court considered that the state courts had found any evidence contrary to its decision to be without credibility or not as persuasive as that on which it explicitly based its reasoning. In its own assessment, the U.S. District Court for the Southern District of Texas found that the suspicious timing of Mr. Tercero's claim, the problematic and evolving tale of his alleged older sibling, the weak evidentiary foundation for his arguments, and the pervasive and consistent information provided prior to his claim did not make his case one where a reasonable factfinder must conclude that the state court's determination of the facts was unreasonable. The court concluded that Mr. Tercero did not show that the state habeas process resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceedings and denied his claim that he was under the age of 18 at the time of the offense.

## **6. Appeals to the United States Court of Appeals for the Fifth Circuit and to the United States Supreme Court**

95. On March 5, 2013, Mr. Tercero filed a notice of appeal from the decision of the U.S. District Court for the Southern District of Texas denying habeas relief in order to appeal the claim that he was a minor at the time of the offense.<sup>79</sup> He argued that the state habeas court's decision was not an adjudication on the merits in the terms of U.S.C. § 2254(d) since the state court did not hold an evidentiary hearing and that, even if it were to be considered an adjudication on the merits, the state habeas court's decision was an unreasonable determination of the facts in light of the evidence presented.<sup>80</sup>

96. On December 18, 2013, the United States Court of Appeals for the Fifth Circuit denied Mr. Tercero's application.<sup>81</sup> With regard to Mr. Tercero's first argument, the court noted that the state habeas court gave Mr. Tercero the opportunity to be heard but he never requested an evidentiary hearing in the state court, and, in any event, had already substantially developed his claim in the district court prior to remand. The United States Court of Appeals for the Fifth Circuit thus affirmed the conclusion of the U.S. District Court for the Southern District of Texas that the state habeas court adjudication was a determination on the merits of the case which warranted AEDPA deference. With regard to Mr. Tercero's second argument contesting the reasonableness of the state habeas court's assessment of the evidence, the United States Court of Appeals for the Fifth Circuit noted that Mr. Tercero asked the court to ignore the substantial record evidence in his case that predates the U.S. Supreme Court decision in *Roper v. Simmons*, and to instead credit suspect evidence that

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<sup>79</sup> Annex 95, U.S. District Court for the Southern District of Texas, Notice of Appeal (Mar. 5, 2013), Brief from the petitioners, received on July 10, 2015.

<sup>80</sup> Annex 96, U.S. Court of Appeals for the Fifth Circuit, Opinion Denying Certificate of Appealability (Dec. 18, 2013), Brief from the petitioners, received on July 10, 2015.

<sup>81</sup> Annex 96, U.S. Court of Appeals for the Fifth Circuit, Opinion Denying Certificate of Appealability (Dec. 18, 2013), Brief from the petitioners, received on July 10, 2015.

was unearthed shortly after that decision was issued. The court found that it was an uncontroverted fact that, for over a decade, Mr. Tercero consistently presented himself as having been born on August 20, 1976 or 1977. The court further noted that this was supported by his own testimony and his family's testimony at trial, as well as his arrest and immigration records. The court held that, "given the substantial evidence corroborating Mr. Tercero's earlier birthdate and the incredible nature of Mr. Tercero's evidence to the contrary," no reasonable jurist would find debatable the U.S. District Court's decision that Mr. Tercero failed to show that the state habeas process resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceedings.

97. In its decision the court also noted that several claims raised for the first time in Mr. Tercero's *pro se* federal habeas petition and his counsel's first amended federal habeas petition were not raised in state court proceedings on remand even though Mr. Tercero had been given the opportunity to exhaust these new claims in state courts.

98. On June 30, 2014, the United States Supreme Court denied Mr. Tercero's petition for writ of certiorari.<sup>82</sup>

## 7. Developments following the exhaustion of legal remedies

99. On May 19, 2015, the District Court of Harris County, Texas, issued an order setting August 26, 2015, as the date for Mr. Tercero's execution.<sup>83</sup> On May 26, 2015, the U.S. District Court for the Southern District of Texas denied a *pro se* motion filed by Mr. Tercero in which he had requested the appointment of new counsel.<sup>84</sup> In its decision the court noted that Mr. Tercero had cited an irreparable conflict of interest with his attorney and that he had supplemented his motion through attorney Katherine C. Black who informed the court that she had been retained by Mr. Tercero to seek enforcement of his right to counsel and to request the court to appoint Ms. Salima Pirmohamed as his new counsel *in lieu* of Mr. Vernay. The court also noted that Mr. Vernay had provided a status report indicating serious impediments to the attorney/client relationship.

100. Despite the existence of impediments cited by both parties, the court decided that it could not substitute Mr. Tercero's counsel until certain issues were resolved, namely his indigent status and the name of another attorney to be appointed along with Ms. Pirmohamed. The court noted in this regard that federal law guarantees the appointment of one or more attorneys to a capital petitioner who is or becomes financially unable to obtain adequate representation but that the law also provides that at least one of the attorneys must have been admitted to practice in the court of appeals for not less than five years and must have had not less than three years experience in the handling of appeals in that court in felony cases. The court stated that Mr. Tercero's description of Ms. Black as being "retained" in his case, without describing whether he had hired her or she served on a *pro bono* basis, called into question his indigence. The court also stated that Ms. Pirmohamed's *résumé* indicates that she was admitted to practice law in 2013 and therefore lacked statutory qualification for appointment as Tercero's sole attorney under federal law. The court reasoned that since Mr. Tercero had not shown the need for the appointment of two attorneys, it could not appoint Ms. Pirmohamed as counsel for Mr. Tercero, without prejudice to the refiling of his motion with more information.

101. On May 27, 2015, Mr. Vernay filed a motion before the U.S. District Court for the Southern District of Texas requesting the court to substitute Mr. Mike Charlton, a highly experienced capital habeas

<sup>82</sup> Annex 97, U.S. Supreme Court, Opinion Denying Writ of Certiorari (June 30, 2014), Brief from the petitioners, received on July 10, 2015.

