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CASE 13.478

REPORT ON ADMISSIBILITY AND MERITS (PUBLICATION)

JOSÉ TRINIDAD LOZA VENTURA
UNITED STATES OF AMERICA

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I. INTRODUCTION

1. On July 17, 2015, the Inter-American Commission on Human Rights (the “Inter-American Commission”, “Commission” or “IACHR”) received a petition and request for precautionary measures¹ submitted by Sandra Babcock, Laurence E. Komp and James A. Wilson (the “petitioners”), alleging the international responsibility of the United States of America (the “State” or “the United States”) for the violation of the rights of José Trinidad Loza Ventura (“Mr. Loza”), a Mexican national who was sentenced to death in the state of Ohio.

2. On October 18, 2016, the Commission notified the parties of the application of Article 36 (3) of its Rules of Procedure, since the petition falls within the criteria established in its Resolution 1/16, and placed itself at the disposition of the parties to reach a friendly settlement. The parties enjoyed the time periods provided for in the IACHR’s Rules to present additional observations on the merits. All the information received by the Commission was duly transmitted to the parties.

II. POSITIONS OF THE PARTIES

A. Petitioners

3. According to the petitioners, Mr. Loza was arrested in the state of Ohio on January 16, 1991, and charged with four counts of murder. He was later convicted and sentenced to death. The petitioners claim that the prosecution of Mr. Loza was “infused by racial animus and police misconduct”; that he was never advised of his right to consular notification and communication prior to and during his trial.

4. The petitioners submit that during the criminal investigation, the lead detective, Roger Knabel, was recorded referring to the alleged victim as the “wetback from California”. Further, the petitioners claim that Mr. Knabel concluded at the crime scene that it was Mr. Loza who had committed the crime. It is submitted by the petitioners that the detective suggested that Mr. Loza’s girlfriend and unborn baby might be electrocuted or placed in the gas chamber unless the alleged victim took the blame for the murders; and that after Mr. Loza sought assurances that no harm would be done, he then gave a confession. The petitioners further state that the detective decided Mr. Loza should face the death penalty and the prosecutors did not question this.

5. The petitioners allege that the State violated Mr. Ventura’s right to equality before the law as it is alleged his capital prosecution was contaminated by prosecutorial misconduct and racial and/or ethnic animus. They state that, although the decision to seek a death sentence is ordinarily made after careful deliberation by a committee of prosecutors, in his case the prosecutor conceded that he simply deferred to detective Knabel’s decision.

6. The petitioners claim that during the first trial the prosecution failed to disclose that after conducting more than thirty tests on Mr. Loza’s clothing, investigators were unable to detect any blood or gun powder residue. Further, the prosecution failed to disclose that Dorothy Jackson had confessed to the murders. Moreover, it is asserted that the error was so egregious that the prosecutor’s misconduct resulted in a mistrial. The petitioners specify that after Mr. Loza’s second trial, his post-conviction counsel learned that Dorothy Jackson admitted to her boyfriend that she killed her mother. The cumulative effect of such action, as submitted by the petitioners, is in violation of the due process rights of the alleged victim.

7. The petitioners assert that the State violated the alleged victim’s rights to fair trial and due process of law by failing to advise him of his consular communication and notification rights pursuant to Article 36 of the Vienna Convention on Consular Relations (“Vienna Convention”), which is essential to safeguard said rights. It is submitted that Ohio authorities failed to inform Mr. Loza of his rights to consular notification and access under the Vienna Convention. The petitioners also allege that counsel at trial were also negligent in not notifying the consulate of Mr. Loza’s detention. It is asserted that despite presenting his Article 36 violation claim in both state and federal habeas proceedings, courts have refused to grant “review and reconsideration”

¹ On August 11, 2015, the IACHR granted precautionary measures on behalf of Mr. Loza pursuant to Article 25(1) of its Rules of Procedure and requested the United States to take the measures necessary to preserve his life and physical integrity so as not to hinder the processing of his case before the Inter-American system.

owed under the judgment of the International Court of Justice in *Avena and other Mexican Nationals (Mexico v U.S.)*, 2004 I.C.J. 12.

8. The petitioners state that Mexico has a history of providing consular assistance to nationals facing the death penalty, and would have ensured that the alleged victim had competent legal representation, supported by necessary experts and investigators. Further that consular officials would have assisted with obtaining records from Mexico that attest to life history of the defendant as mitigating evidence. The petitioner argues that Mr. Loza was compelled to accept representation from court appointed counsel who failed to present an adequate defense. They further allege that Mr. Loza's trial lawyers failed to investigate and present mitigating evidence that would have given the jury a reason to spare his life. The petitioners claim that trial counsel had never before represented a Mexican national, and neglected to investigate and present evidence regarding the alleged victim's cultural background that would have given the jury a reason to vote for life.

9. In particular, petitioners allege that Mr. Loza's lawyers failed to retain a neuropsychologist, failed to conduct a thorough investigation of his social history, and their presentation of misleading and damaging "expert" testimony regarding Mr. Loza's gang involvement, violated his rights to due process and a fair trial.

10. Further, the petitioners assert that the state of Ohio plans to execute Mr. Loza by lethal injection and that its current protocol is untested and shrouded in secrecy. This is due to the protocol that was current at the time of the petition, requiring drugs (pentobarbital or sodium thiopental) that pharmaceutical companies in the United States no longer manufactured. Moreover, the state had not disclosed the alternative protocol that it intends to employ if it cannot legally obtain pentobarbital or sodium thiopental. Additionally, they argue that the state, at the time of the petition, failed to provide sufficient notice of its method of execution. The petitioners assert that the administration of the lethal injection as practiced within Ohio violates the right to freedom from cruel, infamous or unusual punishment; moreover where Ohio uses its secrecy laws to prevent the alleged victim from learning the source or details of the drug used in the protocol is a violation against the right to petition as well. The petitioners assert that the United States operates contrary to international human rights standards relating to the application of the death penalty, as it imposes the burden of proof onto a prisoner to show that a particular method of execution is unconstitutional.

11. Petitioners further assert that Ohio has changed its lethal injection protocol at least three times in the last four years. They indicate that in 2017 Ohio reverted to a three-drug protocol given that pharmaceutical companies in the United States did no longer manufacture pentobarbital or sodium thiopental. A federal district court stayed all executions in Ohio after hearing testimony regarding the risks of using midazolam to kill human beings. This opinion was vacated by the Sixth Circuit Court of Appeals on the grounds that petitioners had failed to show that the use of the three-drug protocol presents a risk that is "sure or very likely" to cause serious pain and "needless suffering." Five judges dissented. The petitioners indicate that the Sixth Circuit stated that the plaintiffs had failed to present sufficient evidence to prove that an inmate was "sure or very likely" to suffer not just some pain, but an unconstitutionally high level of pain.