<sup>83</sup> Annex 107, Harris County District Court, Execution Order (May 19, 2015), Brief from the petitioners, received on July 10, 2015.

<sup>84</sup> Annex 108, U.S. District Court for the Southern District of Texas, Order Denying Pro Se Motion for New counsel (May 26, 2015), Brief from the petitioners, received on July 10, 2015.

attorney, as Mr. Tercero's counsel *in lieu* of Mr. Vernay; a request granted on May 29, 2015, and confirmed on June 6, 2015.<sup>85</sup>

## V. LEGAL ANALYSIS

### A. Preliminary matters

102. The Inter-American Commission takes note of the State's assertion that all claims filed by the petitioners are inadmissible as they fail to characterize any violation of protected rights and its request that the Inter-American Commission reverse its decision on the admissibility of this case. However, the IACHR identifies no supervening facts which would require review of any question of admissibility, and considers that the arguments raised concern questions of fact and law that require review on the merits.

103. Before embarking on such an analysis, the Inter-American Commission considers it relevant to 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 a human right of special importance and as a *sine qua non* for the enjoyment of other rights.

104. That gives rise to the particular importance of the IACHR's obligation to ensure that any deprivation 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.<sup>86</sup> 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>87</sup> and it has been set out and applied by the Inter-American Commission in previous capital cases brought before it.<sup>88</sup>

105. 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:<sup>89</sup>

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

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<sup>85</sup> Annexes 109, 110 and 111, U.S. District Court for the Southern District of Texas, Motion for Substitution of Counsel [Mr. Vernay] (May 27, 2015); U.S. District Court for the Southern District of Texas, Order Substituting Counsel [Mr. Charlton] (May 29, 2015), U.S. District Court for the Southern District of Texas, Order Confirming Appointment of Mr. Charlton as Counsel (June 6, 2015), Brief from the petitioners, received on July 10, 2015.

<sup>86</sup> See, in this respect, 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.

<sup>87</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 (finding that "because execution of the death penalty is irreversible, the strictest and most rigorous enforcement of judicial guarantees is required of the State so that those guarantees are not violated and a human life is not arbitrarily taken as a result"); United Nations Human Rights Committee, *Baboheram-Adhin et al. v. Suriname*, Communications Nos. 148-154/1983, adopted on April 4, 1985, para. 14.3 (observing that "the law must strictly control and limit the circumstances in which a person may be deprived of his life by the authorities of a State"); *Report of the United Nations Special Rapporteur on Extrajudicial Executions*, Bacre Waly Ndiaye, submitted pursuant to Commission on Human Rights Resolution 1994/82, Question of the Violation of Human Rights and Fundamental Freedoms in any part of the World, with particular reference to Colonial and Other Dependent Countries and Territories, UN Doc.E/CN.4/1995/61 (December 14, 1994) ("the Ndiaye Report"), para. 378 (emphasizing that in capital cases, it is the application of the standards of fair trial to each and every case that needs to be ensured and, in case of indications to the contrary, verified, in accordance with the obligation under international law to conduct exhaustive and impartial investigations into all allegations of violation of the right to life).

<sup>88</sup> IACHR, Report No. 11/15, Case 12.833, Merits (Publication), Felix Rocha Diaz, United States, March 23, 2015, para. 54; Report No. 44/14, Case 12.873, Merits (Publication), Edgar Tamayo Arias, United States, July 17, 2014, para. 127; Report No. 57/96, Andrews, United States, IACHR Annual Report 1997, para. 170-171.

<sup>89</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.

punishment, and therefore warrants a particularly stringent need for reliability in determining whether a person is responsible for a crime that carries a penalty of death.<sup>90</sup>

106. According to the “fourth instance formula,” the Commission in principle will not review the judgments issued by domestic courts acting within their competence and with due judicial guarantees. The fourth instance formula does not, however, preclude the Commission from considering a case where the petitioner’s allegations entail a possible violation of any of the rights set forth in the American Declaration.<sup>91</sup> In this regard, the IACHR has affirmed in death penalty cases that the application of the heightened scrutiny test to due process questions is not in any way precluded by the fourth instance formula.<sup>92</sup>

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

[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.<sup>93</sup>

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

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

##### Article XVIII – Right to a fair trial

Every person may resort to the courts to ensure respect for his legal rights. There should likewise be available to him a simple, brief procedure whereby the courts will protect him from acts of authority that, to his prejudice, violate any fundamental constitutional rights.

##### Article XXVI – Right to due process of law

Every accused person is presumed to be innocent until proved guilty.

#### **1. Ineffective assistance of court-appointed counsel**

109. The petitioners contend that Mr. Tercero was never provided with effective assistance of counsel throughout the pre-trial, trial and post-conviction stages of his case as the performance of his

<sup>90</sup> IACHR, Report No. 78/07, Case 12.265, Merits (Publication), Chad Roger Goodman, The Bahamas, October 15, 2007, para. 34.

<sup>91</sup> IACHR, Report No. 75/02, Case 11.140, Mary and Carrie Dann, Merits, United States, December 27, 2002, para. 166.

<sup>92</sup> IACHR, Report No. 44/14, Case 12.873, Merits (Publication), Edgar Tamayo Arias, United States, July 17, 2014, para. 129.

<sup>93</sup> IACHR, Report No. 44/14, Case 12,873, Report on Merits (Publication), Edgar Tamayo Arias, United States, July 17, 2014, para. 214.

court-appointed attorneys during a span of 15 years fell far short of a reasonable professional standard. They argue that from the beginning of Mr. Tercero's case there was enough information to identify specific areas of mitigation that an effective capital defense team should have known to investigate. The United States submits that Mr. Tercero was afforded effective counsel who went to great lengths to investigate his background and arrest by: i) retaining a private investigator and a forensic psychologist to assist with the case in Texas; ii) obtaining funds to travel to Nicaragua to interview witnesses, many of whom later appeared as character witnesses at the trial's sentencing phase; and iii) securing an investigator who traveled to Nicaragua to question witnesses and review documents relating to Mr. Tercero's claim that he was under the age of 18 at the time of the offense. Furthermore, it submits that the decision of counsel to not pursue the mitigating evidence cited by the petitioners was a strategic decision and the effectiveness of that decision does not fall under the purview of the IACHR or of Mr. Tercero's rights under the American Declaration.

110. The Inter-American Commission has indicated 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. Adequate legal representation is a fundamental component of the right to a fair trial.

[...]

The State cannot be held responsible for all deficiencies in the conduct of State-funded defense counsel. National authorities are, however, required [...] to intervene if a failure by legal aid counsel to provide effective representation is manifest or sufficiently brought to their attention. Rigorous compliance with the defendant's right to competent counsel is compelled by the possibility of the application of the death penalty."<sup>94</sup>

111. 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. In the present case, the interests at stake included the potential application of the death penalty, and the assistance of counsel must be evaluated in that context.

112. In terms of the standards that must be applied by the United States in capital cases, the IACHR takes into account that the State is also subject to human rights obligations under the International Covenant on Civil and Political Rights (ICCPR), which it ratified in 1992. While the IACHR does not directly apply the ICCPR, as a general principle of international law it may consider the other obligations of a member state when interpreting and applying its obligations within the inter-American system. The ICCPR sets forth basic due process guarantees, as well as specific limitations on the application of the death penalty, which may only be permissibly imposed following a full and fair criminal process meeting the strictest due process standards. To complement these basic norms, the United Nations Economic and Social Council adopted a set of basic standards concerning the death penalty in Resolution 1984/50. The fifth Safeguard refers to the right to due process and adequate legal assistance and sets out that:

capital punishment may only be carried out pursuant to a final judgment rendered by a competent court after legal process which gives all possible safeguards to ensure a fair trial, at least equal to those contained in article 14 of the International Covenant on Civil and Political Rights, including the right of anyone suspected of or charged with a crime for which capital punishment may be imposed to adequate legal assistance at all stages of the proceedings.

<sup>94</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.

113. In resolution 1989/64 the Economic and Social Council called on retentionist Member States to afford:

special protection to persons facing charges for which the death penalty is provided by allowing time and facilities for the preparation of their defense, including the adequate assistance of counsel at every stage of the proceedings, above and beyond the protection afforded in non-capital cases.

114. It is internationally accepted that the right to an adequate and effective defense in capital cases must, without exception, meet especially strict and rigorous standards of due process.

115. It may also 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>95</sup> According to these guidelines, the duty of counsel in the United States to investigate and present mitigating evidence is now “well-established” and:

Because 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>96</sup>

116. The Guidelines also emphasize that the “mitigation investigation should begin as quickly as possible, because it may affect the investigation of first phase defenses (e.g., by suggesting additional areas for questioning police officers or other witnesses), decisions about the need for expert evaluations (including competency, mental retardation, or insanity), motion practice, and plea negotiations.”<sup>97</sup>

117. According to the facts established in this report, Mr. Tercero was represented by court-appointed counsel throughout all the stages of the criminal proceedings. The record reflects that only summary efforts were made to investigate certain aspects of the case, for example that the court-appointed investigator spent a total of 16 hours on background work a few weeks before the trial, and trial counsel made a trip to Mr. Tercero’s home country for this purpose, again, just a couple of weeks before trial. It is a proven fact that trial counsel returned \$8,449.42 of the \$21,670 given by the Harris County District Court to interview witnesses in Nicaragua after having spent only \$500 on a private investigator in Nicaragua. Moreover, trial counsel called Mr. Tercero as its only witness during trial while the prosecution presented 17 witnesses to testify. Trial counsel did not conduct a thorough investigation into the alleged victim’s background to gather information which could have been presented at the penalty phase of his trial. Trial counsel also failed to protect the record by not objecting to inflammatory comments made by the prosecution during its closing statements.

118. The IACHR also notes that, at the post-conviction stage, trial counsel wrote a letter to counsel on appeal recommending to “protect the record, by stating that [Mr. Tercero] was denied [...] the right to Effective Counsel.”<sup>98</sup> Despite this recommendation, appeal counsel did not claim ineffective assistance of trial counsel in Mr. Tercero’s motion for a new trial and failed to appeal the denial of that

<sup>95</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/sclaid/deathpenaltyguidelines.pdf>.

<sup>96</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 (internal references omitted).

<sup>97</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.

<sup>98</sup> Annex 39, Letter from Mr. Villarreal to Mr. Crowley (Nov. 1, 2000), Brief from the petitioners, received on July 10, 2015.

motion. Further, defense counsel at the appeal and state habeas proceedings failed to raise a number of constitutional claims on Mr. Tercero's behalf. In particular, state habeas counsel did not raise the ineffectiveness of trial counsel in failing to conduct a proper mitigation investigation.

119. On October 24, 2006, Mr. Tercero filed a *pro se* federal habeas petition alleging that he was under the age of 18 at the time of the offense and raising three other new claims. His federal habeas counsel amended that petition to include additional claims. The federal court remanded the proceeding to state courts so that Mr. Tercero could exhaust the claims raised for the first time in Mr. Tercero's *pro se* petition and his counsel's amended petition. The Court of Criminal Appeals of Texas accepted the successor application filed by federal habeas counsel raising the claim that Mr. Tercero was under the age of 18 at the time of the offense and ordered that the issue be remanded to the trial court. The District Court of Harris County concluded that Mr. Tercero failed to show by a preponderance of the evidence that he was under the age of 18 the time of the offense.

120. The IACHR notes that on January 8, 2008, counsel for Mr. Tercero had attached an affidavit from investigator Norma Villanueva to their brief in reply to the state's response to their federal habeas petition. The affidavit explained her investigation conducted in Nicaragua regarding the claim that Mr. Tercero was under the age of 18 at the time of the offense. Ms. Villanueva provided evidence with regard to Mr. Tercero having had an older brother who was born in 1976 and later died and with respect to Mr. Tercero being given the exact same name as the deceased brother when he was born in 1979. According to the records, however, this evidence was not introduced by Mr. Tercero's counsel on remand before state courts.