12. According to the petitioners, the three-judge panel rejected the magistrate judge's finding, amply supported by a near-universal scientific consensus, that midazolam cannot block or attenuate pain, since midazolam, at any dosage level, has no analgesic properties. The petitioners note that, on November 15, 2017, the new execution protocol led to another botched execution.

13. The petitioners state that it is unclear whether the State of Ohio views the Sixth Circuit's decision as approving the current execution protocol, and will resume executions once the government can secure the drugs, or whether the government is still searching for a new method.

14. With regard to the requirement of exhaustion of domestic remedies, the petitioners indicate that Mr. Loza's conviction and sentence were affirmed on direct appeal and that he has exhausted post-conviction relief. The petitioners conclude that the United States has violated Articles I, II, XVIII, XXIV, XXV and XXVI of the American Declaration.

B. State

15. The United States alleges that the petition is inadmissible and that it does not demonstrate a breach of any commitment of the United States under the American Declaration.

16. The United States alleges that the petitioners have failed to state facts that tend to establish a violation of the Declaration, and the petition is therefore inadmissible under Article 34(a) of the Rules of Procedure. Petitioner's allegations of ethnic bias, prosecutorial misconduct, and ineffective assistance of counsel fail to set forth facts that tend to establish a violation of Articles II, XVIII, or XXVI of the Declaration, and are meritless. The State claims that it has substantially reviewed and appropriately responded to the allegations and the petitioners have failed to provide evidence that racial discrimination tainted the conviction or sentence. Further, it is submitted that statistical evidence does not remedy the lack of evidence on racial discrimination in the conviction and sentence.

17. The State maintains its position that the Commission does not have competence to review claims arising under the Vienna Convention. Further, that claims concerning consular notification do not give rise to a violation of human rights enshrined in any international instrument to which the United States is a party or has endorsed. The State further argues that consular notification is not a human right. According to the State, such 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.

18. With regards to the coerced confession, the State submits that the alleged victim was fully informed of his Miranda rights and knowingly and willingly waived his rights against self-incrimination by voluntarily speaking with detectives; and the resulting video is one of many independent statements acknowledging culpability. The alleged failure by the prosecution to disclose exculpatory evidence, the State claims, has been considered at length by domestic courts, was remedied with a new trial and is without merit. Further, that the claim of withholding psychological evaluations and alleged confession from Jackson was similarly addressed by state and federal courts and rejected. The State holds that the alleged victim had the opportunity to raise trial counsel's alleged ineffectiveness in his state and federal habeas corpus proceedings and the courts determined that he was not entitled to a new trial or other relief.

19. With regard to the alleged discrimination, the State asserts that petitioners offer a new, expansive interpretation of Article II, "untethering it from its well-established context of judicial proceeding by which judges and jurors occupy a singular role in judicial proceedings, and are thus held to a distinct standard of impartiality, as the primary and final decision-makers over a defendant's guilt and sentencing." According to the State, the argument that the police detective had usurped the role of the prosecutor making the determination to seek the death penalty, to which the prosecutor simply deferred, is entirely baseless. The State indicates that the detective did not and could not exercise prosecutorial decision-making authority in Mr. Loza's case. It also emphasizes that petitioners fail to identify any specific evidence of ethnic bias by decision-makers – prosecutors, judges, or jurors. The State further argues that each time Mr. Loza presented this allegation before state and federal courts; he failed to provide sufficient evidence that racial discrimination tainted his investigation or prosecution.

20. Regarding the claim of ineffective assistance of trial counsel, the State alleges that this claim was raised in state and federal courts, where it received multiple layers of judicial review. The State emphasizes that domestic courts have carefully considered this claim on at least five occasions, and all found that Mr. Loza's due process rights had not been violated.

21. The State asserts that the petition's challenge to the Ohio execution protocol is without merits and fails to allege facts that tend to establish a violation of the American Declaration. The United States asserts that the Commission should provide the State with a margin of appreciation, deferring to the discretion of local actors who are required to make difficult decisions based on their own factual assessments. It considers that the complicated medical and scientific circumstances in this matter counsel strongly in favor of deferring to the discretion of those responsible for decision-making and international bodies use this "margin of appreciation" standard to respect state sovereignty.

22. According to the United States, Ohio has complied with constitutional requirements by seeking to make lethal injections as humane as possible. It is asserted that lethal injection has been the state’s only method of execution and the Ohio Revised Code 2949.22 does not allow for an alternative method of execution unless (a) lethal injection is found unconstitutional, and (b) the alternative method is constitutional and subsequently prescribed by law. State claims that the petition does not provide a factual basis for the claim and relies on allegations that other states import and combine drugs. It alleges that this conclusion was reaffirmed by the U.S. Court of Appeals for the Sixth Circuit in 2017 which found that Ohio’s lethal injection procedure is the same as that which the U.S. Supreme Court had already upheld.

23. Finally, the United States does not consider the Commission’s request for precautionary measures to be binding upon it under international law, because the Commission does not have the authority to require that the United States adopt such measures.

24. The State concludes that, if admitted, the petition is entirely without merit because it does not demonstrate a failure to live up to any United States commitments under the American Declaration. The State affirms that the Declaration is a nonbinding instrument that does not create legal rights or impose legal obligations on Member States of the Organization of American States (OAS), and that the Commission may issue recommendations but not binding orders. Moreover, it claims that the review of the arguments presented in the petition is also precluded by the Commission’s fourth instance formula and the Commission therefore lacks jurisdiction to review, as this would amount to mere disagreement with considered determinations of the United States state and federal courts, rendered in full conformity with United States commitments under the Declaration.

III. ADMISSIBILITY

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

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

25. The IACHR notes the State’s position that the Commission does not have competence to review claims arising under the Vienna Convention. As it will be addressed below, while the Commission has no jurisdiction to find a violation of such provisions, it may consider them for the purpose of evaluating the State’s compliance with a foreign national’s due process rights under the American Declaration.

B. Exhaustion of domestic remedies and timeliness of the petition

26. According to the information available, and as established in the facts described below, Mr. Loza was found guilty on four counts of aggravated murder on October 31, 1991 and sentenced to death.² The Ohio Court of Appeals affirmed the convictions and sentences³ and on November 27, 1995, Mr. Loza filed a petition for post-conviction relief, a motion for discovery, and a motion requesting review of prosecutorial and police files. Further, on December 7, 1995, he filed a motion for discovery on the discriminatory enforcement of the death penalty in Butler County, Ohio. On September 24, 1996, the trial court, issued a decision that denied all of his motions and dismissed his petition for post-conviction relief. The decision was appealed and on October 13, 1997 the Ohio Court of Appeals affirmed the County Court’s denial of post-conviction relief and the Ohio

² State v Loza, Not reported in N.E.2d (1997).