121. After the re-opening of federal habeas corpus proceedings, Mr. Tercero's federal habeas counsel filed a second amended federal habeas petition incorporating all claims originally raised by Mr. Tercero in his *pro se* federal habeas petition and in the first amended petition. The U.S. District Court denied the petition on February 7, 2013, based on the fact that none of those claims, with the exception of the claim concerning Mr. Tercero's age at the time of the offense, were advanced in state courts despite the fact that Mr. Tercero had been given the opportunity to do so when federal habeas proceedings were stayed. Also, federal habeas counsel had the opportunity to present evidence during state habeas proceedings in remand but failed to request an evidentiary hearing, as later noted by the U.S. District Court and the Court of Appeals.

122. Having reviewed the record and the claims of the parties, the Inter-American Commission observes that a number of troubling issues in the way the prosecution was conducted have remained unaddressed or unresolved because they were never raised in subsequent proceedings. While these issues have not been developed before the IACHR, it must take note that, in his *pro se* motion to amend the state habeas petition presented in 2005, Mr. Tercero indicated that he had been coerced to provide an inculpatory declaration when first detained in July of 1999. This allegation was not developed prior or subsequent to his *pro se* filing. The IACHR also notes that, during the sentencing phase of the proceedings, evidence related to prior unadjudicated offenses that Mr. Tercero allegedly committed in Nicaragua was admitted as aggravating. Again, this issue was not developed subsequently. The IACHR has established in past cases that the admission of evidence of prior unadjudicated offenses raises very serious questions in the context of a capital case.<sup>99</sup> The record indicates that Mr. Tercero was never tried for the alleged prior offenses in Nicaragua. The standard for admissibility of mitigating or aggravating evidence at the sentencing phase is not the standard used to prove guilt or innocence. As the IACHR has previously established, "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>100</sup> The admission of such evidence at the sentencing phase has the effect of establishing a presumption of guilt, absent a trial process

<sup>99</sup> IACHR, Report No. 52/01, Case 12.243, Juan Raul Garza, United States, April 4, 2001, paras. 103-112.

<sup>100</sup> IACHR, Report No. 52/01, Case 12.243, Juan Raul Garza, United States, April 4, 2001, paras. 103-112.

with its attendant guarantees, that is then taken into account in determining the sentence for the crime that has just been adjudicated.<sup>101</sup>

123. As a consequence of these failures on the part of court-appointed counsel, and the corresponding failure on the part of the State to ensure that Mr. Tercero received effective assistance according to the standards applicable in a capital case, the Inter-American Commission concludes that the United States violated Mr. Tercero's right to due process and to a fair trial under Articles XVIII and XXVI of the American Declaration.

## **2. Right to consular notification and assistance**

124. According to the original petition, the Federal Bureau of Investigation (FBI) and other agents of the state of Texas and the United States allegedly failed or refused to notify the Consulate of Nicaragua of the arrest of the alleged victim, though he reportedly requested to be provided with consular assistance. In their additional observations on the merits, the petitioners do not develop this allegation originally presented by Mr. Bellamy. The United States submits that the IACHR does not have jurisdiction to review issues arising under the Vienna Convention on Consular Relations and that consular assistance is not a human right or a component of due process in criminal proceedings. Moreover, the United States argues that there is no evidence one way or the other showing whether authorities followed proper consular notification procedures and that the petitioners themselves concede that such evidence is lacking.

125. The Inter-American Commission takes notes of the assertions of the United States regarding the IACHR's alleged lack of jurisdiction to review issues under the Vienna Convention, but the IACHR has already established its jurisdiction on this issue in previous cases and stated that it is necessary and appropriate to consider the extent to which a state party has given effect to the requirements of Article 36 of the Vienna Convention for the purpose of evaluating that state's compliance with a foreign national's due process rights under Articles XVIII and XXVI of the American Declaration. Therefore, it is well established that the IACHR does consider compliance with Article 36 of the Vienna Convention when interpreting and applying the provisions of the American Declaration to a foreign national who has been arrested, committed to trial or to custody pending trial, or is detained in any other manner by that state.<sup>102</sup>

126. In this regard, the Commission has noted that "non-compliance with obligations under Article 36 of the Vienna Convention is a factor that must be evaluated together with all of the other circumstances of each case in order to determine whether a defendant received a fair trial."<sup>103</sup>

127. In addition, the "Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas" adopted by the Commission in 2008 establish that:

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

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<sup>101</sup> IACHR, Report No. 90/09, Case 12.644, Admissibility and Merits (Publication), Medellín, Ramírez, Cardenas and Leal García, United States, Aug. 7, 2009, paras. 145-47.

<sup>102</sup> IACHR, Report No. 11/15, Case 12.833, Merits (Publication), Felix Rocha Diaz, United States, March 23, 2015, paras. 63-66. See also, IACHR, Report No. 44/14, Case 12.873, Merits (Publication), Edgar Tamayo Arias, United States, July 17, 2015, paras 136-139; IACHR, Report No. 90/09, Case 12.644, Admissibility and Merits (Publication), Medellín, Ramírez Cardenas and Leal García, United States, August 7, 2009, paras 124-132; IACHR, Report No. 91/05 (Javier Suarez Medina), United States, Annual Report of the IACHR 2005; Report No. 1/05 (Roberto Moreno Ramos), United States, Annual Report of the IACHR 2005; and Report 52/02, Case 11.753 (Ramón Martínez Villarreal), United States, Annual Report of the IACHR 2002.

<sup>103</sup> IACHR, Report No. 90/09, Case 12.644, Admissibility and Merits (Publication), Medellín, Ramírez Cardenas and Leal García, United States, August 7, 2009, para. 127.

deprivation of liberty immediately. Furthermore, they shall have the right to communicate with their diplomatic and consular authorities freely and in private.<sup>104</sup>

128. The Inter-American Commission notes that the United States acknowledges in its own federal guidelines concerning the arrest and detention of foreign nationals that the authorities in charge are required as a matter of international law to inform such a detainee of his or her right to consular notification.<sup>105</sup> The current version of the guidelines indicates that “[t]hese instructions focus primarily on providing consular notification and access with respect to foreign nationals arrested or detained in the United States, so that their governments can assist them.”<sup>106</sup> In other words, the State’s own guidelines make it clear that the objective is to ensure that a foreign detainee has the possibility to request consular assistance. The guidelines call on law enforcement personnel to inform the detainee promptly of this notification provision. If the detainee wishes for the consulate to be notified, this must be done promptly, a written record of the notification should be made, and the detainee should be informed that the notification has been made.

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

[u]nless predecessor counsel has already done so, counsel representing a foreign national should: 1. immediately advise the client of his or her right to communicate with the relevant consular office; and 2. obtain the consent of the client to contact the consular office. After obtaining consent, counsel should immediately contact the client’s consular office and inform it of the client’s detention or arrest [...].<sup>107</sup>

130. According to the facts established in this report, in the amended federal habeas petition filed on November 10, 2006, defense counsel claimed that the actions of agents of the United States Government and State of Texas in failing and/or refusing to notify the Nicaraguan Consulate of Mr. Tercero’s detention, despite his request for consular assistance constituted a violation of Article 36(1)(b) of the Vienna Convention on Consular Relations.

131. The first indication in the arguments and documentation before the Inter-American Commission that consular officials of Nicaragua were informed of Mr. Tercero’s detention and trial is the March 27, 2000 letter sent by his trial counsel to the Nicaraguan Consulate in Houston, Texas. Mr. Tercero had been detained as from July 1999; he maintains that, despite his requests to contact consular officials, the detaining authorities failed or refused to notify the consulate. There is no indication in the record that such notification was made, and the State has not offered any proof or indication that it was, such as a note in prison records or an indication that he had received a phone call, correspondence or a visit from the consulate prior to 2000. Following the March 2000 letter from Mr. Tercero’s trial counsel, the consulate contacted Mr. Tercero on multiple occasions.

132. Based upon the foregoing, the IACHR concludes that the State’s obligation under Article 36.1 of the Vienna Convention to inform Mr. Tercero of his right to consular notification and assistance constituted

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<sup>104</sup> Principle V (Due Process) of the “Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas” approved by the Commission during its 131<sup>st</sup> regular period of sessions, held from March 3-14, 2008, <http://www.cidh.org/Basicos/English/Basic21.a.Principles%20and%20Best%20Practices%20PDL.htm>

<sup>105</sup> See current guidelines: US Dept. of State, Consular Notification and Access, 4<sup>th</sup> ed. March 2014, p. 6 at [http://travel.state.gov/content/dam/travel/CNAtrainingresources/CNAMAnnual\\_Feb2014.pdf](http://travel.state.gov/content/dam/travel/CNAtrainingresources/CNAMAnnual_Feb2014.pdf)

<sup>106</sup> See current guidelines: US Dept. of State, Consular Notification and Access, 4<sup>th</sup> ed. March 2014, at [http://travel.state.gov/content/dam/travel/CNAtrainingresources/CNAMAnnual\\_Feb2014.pdf](http://travel.state.gov/content/dam/travel/CNAtrainingresources/CNAMAnnual_Feb2014.pdf)

<sup>107</sup> American Bar Association, *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases* (Revised Edition)(February 2003), Guideline 10.6B “Additional Obligations of Counsel Representing a Foreign National.”

a fundamental component of the due process standards to which he was entitled under the American Declaration. Therefore, the State's failure to respect and ensure this obligation deprived the alleged victim of a criminal process that satisfied the minimum standards of due process and a fair trial required under Articles XVIII and XXVI of the Declaration.

### 3. Procedural bars

133. The Inter-American Commission notes that, according to the information in the file, strict procedural bars have prevented or restricted the consideration of new evidence or claims by the federal courts. In its observations on the merits, the United States noted that federal courts were barred from considering most of the claims brought to their attention by Mr. Tercero because he had not exhausted such claims in a procedurally appropriate manner in state courts. In this regard, the IACHR reiterates that the right to appeal a judgment is a basic guarantee of due process to prevent the consolidation of a situation of injustice. In this respect, the IACHR has stated that “[t]he due process guarantees should also be interpreted to include a right of effective review or appeal from a determination that the death penalty is an appropriate sentence in a given case.”<sup>108</sup> The aim of the right to appeal is to protect the right of defense by creating a remedy to prevent a flawed ruling, containing errors prejudicial to a person's interests, from becoming final. Due process of law would lack efficacy without the right of defense at trial and the opportunity to defend oneself against a sentence by means of a proper review.<sup>109</sup>

134. According to the standards developed by the inter-American human rights system, a remedy must be effective, i.e., it must provide results or responses consistent with the objectives that they were intended to serve. It must also be accessible, without requiring the kind of complex formalities that would render this right illusory. The efficacy of a remedy is closely linked to the scope of the review. Judicial error is not confined to the application of the law, but may happen in other aspects of the process such as the determination of the facts or the weighing of evidence. Hence, the remedy of appeal will be effective in accomplishing the purpose for which it was conceived if it makes possible a review of such issues without *a priori* limiting that review to certain aspects of the court proceedings.<sup>110</sup>

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

to guarantee the full right of defense, this remedy should include a material review of the interpretation of procedural rules that may have influenced the decision in the case when there has been an incurable nullity or where the right to defense was rendered ineffective, and also with respect to the interpretation of the rules on the weighing of evidence, whenever they have led to an erroneous application or non-application of those rules.<sup>111</sup>

136. With respect to the accessibility of the remedy, the Inter-American Commission has considered that, in principle, the establishment of some minimum requirements for the presentation of the appeal is not incompatible with the right to appeal. Some of these requirements are, for example, the presentation of the appeal itself or the setting of a reasonable period within which it must be filed. However, in some circumstances, rejection of appeals based on failure to comply with formal requirements established by statute or defined in judicial practice may be a violation of the right to appeal a judgment.<sup>112</sup>

137. In analyzing the right to an effective remedy in the present case, the IACHR must underscore that it has an enhanced obligation to ensure that any deprivation of life which may occur through the

<sup>108</sup> IACHR, Report No. 48/01, Case No. 12.067 and others, Michael Edwards *et al.*, The Bahamas, April 4, 2001, para. 149.