³ Loza v Mitchell, 766 F.3d 466 (2014).

Supreme Court declined discretionary review of Mr. Loza's appeal.⁴ Following the affirmance of his convictions, sentence and denial of post-conviction relief, Mr. Loza then filed a habeas corpus petition in the district court. The United States District Court for the Southern District of Ohio denied the habeas corpus claims and dismissed the action on March 31 2010. Mr. Loza then appealed against the denial and the United States Court of Appeals, on October 24, 2014, affirmed the District Court's dismissal of Mr. Loza's petition for habeas corpus. On June 29, 2015 the United States Supreme Court denied Mr. Loza's petition for a writ of certiorari.

27. Based on the available information, the IACHR notes that the alleged victim has not only exhausted all direct review proceeding, but also state and federal post-conviction proceedings. The IACHR also notes that the petitioner raised the drugs used in lethal injection's claim before domestic courts.

28. Based on the above factors, the Inter-American Commission concludes that the petitioner properly exhausted domestic remedies available within the domestic legal system and, therefore, that the alleged victims' claims before the Commission are not barred from consideration by the requirement of exhaustion of domestic remedies under Article 31(1) of its Rules of Procedure. The petition before the IACHR was presented on July 17, 2015, and the United States Supreme Court denied the writ of certiorari on June 29, 2015. The Commission concludes that in the circumstances the petition has been submitted within the requirement specified in Article 32(1) of its Rules of Procedure.

C. Colorable claim

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

30. With regard to the alleged violation of Article XXIV of the Declaration, the Commission concludes that the information provided by the petitioners is not sufficient to establish a colorable claim.

IV. FINDINGS OF FACT

A. Facts of the case

31. According to the information available, the facts of the matter are outlined below, stemming from incidents on January 16, 1991, when the alleged victim, Mr. Loza, allegedly shot four family members of his girlfriend, Dorothy Jackson, who was pregnant at the time. The victims were Ms. Jackson's mother, her brother and two sisters.

32. On the afternoon of January 16, 1991 G. Hoertt observed an individual in a white Mazda pickup truck with California plates loading trash into his dumpster at his shop; he searched the dumpster for something to identify the individual. A letter was found, signed by Mr. Loza, indicating that Mr. Loza was involved in a drive-by shooting in Los Angeles and that he came to Ohio to avoid apprehension by the Los Angeles police. G. Hoertt called the Warren County Sheriff's Department to report his discovery and was informed that the individual and a female companion were seen in the vicinity of the nearby Greyhound bus station. G. Hoertt then called the Middletown police detective Roger Knable.

33. After reading the letter, the detective and G. Hoertt went to the dumpster where they retrieved other items which included a knife, an empty box for a .25 caliber Raven automatic handgun; a receipt signed for the purchase of the handgun on January 15, 1991, a woman's purse, a blank check on account of Georgia L. Davis (Ms. Jackson's mother), a general money order made payable to Mr. Loza, clothing and some other personal items. As they were going through the items, G. Hoertt saw Mr. Loza approach the dumpster and the detective requested the dispatcher notify Warren County deputies that the individual had returned to the dumpster and that he, the detective, was going to speak to him. R. Knable identified himself as a police officer, approached Mr. Loza with his gun in his hand. He then searched Mr. Loza. Mr. Loza identified himself as "Jose Rodriguez" and

⁴ Loza v Mitchell, 766 F. 3d 466 (2014).

that the woman with him was “Cynthia Rodriguez” who was his wife and they were headed to California. Mr. Knable informed Mr. Loza that he was stopped because of what he put in the dumpster, that the letter indicated that Mr. Loza may have been involved in a drive-by shooting and that Mr. Knable was going to handcuff him and detain him until Warren County deputies arrived. Mr. Knable went to locate the woman who had been seen with Mr. Loza.

34. Dorothy Jackson identified herself as “Dorothy Jackson”, Mr. Loza as “Jose Rodriguez” and that they were not married. The Warren County deputies arrived and determined Ms. Jackson was under age and planned to travel to California with Mr. Loza. Mr. Knable was unsuccessful in contacting Ms. Jackson’s mother by phone and George Jeffrey, a detective, did not receive any response when he visited Georgia L. Davis’s home. Unable to determine if Ms. Jackson had permission to travel out of state, she was arrested for being an unruly minor and was taken to the Warren County Juvenile Detention Center, and Mr. Loza was arrested for contributing to the delinquency or unruliness of a minor and was taken to the Warren County Justice Center.

35. Upon being questioned by the detectives Ms. Jackson said that Mr. Loza killed her family and that she knew about the murders. Based on the statement, Mr. Knable got a search warrant for the house, and police discovered the victims’ bodies. Mr. Knable and Jeffrey returned to the Warren County Justice Center and began questioning Mr. Loza, and the interview was videotaped. At the beginning Mr. Loza waived his Miranda rights. Initially Mr. Loza said that he and Ms. Jackson were traveling to California with her mother’s permission and after he was informed of the detectives’ knowledge of the deaths, and informed that it would be in his, Ms. Jackson and the baby’s best interests to tell the truth; one hour into the interview Mr. Loza confessed, stating that Ms. Jackson was not in the house at the time of the murders and she did not know he would kill her family. Mr. Loza explained that he shot Georgia Davis because of her threat to have him arrested if he tried to leave the state with Ms. Jackson.

B. Trial and death sentence

36. Mr. Loza was indicted on four counts of aggravated murder. He waived his right to a jury trial and proceeded to trial before a three-judge panel. The defense moved for a mistrial on the basis that the state had failed to disclose certain exculpatory evidence during discovery. Such exculpatory evidence was the lack of scientific findings of gun powder residue or blood splatter onto Mr. Loza’s clothing as auxiliary evidence to the crime. The Court granted the mistrial without prejudice, denied the subsequent motion to bar his trial on double jeopardy grounds and denied the pretrial motion to suppress all statements and evidence seized in the matter.

37. A trial by jury commenced on October 21, 1991. On October 31, 1991, the jury found Mr. Loza guilty on all four counts of aggravated murder.⁵ The jury recommended the death sentence for the aggravated murders of Mullins, Senteno and Jerri Jackson; and thirty years to life imprisonment for the aggravated murder of Georgia Davis. The Ohio Butler County Court of Common Pleas accepted the recommendations and sentenced Mr. Loza respectively.⁶ The Ohio Court of Appeals affirmed the convictions and sentences on April 19, 1993.⁷

38. On direct appeal, the Supreme Court of Ohio affirmed the convictions and sentences on November 30, 1994,⁸ and denied the motion for reconsideration.⁹ The United States Supreme Court denied Mr. Loza’s writ of certiorari.¹⁰

C. Post-conviction

39. On November 27, 1995, Mr. Loza filed a petition for post-conviction relief, a motion for discovery, and a motion requesting review of prosecutorial and police files. On December 7, 1995, he filed a motion for discovery

⁵ State v Loza, Not reported in N.E.2d (1997).