<sup>109</sup> See, *mutatis mutandi*, IACHR, Report No. 55/97, Case 11.137, Merits, Juan Carlos Abella (Argentina), November 18, 1997, para. 252; and I/A Court H. R., *Case of Herrera Ulloa v. Costa Rica*. Judgment of July 2, 2004. Series C No. 107, para. 158.

<sup>110</sup> IACHR, Report No. 53/13, Case 12.864, Merits (Publication), Ivan Teleguz, United States, July 15, 2013, paras. 102/103.

<sup>111</sup> IACHR, Report No. 55/97, Case 11.137, Merits, Juan Carlos Abella, Argentina, November 18, 1997, para. 261.

<sup>112</sup> IACHR, Report No. 53/13, Case 12.864, Merits (Publication), Ivan Teleguz, United States, July 15, 2013, para. 105.

application of the death penalty is effectuated only after strict compliance with the right to a timely, effective and accessible appeal.

138. The IACHR notes that, in the present case, state and federal courts that reviewed Mr. Tercero's conviction applied strict and inflexible limitations on the claims they could review based on which claims had been raised at the first possible procedural opportunity. For example, the Court of Criminal Appeals, in dismissing the direct appeal on September 18, 2002, indicated that the appellant had forfeited the right to complain about the language used by the prosecution during the penalty phase since trial counsel had not objected to the use of such language. Subsequently, on February 7, 2013, the U.S. District Court denied habeas relief to Mr. Tercero after concluding that it was prevented from reviewing the majority of his claims. The court found that, in light of the failure to raise certain claims on previous occasions, the AEDPA precluded it from affording habeas relief on those issues.<sup>113</sup> It concluded that Mr. Tercero's failure to present his claims to the state courts in a procedurally adequate manner barred the federal courts from considering their merits. The court further explained that a claimant's failure to properly exhaust his claims results in a federal procedural bar, and that since Mr. Tercero had not presented his unexhausted claims in his previous state habeas applications, Texas procedural law would preclude the state courts from considering them in a subsequent application.

139. In analyzing these strict procedural limitations, the Inter-American Commission must take into account the necessary link between the claims concerning ineffective assistance of counsel and the way that the procedural requirements would limit subsequent opportunities for review of claims not raised or not fully or properly raised at the first procedural opportunity. Through each stage of his trial and post-conviction remedies, Mr. Tercero informed the courts that he considered that his state-appointed lawyers were failing to provide effective assistance of counsel. The claims he presented included that his lawyers had failed to object to various prosecution practices at trial including the use of inflammatory language; failed to pursue mitigation evidence during the sentencing phase; failed to raise a complaint concerning noncompliance with consular notification; and failed to properly pursue a claim under *Roper* concerning his age at the time of the crime. This latter claim was a central element of the *pro se* motion that Mr. Tercero filed on his own behalf during the federal habeas proceedings, and was deemed sufficiently serious by the District Court to warrant reopening the state habeas proceedings. The record indicates that this claim was reviewed on the basis of the existing record, without an evidentiary hearing or the consideration of additional information or evidence. Mr. Tercero filed another *pro se* motion following that stage of the proceedings, and maintained throughout the process that his lawyers had failed to adequately present his claims and defend his rights.

140. The record in this case reflects that Mr. Tercero identified a number of claims that he considered important in his defense, but that were not raised by his lawyers. For example, in his *pro se* state habeas petition, Mr. Tercero claimed to have been coerced into providing inculpatory evidence when he was detained in July of 1999; the petition was dismissed by the court as an abuse of writ without any analysis of its merit. This dismissal, coupled with the failure of his court-appointed attorneys to raise this claim in subsequent proceedings, prevented Mr. Tercero from ever having this claim assessed by a court. Moreover, even when the U.S. District Court for the Southern District of Texas took note of the seriousness of certain complaints that had not been raised at the state level, but had been raised by Mr. Tercero in his *pro se* motions, these claims were dealt with primarily or exclusively on the basis of the already existing record. In practice, this meant that the limitations Mr. Tercero identified in the presentation of his defense, and that prompted him to repeatedly request new counsel, continued to restrict his possibilities to obtain substantive review of those claims on appeal.

141. In the Inter-American Commission's view, the review procedures applied in Mr. Tercero's case failed to meet the strict standard of due process applicable in capital cases. The IACHR notes, in particular, that the Court of Criminal Appeals, in dismissing the direct appeal on September 18, 2002, noted

<sup>113</sup> See *supra*, paras. 68, 73, 75, 87-89.

that the appellant had forfeited the right to complain about the language used by the prosecution during the penalty phase since trial counsel had not objected to the use of such language.

142. Further, on February 7, 2013, the U.S. District Court denied habeas relief to Mr. Tercero after concluding that it was prevented from reviewing the majority of his claims. The court found that in light of the failure of federal habeas counsel, the AEDPA precluded the court from affording habeas relief on those issues. It concluded that Mr. Tercero's failure to present his claims to the state courts in a procedurally adequate manner barred federal courts from considering their merits. Similarly, the court explained that a petitioner's failure to exhaust his claims results in a federal procedural bar and that since Mr. Tercero had never presented his unexhausted claims in his previous state habeas applications, Texas procedural law would prohibit the state courts from considering them in a subsequent application. The standard applied in the federal habeas proceedings under *Martinez* required a claimant to demonstrate actual prejudice, as well as to have raised the claims at the first procedural opportunity unless the claimant was without counsel or it had been demonstrated that counsel at that stage had been ineffective. The standards applicable to the death penalty under international law do not require that a claimant demonstrate actual prejudice, but rather that the claimant was not afforded effective assistance of counsel at each stage of the proceedings.