⁶ State v Loza, 71 Ohio St.3d 61 (1994).

⁷ Loza v Mitchell, 766 F.3d 466 (2014).

⁸ State v Loza, 71 Ohio St.3d 61 (1994).

⁹ Loza v Mitchell, 766 F.3d 466 (2014).

¹⁰ Loza v Ohio (1995), U.S. 115 S. Ct. 1983.

on the discriminatory enforcement of the death penalty in Butler County, Ohio. On September 24, 1996, the trial court issued a decision that denied all of his motions and dismissed his petition for post-conviction relief.

40. The decision was appealed to the Ohio Court of Appeals with claims concerning a breach of the Vienna Convention on Consular Relations, ineffective assistance of counsel, selective prosecution based on race; and Mr. Loza's right to have a jury from a fair cross-section, among others. On October 13, 1997 the Ohio Court of Appeals affirmed the County Court's denial of post-conviction relief and the Ohio Supreme Court declined discretionary review of Mr. Loza's appeal, stating that it posed no substantial constitutional question.¹¹

D. Federal habeas proceedings

41. Mr. Loza filed a habeas corpus petition in the district court on April 17, 1998.¹² This petition raised claims for review of the court rulings on the claims raised within the Ohio Court of Appeal. The United States District Court for the Southern District of Ohio denied the habeas corpus claims and dismissed the action on March 31 2010. Mr. Loza then appealed against the denial and the United States Court of Appeals, on October 24, 2014, affirmed the District Court's dismissal. Below are the court's conclusions.

42. On appeal Mr. Loza argued that he was entitled to habeas corpus relief. The court reviewed the district court's legal conclusions *de novo*.¹³ The court held that the police officer questioned petitioner pursuant to lawful Terry stop, that police detectives did not threaten petitioner's girlfriend or his unborn child to coerce him to confess, that petitioner's confession was voluntary, that exclusion of psychologist's testimony regarding credibility of petitioner's confession at guilt phase did not violate petitioner's right to present relevant evidence, that petitioner was not denied effective assistance due to counsel's failure to present additional evidence from cultural expert and petitioner's family members at mitigation phase, and that petitioner was not selectively prosecuted for capital offense based on invidious racial discrimination.

43. Mr. Loza's argued that the Ohio Supreme Court unreasonably applied clearly established federal law when it held that the trial court properly refused to suppress statements that Mr. Loza made to Mr. Knable shortly after the encounter by the trash bin on the day of his arrest; of the false names provided for himself and Dorothy Jackson. Mr. Loza argued that Knable's seizure if him violated the Fourth Amendment; he also argued that Knable failed to provide him with his Miranda rights, prior to questioning him, in violation of his Fifth Amendment privilege against self-incrimination. The US Court of Appeals reasoned that the Ohio Supreme Court's determination was not unreasonable. It noted that Mr. Knable had a reasonable, articulable suspicion that criminal activity was afoot, had reason to suspect that Loza may have been involved; therefore it was not unreasonable for the court to conclude that Knable permissibly approached Mr. Loza, patted him down and asked him for his name and the name of his companion. Mr. Loza argued that the encounter was more coercive than a typical Terry stop, noting that Knable was holding his firearm when he approached Loza and that he handcuffed Loza and placed him in the back of his patrol car. The US Court of Appeals reasoned that, to the extent that the law is not clearly established with regards to Terry stops and custodial interrogations subject to Miranda, the Ohio Supreme Court's decision was not unreasonable.

44. Mr. Loza argued that the Ohio Supreme Court's decision upholding the voluntariness and admissibility of his confession was based on an unreasonable determination of the facts and was contrary to or an unreasonable application of clearly established federal law. Mr. Loza referenced the Court's finding of no threats made concerning Ms. Jackson, during the interrogation, as being contrary to the record. The statements referenced were questions of whether Mr. Loza "want[ed] Dorothy to have her baby in a penitentiary", "[his] baby put up for adoption to somebody you've never heard of" and statement that "[w]hat you're trying to do is put yourself in an electric chair or a gas chamber right along with Dorothy, and this child is going to go off into never, never land and never be seen again."¹⁴ The court reasoned that the statements made by the detectives did not constitute threats and concluded this was not unreasonable holding that the record supports the court's

¹¹ *Loza v Mitchell*, 766 F.3d 466 (2014).

¹² *Loza v Mitchell*, Not Reported in F. Supp. 2d (2002).

¹³ *Loza v Mitchell*, 766 F.3d 466 (2014).

¹⁴ *Loza v Mitchell*, 766 F.3d 466 (2014).

conclusion that “detectives merely informed appellant of the possible consequences of his action”.¹⁵ Mr. Loza argued that the detectives lied to him when they falsely told him that they had spoken with Jerri Jackson, who was alive but unresponsive when police arrived, however the court reasoned that this did not compel a conclusion of an involuntary confession and that Miranda case law does not prohibit “mere strategic deception”.¹⁶

45. Mr. Loza argued that the upholding of the exclusion of the testimony of Dr. Roger Fisher at the guilt phase of trial was contrary to and an unreasonable application of established law. The Court of Appeal did deem that the state’s supreme court’s reasoning was flawed in that it was not the case that evidence of a defendant’s mental state is not relevant to the credibility of a defendant’s confession. Further, the court reasoned that the fact that the trial court had ruled on the voluntariness of Loza’s confession did not provide a basis for excluding Fisher’s testimony, to the extent that it was relevant to credibility. However the court determined that the Ohio Supreme Court clearly and in detail noted the evidence in record other than Dr. Fisher’s testimony pertaining to credibility and had reasonably concluded that the law did not require this evidence to be admitted, and the decision is properly characterized as a determination that, given the ample evidence going to credibility, the rule did not require the testimony, embodying the law that the “introduction of relevant evidence can be limited by the state for a valid reason”.¹⁷ It was concluded that the Supreme court did not exclude the testimony arbitrarily.