143. Considering the irreversible nature of the death penalty, a federal post-conviction review limited by state court interpretations and by the state factual determination (i.e. "a determination of a factual issue made by a State court shall be presumed to be correct")<sup>114</sup> does not comply with inter-American standards, according to which the right to appeal is part of the body of procedural guarantees that ensures the due process of law.

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

### **C. Right to protection for children (Article VII of the American Declaration)**

145. Article VII of the American Declaration provides that:

#### Article VII – Right to protection for mothers and children

All women, during pregnancy and the nursing period, and all children have the right to special protection, care and aid.

146. In his original petition, Mr. Bellamy alleged that Mr. Tercero's real date of birth is August 20, 1979, and that, therefore, he was under the age of 18 at the time of committing the offense. According to the petitioner, Mr. Tercero used his older brother's birth certificate to obtain a Texas Identification Card given that he was a minor when he immigrated to the United States. It was allegedly on the basis of his brother's identity and age that the presumed victim was convicted and sentenced to the death penalty. After the Supreme Court's decision in *Roper v. Simmons* in 2005 Mr. Tercero reportedly revealed his true age. In their additional observations on the merits, the petitioners do not develop this allegation. They claim that, as a result of the ineffective assistance of counsel, trial records were so poorly maintained and incomplete that there is not sufficient evidence to adequately do so. The United States submits that all of the evidence put forth by the petitioners was in the possession of Mr. Tercero at the time he made the same arguments before domestic courts and both state and federal courts found such evidence to be unpersuasive for several reasons. It also submits that the petitioners themselves concede that the record of Mr. Tercero's case does not contain sufficient evidence to support Mr. Bellamy's initial claim.

<sup>114</sup> Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214, Sec. 104 (e) (1).

147. The Inter-American Commission notes that there is limited information from investigator Villanueva's trip to Nicaragua that would support that Mr. Tercero was under 18 years of age at the time of the crime. Other information in the record is unclear or would demonstrate the contrary. As indicated above, the District Court of Harris County concluded that Mr. Tercero failed to show by a preponderance of the evidence that he was under the age of 18 at the time of the offense. In the re-opening of federal habeas corpus proceedings, defense counsel informed the U.S. District Court that he did not present some of the evidence referenced by Mr. Tercero in a *pro se* motion on the basis that there were doubts about the veracity of that evidence.

148. Therefore, based on the record before it and given the absence of evidentiary hearings that would have fully explored the contradictions presented with respect to this issue, the IACHR considers that it doesn't have enough information before it to make the factual determinations that would be necessary to fully analyze the alleged violation of Article VII of the American Declaration.

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

149. Article I of the American Declaration provides that:

Article I - Right to life, liberty and personal security

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

150. As mentioned above, according to the "fourth instance formula," in principle, the Inter-American Commission will not review the judgments issued by the domestic courts acting within their competence and with due judicial guarantees. This is because, in principle, the IACHR does not have the authority to superimpose its own interpretations on evaluations of fact by domestic organs. However, the fourth instance formula does not preclude the Inter-American Commission from considering a case where the petitioner's allegations entail a possible violation of any of the rights set forth in the American Declaration.<sup>115</sup> This authority is enhanced in cases involving the imposition of the death penalty given its irreversible nature.

151. As also noted above, the Inter-American Commission considers that it is the competence of domestic courts, and not of the Commission, to interpret and apply domestic law, and, in the instant case, to determine whether the alleged victim is innocent or guilty. However, the IACHR must ensure that any deprivation of life that may arise from the enforcement of the death penalty would be strictly consistent with the requirements set forth in the American Declaration.<sup>116</sup>

152. In evaluating the information on the record, the Inter-American Commission concludes that the manner in which certain evidence pertinent to the basis for Mr. Tercero's capital conviction was treated in the course of his criminal proceedings and the ineffective defense provided by a court-appointed counsel failed to meet the rigorous standard of due process applicable in capital cases and amounted to a denial of justice contrary to the fair trial and due process standards.

153. The Commission has consistently established that the heightened standard of due process in death penalty cases must be adhered to without exception. As the UN Human Rights Committee has consistently affirmed:

[T]he imposition of a sentence of death upon the conclusion of a trial in which the provisions of the Covenant have not been respected constitutes ... a violation of Article 6 of the Covenant. As the Committee noted in its general comment 6(16), the provision that a sentence of death may be imposed only in accordance with the law and not contrary to the provisions of the present Covenant implies that "the procedural guarantees therein

<sup>115</sup> See, *mutatis mutandi*, IACHR, Report No. 57/96, Case 11.139, William Andrews, United States, December 6, 1996.

<sup>116</sup> IACHR, Report No. 53/13, Case 12.864, Merits (Publication), Ivan Teleguz, United States, July 15, 2013, para. 129.

prescribed must be observed, including the right to a fair hearing by an independent tribunal, the presumption of innocence, the minimum guarantees for the defence, and the right to review by a higher tribunal.<sup>117</sup>

154. When a convicted prisoner's right to a fair trial has been violated in proceedings through which the death penalty was imposed, the IACHR has maintained that executing the person under such a sentence would be an extremely grave and deliberate violation of the right to life set forth in Article I of the American Declaration.<sup>118</sup> Therefore, the IACHR concludes that the imposition of the death penalty in such circumstances would constitute a grave violation of Mr. Tercero's right to life recognized under Article I of the American Declaration.

## VI. ACTIONS SUBSEQUENT TO REPORT No. 50/15

155. On August 18, 2015, the Inter-American Commission electronically approved Report No. 50/15 on the merits of this matter, which comprises paragraphs 1 to 154 *supra*, with the following recommendations to the State:

1. Grant Bernardo Aban Tercero effective relief, including the review of his trial and sentence in accordance with the guarantees of due process and a fair trial enshrined in Articles I, XVIII and XXVI of the American Declaration;

2. Review its laws, procedures, and practices to ensure that persons accused of capital crimes are tried and, if convicted, sentenced in accordance with the rights established in the American Declaration, including Articles I, XVIII, and XXVI thereof;

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

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

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

6. Given the violations of the American Declaration that the IACHR has established in the present case and in others involving application of the death penalty, the Inter-American Commission also recommends to the United States that it adopt a moratorium on executions of persons sentenced to death;<sup>119</sup> and

7. In accordance with Article 9 of the Rules of the Inter-American Commission on Human Rights on the Legal Assistance Fund of the Inter-American Human Rights System, the IACHR recommends the United States to reimburse the amount indicated in paragraph 7 of this report to the Legal Assistance Fund.

156. On August 25, 2015, the Inter-American Commission electronically approved Report No. 51/15 containing the final conclusions and recommendations indicated *infra*. As set forth in Article 47.2 of its Rules of Procedure, on August 25, 2015, the IACHR transmitted the report to the State with a time period of five days to present information on compliance with the final recommendations, taking into account that a

<sup>117</sup> United Nations Human Rights Committee, *Carlton Reid v. Jamaica*, Communication No. 250/1987, U.N. Doc. CCPR/C/39/D/250/1987 (1990), at. 11.5.

<sup>118</sup> IACHR, Report No. 11/15, Case 12.833, Merits (Publication), Felix Rocha Diaz, United States, March 23, 2015, para. 106.

<sup>119</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.

date had been set for execution. On that same date the IACHR transmitted the report to the petitioners and also requested their observations on compliance with the final recommendations.

157. By letter dated August 25, 2015, the State provided its response to the recommendations set forth in Report No. 51/15. In the response, the State raised its disagreement as to the conclusion that in this case there has been a violation of the American Declaration. The State also reported that the Texas Court of Criminal Appeals granted the application for a writ of habeas corpus in favor of Mr. Tercero in which it alleges that he was denied due process because the prosecutor allegedly presented false testimony at his trial. Therefore, Mr. Tercero's execution, which was scheduled for August 26, 2015, was stayed and according to the State, the Texas Court remanded the case to the trial court to review the merits of the claim.

158. In light of the above, the State requested that the IACHR "rescind" its Report No. 51/15, since the State considers that the petitioners are still exhausting domestic remedies "with the prospect of obtaining effective relief in the domestic system."

159. The State did not provide information with respect to the other specific final recommendations. Also, no response was received within the stipulated period from the petitioners.

## VII. FINAL CONCLUSIONS AND RECOMMENDATIONS

160. In accordance with the legal and factual considerations set out in this report, the Inter-American Commission concludes that the United States is responsible for the violation of the right to a fair trial (Article XVIII), and the right to due process of law (Article XXVI) guaranteed in the American Declaration, with respect to Bernardo Aban Tercero. Consequently, should the State carry out the execution of Mr. Tercero, it would be committing a serious and irreparable violation of the basic right to life recognized in Article I of the American Declaration.

161. Bernardo Aban Tercero is the beneficiary of precautionary measures adopted by the Inter-American Commission under Article 25 of its Rules of Procedure. The Inter-American Commission must remind the State that carrying out a death sentence in such circumstances would not only cause irreparable harm to the person but would also deny his right to petition the inter-American human rights system and to obtain an effective result, and that such a measure would be contrary to the fundamental human rights obligations of an OAS member state pursuant to the Charter of the Organization and the instruments deriving from it.<sup>120</sup>

Accordingly,

### **THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS REITERATES THAT THE UNITED STATES:**

1. Grant Bernardo Aban Tercero effective relief, including the review of his trial and sentence in accordance with the guarantees of due process and a fair trial enshrined in Articles I, XVIII and XXVI of the American Declaration;

<sup>120</sup> See: IACHR, Report No. 11/15, Case 12.833, Merits (Publication), Felix Rocha Diaz, United States, March 23, 2015, para. 106; Report No. 13/14, Case 12.422, Merits (Publication), Abu-Ali Abdur' Rahman, United States, April 1, 2014, para 96; IACHR, Report No. 53/13, Case 12.864, Merits (Publication), Ivan Teleguz, United States, July 15, 2013, para. 138; IACHR, Report No. 81/11, Case 12.776, Merits, Jeffrey Timothy Landrigan, United States, July 21, 2011, para. 66; Report No. 52/01, Case No. 12.243, Juan Raúl Garza, United States, Annual Report of the IACHR 2000, para. 117; IACHR, *Fifth Report on the Situation of Human Rights in Guatemala*, Doc.OEA/Ser.L/V/II.11doc.21rev. (April 6, 2001) paras. 71 and 72. See also: International Court of Justice, *Case re. the Vienna Convention on Consular Relations (Germany v. United States of America)*, Request for the Indication of Provisional Measures, Order of March 3, 1999, General List, No. 104, paras. 22-28; United Nations Human Rights Committee, *Dante Piandiong et al. v. Philippines*, Communication No. 869/1999, UN Doc. CCPR/C/70/D/869.

2. Review its laws, procedures, and practices to ensure that persons accused of capital crimes are tried and, if convicted, sentenced in accordance with the rights established in the American Declaration, including Articles I, XVIII, and XXVI thereof;

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

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

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

10. Given the violations of the American Declaration that the IACHR has established in the present case and in others involving application of the death penalty, the Inter-American Commission also recommends to the United States that it adopt a moratorium on executions of persons sentenced to death;<sup>121</sup> and

11. In accordance with Article 9 of the Rules of the Inter-American Commission on Human Rights on the Legal Assistance Fund of the Inter-American Human Rights System, the IACHR recommends the United States to reimburse the amount indicated in paragraph 7 of this report to the Legal Assistance Fund.

### **VIII. PUBLICATION**

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

Done and signed in the city of Washington, D.C., on the 28<sup>th</sup> day of the month of October, 2015. (Signed): Rose-Marie Belle Antoine, President; Felipe González, Rosa María Ortiz, Tracy Robinson, and Paulo Vannuchi, Commissioners.

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