46. It was argued that the Ohio Court of Appeals decision that trial counsel was not ineffective for failing to adequately investigate and present evidence on Mr. Loza’s cultural background and family history was based on an unreasonable determination of the facts and was an unreasonable application of the law assessing ineffective assistance claims. He argued that in the petition for post-conviction relief in state court that his trial counsel failed to consult a cultural expert who could have testified regarding the cultural factors influencing Mr. Loza’s confession. He also argued that trial counsel failed to present additional mitigating evidence from his family. The court assessed that Mr. Loza’s trial counsel requested funds which were granted to travel to Los Angeles to investigate Mr. Loza’s background and family history. Further, the Court accounted for trial counsel’s attempt to introduce the testimony of Dr. Fisher at the guilt phase, but noted that this was excluded by the trial court. Moreover, the court recognized that counsel presented testimonies from several family members at the mitigation phase of trial. The United States Court of Appeals did not find the courts’ factual determinations unreasonable. Moreover, it reasoned that the testimonies excluded, resembled evidence the jury had before it, to weigh aggravating and mitigating factors and would not have changed the calculations when weighing the circumstances of murder.

47. Mr. Loza argued that the Ohio Supreme Court unreasonably applied clearly established federal law when it held that the trial court’s charge to the jury did not coerce the jury’s verdict. When the jury sought clarification on how to decide a verdict when a unanimous decision cannot be reached, the court advised the jury to exhaust all reasonable efforts to reach a unanimous verdict, provided the ‘Howard charge’, and told the foreman to note on the verdict any failure to reach a unanimous verdict. After further deliberation the jury reached a unanimous verdict. The US Court of Appeal concluded that the trial court gave a supplemental instruction that was previously approved by the court.¹⁸ The court explained that when a jury is deadlocked, a trial court may give a supplemental instruction encouraging the jury to reach a verdict if possible. Quoting from the reasoning in *Brown v Bradshaw*,¹⁹ “the [Howard charge] merely encourage[s] the jurors to consider each other’s views and to ask themselves whether their own views [are] reasonable under the circumstances,” the court viewed that the Ohio Supreme Court did not unreasonably apply the law in determining the Howard charge was appropriate as guidance to the jury on how to resolve a deadlock.

48. Mr. Loza argued that the Ohio court of appeal unreasonably applied clearly established federal law when it rejected his claim that he was selectively prosecuted for capital offenses based on invidious racial discrimination. The District Court in his habeas corpus petition, granted a motion for leave to conduct discovery

¹⁵ *Loza v Mitchell*, 766 F.3d 466 (2014).

¹⁶ *Loza v Mitchell*, 766 F.3d 466 (2014).

¹⁷ *Egelhoff*, 518 U.S. at 53, 116 S.Ct. 2013, referenced within *Loza v Mitchell*, 766 F.3d 466 (2014).

¹⁸ *State v Howard* [42 Ohio St.3d. 18, 537 N.E.2d 188 (Ohio 1989)].

¹⁹ *Brown v Bradshaw*, 531 F.3d 433, 437 (6th Cir. 2008).

on the claim; the evidence produced was considered and the selective prosecution claim was denied. The United States Court of Appeal considered that a criminal defendant bears the burden of proving that his prosecution violated equal protection standards, and must demonstrate that the prosecutorial policy “had a discriminatory effect and that it was motivated by a discriminatory purpose.”²⁰ The Court further accounted that where a defendant alleges unlawful discrimination based on race, he “must show that similarly situated individuals of a different race were not prosecuted” in order to establish discriminatory effect.²¹ Regarding the claim that Mr. Loza and Ms. Jackson were similarly situated to be prosecuted for murder, the Court highlighted the “significant and substantial evidence” implicating Mr. Loza in the killings, including his confession and Dorothy Jackson’s statement to investigators that Mr. Loza killed her family; and concluded that the court was not unreasonable in its determination that Mr. Loza and Ms. Jackson were not similarly situated, as no such evidence implicated Ms. Jackson in the killings. The court also determined Mr. Loza could not demonstrate the discriminatory effect necessary to succeed on his selective prosecution claim. Further, that the statistical data provided was insufficient to establish discriminatory purpose, emphasizing that a defendant must show discriminatory purpose and effect.

49. Lastly, Mr. Loza argued that he was entitled to habeas relief because officials failed to inform him after his arrest that he had a right to contact the Mexican consulate pursuant to the Vienna Convention on Consular Relations. The court held that “the Vienna Convention does not create a right for a detained foreign national to consult with the diplomatic representatives of his nation that the federal courts can enforce.”²² The Court affirmed the District Court’s dismissal. The United States Supreme Court denied his writ of certiorari.²³

50. The petitioners explain that on May 21, 2018, Mr. Loza filed a clemency petition with Ohio’s Governor.²⁴ The Commission has no information about the outcome of the. Mr. Loza is currently detained pending further details on execution.

E. Method of execution

51. At the time of the filing of the petition, the drugs used in lethal injections, specified by the State of Ohio’s Execution Policy, were sodium thiopental and pentobarbital.²⁵ However, the original manufacturer of sodium thiopental had stopped the production of the drug and the manufacturers and suppliers of pentobarbital had contractually prohibited its sale to corrections departments.²⁶

52. According to the information provided by the petitioners, not contested by the State, Ohio has changed its lethal injection protocol at least three times in the last four years. In 2017 Ohio reverted to a three-drug protocol using a combination of midazolam, potassium chloride and rocuronium bromide.²⁷ In January 2017, a federal district court stayed all executions in Ohio after hearing testimony regarding the risks of using midazolam to kill human beings.²⁸ This opinion was vacated by the Sixth Circuit Court of Appeals on the grounds that petitioners had failed to show that the use of the three-drug protocol presents a risk that is “sure or very likely” to cause serious pain and “needless suffering.”²⁹ Five judges dissented. On November 15, 2017, the new execution protocol led to another botched execution.

53. On January 15, 2019, a magistrate judge in Ohio ruled that the State’s use of a mixture of three drugs to execute prisoners would constitute cruel and unusual punishment.³⁰ On February 19, 2019, Governor Mike

²⁰ *Armstrong*, 527 U.S. at 465, 116 S.Ct. 1480, quoting *Wayte*, 470 U.S. at 608, 105 S.Ct. (1524).

²¹ *Armstrong*, 527 U.S. at 465, 116 S.Ct. 1480.

²² *Emuegbunam*, 268 F.3d at 394, referenced within *Loza v Mitchell*, 766 F.3d 466 (2014).

²³ *Loza v Jenkins*, 135 S.Ct. 2892 (2015).

²⁴ Petitioners’ observations on the merits dated June 4, 2018, p. 2.

²⁵ State of Ohio, Department of Rehabilitation and Correction, Execution Policy, Rule ORCS 2949.22; 2949.25, June 29, 2015.

²⁶ *Beatty v FDA*, 853 F. Supp. 2d 30 (D.D.C. 2012).

²⁷ Petitioners’ observations on the merits dated June 4, 2018, p. 21.

²⁸ *In re Ohio Execution Protocol Litigation*, Case No. 2:11-cv-1016, slip op. at 104-05 (S.D. Ohio Jan.26, 2017).

²⁹ *In re Ohio Execution Protocol*, 860 F.3d 881, 886 (6th Cir. 2017).

³⁰ *In re Ohio Execution Protocol Litig.*, No. 2:11-cv-1016, 2019 U.S. Dist. LEXIS 8200, at *252 (S.D. Ohio Jan. 14, 2019).

DeWine announced that Ohio will not carry out any of the scheduled executions until it devises a new execution protocol that is approved by the courts.³¹

54. On September 11, 2019, a three-judge panel of the Sixth Circuit Court of Appeals reversed this finding, noting, citing the U.S. Supreme Court's decision in *Bucklew v. Precythe*, that death by suffocation was not "constitutionally problematic" since "suffocation does not qualify as "severe pain and needless suffering.""³² The panel upheld the magistrate judge's finding rejecting the method proposed by the plaintiff; namely, execution by a single injection of secobarbital, a true analgesic drug, because it may take days to cause death and because no state had ever used it in an execution. The petitioners allege that secobarbital has an extensive record of success in "Medical Aid in Dying" states. The court declined to address the risk of severe pain posed by the execution protocol as a whole.

55. On October 30, 2019, Governor Mike DeWine announced Ohio would not hold anymore executions in 2019 due to the State's "continuing problems with finding a pharmaceutical company willing to sell drugs for use in executions.

V. ANALYSIS OF LAW

A. Preliminary considerations

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

57. That gives rise to the particular importance of the IACHR's obligation to ensure that any denial of life that may arise from the enforcement of the death penalty strictly abides by the requirements set forth in the applicable instruments of the Inter-American human rights system, including the American Declaration. That heightened scrutiny is consistent with the restrictive approach adopted by other international human rights bodies in cases involving the imposition of the death penalty,³³ and it has been set out and applied by the Inter-American Commission in previous capital cases brought before it.³⁴ As the Inter-American Commission has explained, this standard of review is the necessary consequence of the specific penalty at issue and the right to a fair trial and all attendant due process guarantees, among others.³⁵ In the words of the Commission:

due in part to its irrevocable and irreversible nature, the death penalty is a form of punishment that differs in substance as well as in degree in comparison with other means of punishment, and therefore, warrants a particularly stringent need for reliability in determining whether a person is responsible for a crime that carries a penalty of death.³⁶

58. The Inter-American Commission will therefore review the petitioner's allegations in the present case with a heightened level of scrutiny, to ensure in particular that the rights to life, not to receive cruel, infamous or

³¹ Death penalty information center. Ohio Executions Scheduled for 2017 – 2022. Available at: <https://deathpenaltyinfo.org/facts-and-research/dpic-reports/dpic-special-reports/ohio-executions-scheduled-for-2017-2022>

³² *In re Ohio Execution Protocol Litig.*, 937 F.3d 759, 762 (6th Cir. 2019).

³³ See, for example: I/A Court H. R., Advisory Opinion OC-16/99 (October 1, 1999), *The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law*, para. 136; United Nations Human Rights Committee, *Baboheram-Adhin et al. v. Suriname*, Communications Nos. 148-154/1983, adopted on April 4, 1985, para. 14.3; *Report of the United Nations Special Rapporteur on Extrajudicial Executions*, Bacre Waly Ndiaye, submitted pursuant to Commission on Human Rights Resolution 1994/82, Question of the Violation of Human Rights and Fundamental Freedoms in any part of the World, with particular reference to Colonial and Other Dependent Countries and Territories, UN Doc.E/CN.4/1995/61 (December 14, 1994), para. 378.

³⁴ IACHR, Report No. 57/96, Andrews, United States, IACHR Annual Report 1997, para. 170-171; Report No. 38/00 Baptiste, Grenada, IACHR Annual Report 1999, paras. 64-66; Report No. 41/00, McKenzie *et al.*, Jamaica, IACHR Annual Report 1999, paras. 169-171.

³⁵ 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.

³⁶ IACHR, Report No. 78/07, Case 12.265, Merits (Publication), Chad Roger Goodman, The Bahamas, October 15, 2007, para. 34.

unusual punishment, to due process, and to a fair trial as prescribed under the American Declaration, have been respected by the State. With regard to the legal status of the American Declaration, the IACHR reiterates that:³⁷

[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.

59. Finally, the Commission recalls that its review does not consist of determining that the death penalty in and of itself violates the American Declaration. What this section addresses is the standard of review of the alleged human rights violations in the context of criminal proceedings in a case involving the application of the death penalty.

B. Right to a fair trial³⁸ and right to due process of law³⁹

1. General considerations on the right to consular notification

60. The Commission has determined in previous cases 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 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.⁴⁰

61. On March 31, 2004, the International Court of Justice found in the *Case concerning Avena and Other Mexican Nationals (Mexico v. the United States of America)* that the United States of America had breached its obligations under the Vienna Convention with respect to Mr. Avena and 50 other Mexican nationals arrested and imprisoned for crimes in the United States by failing to inform them, without delay upon their detention, of their rights under Article 36 paragraph 1 (b) of the Vienna Convention.⁴¹ The Court found that those individuals were entitled to review and reconsideration of their convictions and sentences regardless of their failure to comply with generally applicable state rules governing challenges to criminal convictions. Mr. Loza was one of the 51 Mexican nationals named in the ICJ judgment.

62. On March 25, 2008, the United States Supreme Court held, in *Medellín v. Texas*, that in the absence of congressional legislation, the ICJ judgment in *Avena* was not directly enforceable as domestic law in state courts because the Optional Protocol to the Vienna Convention was not "self-executing."⁴² However, the opinions agreed that compliance with *Avena* is an international legal obligation of the United States and that Congress has the authority to implement that obligation.⁴³

³⁷ IACHR, Report No. 44/14, Case 12,873, Report on Merits (Publication), Edgar Tamayo Arias, United States, July 17, 2014, para. 214.

³⁸ Article XVIII of the American Declaration establishes: Every person may resort to the courts to ensure respect for his legal rights. There should likewise be available to him a simple, brief procedure whereby the courts will protect him from acts of authority that, to his prejudice, violate any fundamental constitutional rights.

³⁹ Article XXVI of the American Declaration establishes: Every accused person is presumed to be innocent until proved guilty. Every person accused of an offense has the right to be given an impartial and public hearing, and to be tried by courts previously established in accordance with pre-existing laws, and not to receive cruel, infamous or unusual punishment.

⁴⁰ IACHR, Report No. 90/09, Case 12.644, Admissibility and Merits (Publication), Medellín, Ramírez Cardenas and Leal García, United States, August 7, 2009, paras 124-132. See also, IACHR, Report No. 91/05 (Javier Suarez Medina), United States, Annual Report of the IACHR 2005; Report No. 1/05 (Roberto Moreno Ramos), United States, Annual Report of the IACHR 2005; and Report 52/02, Case 11.753 (Ramón Martínez Villarreal), United States, Annual Report of the IACHR 2002.

⁴¹ International Court of Justice, *Case concerning Avena and Other Mexican Nationals (Mexico v. the United States of America)*, Judgment of 31 March, 2004. Available at: <http://www.icj-cij.org/docket/files/128/8188.pdf>

⁴² *Medellín v. Texas*, 552 U.S. 491 (2008). Available at: <http://www.supremecourt.gov/opinions/07pdf/06-984.pdf>

⁴³ IACHR, Report No. 11/15, Case 12.833, Merits (Publication), Felix Rocha Diaz, United States, March 23, 2015, para. 62.

2. Analysis of the case

63. In the present case, the petitioners allege that Mr. Loza is a national of Mexico and that law enforcement authorities in Ohio were aware of this fact. Mr. Loza has stated that he was never informed of his right to consular notification when arrested or subsequent thereto. The State has not disputed the petitioners' contentions in this regard save for attesting to the Convention's non-binding provisions. Accordingly, based upon the information and arguments presented, the Commission concludes that Mr. Loza was not notified of his right to consular assistance at or subsequent to the time of his arrest and did not have access to consular officials until after his trial had ended.

64. As the Commission has determined in previous cases, given the comprehensive assistance provided by the Mexican Government to its citizens in death penalty cases in the United States, the IACHR believes that there is a reasonable probability that, had Mr. Loza received consular assistance at the time of his arrest, this would have had a positive impact in the development of his criminal case. More specifically, it may well have had a positive impact on his right to an adequate defense.⁴⁴

65. Based upon the foregoing, the Commission concludes that the State's obligation under Article 36 of the Vienna Convention to inform Mr. Loza of his right to consular notification constituted a fundamental component of the due process standards to which he is entitled under Articles XVIII and XXVI of the Declaration, and that the State's failure to respect and ensure this obligation deprived Mr. Loza 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. General considerations on ineffective assistance of court-appointed counsel

66. Adequate legal representation is a fundamental component of the right to a fair trial. The IACHR has found that "[t]he right to due process and to a fair trial includes the right to adequate means for the preparation of a defense, assisted by adequate legal counsel."⁴⁵ According to the Commission, "[t]he State cannot be held responsible for all deficiencies in the conduct of State-funded defense counsel. National authorities are, however, required [...] to intervene if a failure by legal aid counsel to provide effective representation is manifest or sufficiently brought to their attention. Rigorous compliance with the defendant's right to competent counsel is compelled by the possibility of the application of the death penalty."⁴⁶

67. The Commission has established that "the fundamental due process requirements for capital trials include the obligation to afford a defendant a full and fair opportunity to present mitigating evidence for consideration in determining whether the death penalty is the appropriate punishment in the circumstances of his or her case."⁴⁷ The Commission has also indicated that due process protections, under the Declaration:

guarantee an opportunity to make submissions and present evidence as to whether a death sentence may not be a permissible or appropriate punishment in the circumstances of the defendant's case, in light of such considerations as the offender's character and record, subjective factors that might have motivated his or her conduct, the design and manner of execution of the particular offense, and the possibility of reform and social readaptation of the offender.⁴⁸

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

⁴⁴ IACHR, Report No. 44/14, Case 12.873, Merits (Publication), Edgar Tamayo Arias, United States, July 17, 2014, para. 140.

⁴⁵ 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.

⁴⁶ 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.

⁴⁷ IACHR, Report No. 90/09, Case 12.644, Admissibility and Merits (Publication), Medellín, Ramírez Cárdenas and Leal García, United States, August 7, 2009, para. 134.

⁴⁸ IACHR, Report No. 90/09, Case 12.644, Admissibility and Merits (Publication), Medellín, Ramírez Cárdenas and Leal García, United States, August 7, 2009, para. 134.

emphasize the importance of investigating and presenting mitigating evidence in death penalty cases.⁴⁹ According to these guidelines, the duty of counsel in the United States to investigate and present mitigating evidence is now well-established and “[b]ecause the sentencer in a capital case must consider in mitigation, anything in the life of the defendant which might militate against the appropriateness of the death penalty for the defendant,” penalty phase preparation requires extensive and generally unparalleled investigation into personal and family history.⁵⁰ The ABA has also reflected the significance of consular notification in its guidelines:

[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 [...]⁵¹

4. Analysis of the case

69. In the instant case, the petitioners claim that Mr. Loza’s court-appointed counsel failed to advise him of his consular communication and notification rights and to notify the consulate of Mr. Loza’s detention. They also allege that Mr. Loza’s counsel failed to retain a neuropsychologist and to conduct a thorough investigation of his social history. The State alleges that legal representation during trial, appellate, and post-conviction relief proceedings met constitutional standards of competence.

70. The Commission notes that court-appointed counsel knew that Mr. Loza was a foreign national. In his first meeting with Mr. Loza, counsel should have corroborated that he had been notified of his right to request that the Mexican consulate be immediately notified of his arrest, a fundamental component of a foreign national’s due process rights. However, counsel failed to advise Mr. Loza of his right or to obtain his consent to contact the consular office. This, in turn, had a potential impact in Mr. Loza’s defense, as it will be addressed below.

71. The Commission also notes that appointed counsel sought expert and family testimonies to provide a narrative of Mr. Loza’s cultural, historical and family background. However, according to the above mentioned standards, penalty phase preparation in death penalty cases requires extensive and generally unparalleled investigation into personal and family history.

72. Considering that the fundamental due process and fair trial requirements for capital trials include the obligation to afford adequate legal representation, and that the failure to inform a client of his rights to consular notification would constitute inadequate representation, the Commission concludes that the United States has violated Mr. Loza’s right to due process and to a fair trial under Articles XVIII and XXVI of the American Declaration.

5. Confession obtained through coercion and prosecutorial misconduct

73. The petitioners contend that Mr. Loza’s confession was coerced by threats of harm to be done to him, his girlfriend and their unborn baby; made by the detectives as aforementioned. The Commission acknowledges that the confession was fully ventilated before the trial and appellate courts, after which all statements were reaffirmed as voluntary and not coerced. The Commission also notes that the various domestic courts held that in addition to the confession, there were varied sources of evidence ventilated before the court, to which the jury could have determined guilt, aggravating and mitigating circumstances in order to determine conviction and an appropriate sentence.

⁴⁹ 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/legal/services/downloads/sclaid/deathpenaltyguidelines.pdf>.

⁵⁰ 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.

⁵¹ American Bar Association, *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases* (Revised editions) (February 2003), Guideline 10.6B – Additional Obligations of Counsel Representing a Foreign National.

74. The petitioners also allege that the prosecution failed to disclose that Dorothy Jackson had confessed to the murders, which is in violation of the due process rights of the alleged victim. However, as the petitioner indicates and as established in this report, the prosecutor's misconduct resulted in a mistrial. Therefore, this due process violation was corrected by domestic courts.

75. Based on the above considerations, the Commission finds that in both instances, the court allowed judicial process to prevail, and with regards to the instance of non-disclosure, the court ruled a mistrial and ordered another trial to proceed. Given the available information, the Commission does not conclude that the United States violated Mr. Loza's due process rights as alleged by the petitioners.

C. Right to protection from arbitrary arrest⁵² and right to equality before the law⁵³

1. General considerations

76. Articles XXV of the American Declaration and 7.2 of the American Convention recognize the primary guarantee of the right to personal liberty: the reservation of law, according to which, only through a law can this right be affected. Therefore, States have the duty to establish in advance the causes and conditions of the deprivation of liberty, so that any legal requirement that is not fulfilled renders the deprivation of liberty illegal. The IACHR has emphasized in this regard that the improper conduct of the police forces constitutes one of the main threats to individual freedom and security. Therefore, States must adopt measures to ensure that police officers carry out their duties in a manner that guarantees human rights and that arrests are carried out in accordance with domestic legislation.⁵⁴

77. Further, according to inter-American standards, "no one may be subjected to detention or imprisonment for causes and methods which, even if qualified as legal, may be considered incompatible with respect for the fundamental rights of the individual because they are, *inter alia*, unreasonable, unforeseeable, or lack proportionality."⁵⁵ The concept of arbitrariness of detention, should not be equated with that of "against the law", but should be interpreted more broadly to include elements of impropriety, injustice and unpredictability, as well as the principle of due process. Therefore, any detention must be carried out not only in accordance with the provisions of domestic law, but it is also necessary that domestic law is compatible with the American Declaration.⁵⁶

78. Therefore, the legality of a detention implies the conformity to the substantive and procedural rules of domestic law, but also relates to the quality of the law, requiring it to be compatible with the rule of law. The "quality of the law", according to the European Court of Human Rights, implies that where a national law authorizes a deprivation of liberty, it must be sufficiently accessible, precise and foreseeable in its application to avoid all risk of arbitrariness. The standard of "lawfulness" requires that all law be sufficiently precise to allow the person to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail. Where deprivation of liberty is concerned, it is essential that domestic law clearly defines the conditions for the arrest or detention.⁵⁷

79. Further, any deprivation of liberty must be carried out with respect for the right to equality before the law. The principles of equality before the law, equal protection, and non-discrimination are among the most basic human rights, and are in fact recognized as *jus cogens* norms.⁵⁸ The Commission has understood

⁵² Article XXV of the American Declaration provides: "No person may be deprived of his liberty except in the cases and according to the procedures established by pre-existing law." [...]

⁵³ Article II of the American Declaration provides: "All persons are equal before the law and have the rights and duties established in this Declaration, without distinction as to race, sex, language, creed or any other factor."

⁵⁴ See in this regard, IACHR, Report No. 129/17. Case 12.315. Merits. Carlos Alberto Fernandez and Carlos Alejandro Tumbeiro. Argentina. October 25, 2017, para. 47.

⁵⁵ IACHR, Report No. 24/18. Case 12.982. Azul Rojas Marin. Merits. Peru, para. 67.

⁵⁶ See, *mutatis mutandi*, IACHR, Report No. 24/18. Case 12.982. Azul Rojas Marin. Merits. Peru, para. 67.

⁵⁷ IACHR, Report No. 129/17. Case 12.315. Merits. Carlos Alberto Fernandez and Carlos Alejandro Tumbeiro. Argentina. October 25, 2017, para. 49; ECHR. *Del Rio Prada v. Spain* [GC], no. 42750/09. October 21, 2013, para. 125.

⁵⁸ See I/A Ct. H.R. *Juridical Condition and Rights of Undocumented Migrants*, Advisory Opinion OC-18/03 of Sept. 17, 2003, para. 101. See also IACHR, Report No. 50/16, Case 12.834, Merits (Publication), Undocumented Workers, United States, Nov. 30, 2016, para. 72.

“discrimination” to mean “any distinction, exclusion, restriction, or preference which is based on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms.”⁵⁹

80. The principle of equality and non-discrimination incorporates both “the prohibition of arbitrary differences of treatment,” and “the obligation of States to create conditions of real equality for groups that have been historically excluded or that are at greater risk of being discriminated against.”⁶⁰ Further, distinctions based on grounds explicitly enumerated under pertinent articles of international human rights instruments are subject to a particularly strict level of scrutiny whereby States must provide an especially weighty interest and compelling justification for the distinction.⁶¹

81. Therefore, arbitrary treatment and distinctions on the basis of race or ethnicity are prohibited under international human rights law, and should be prevented. Race-based restrictions must be based on very compelling reasons; on this issue, there is a “presumption of invalidity” and the burden of proof rests with the State. The Commission has underscored that laws and policies should be examined to ensure that they comply with the principles of equality and non-discrimination; this analysis should assess the potential discriminatory effect of even facially neutral provisions. This, in light of the fact that States are not only obligated to provide for equal protection of the law, but must also adopt the legislative, policy and other measures necessary to guarantee the effective enjoyment of the rights protected under Article II of the American Declaration.⁶²

82. In the case of William Andrews, an African-American on death row, the IACHR found that the existence of “a reasonable appearance of “racial bias” by some members of the jury” that tainted the trial and resulted in the death sentence, constituted a violation of the right to an impartial trial and to equality before the law.⁶³ In the case of Kevin Cooper, also an African-American on death row, the point at stake was the deficiencies in due process that had left the possibility of racial discrimination unresolved.⁶⁴

83. Further, in its report on Police Violence Against Afro-descendants in the United States, the Commission noted that the United States’ legal framework for conducting police stops, such as the *Terry* stops, may allow or encourage expressions of bias in policing. In particular, the Commission emphasized that *Terry* stops empower police to briefly stop individuals if they have a “reasonable suspicion,” formed on an “objective basis,” that an individual is engaged in or about to be engaged in criminal activity. In this regard, the Commission noted:⁶⁵

“Reasonable suspicion” is a lower threshold than the “probable cause” required for searches or seizures required under the Fourth Amendment, and is shaped by social context. For example, the Supreme Court has found that the fact of a black man running in a “high-crime” area may be sufficient to give rise to a “reasonable suspicion” for a police officer to decide to stop him.

2. Analysis of the case

84. According to the facts established in this report, on January 16, 1991, Mr. Loza was seen loading trash from his car into the dumpster of a shop. The shop owner searched the dumpster for something to identify Mr. Loza and found a letter indicating that Mr. Loza was involved in a drive-by shooting in Los Angeles. The shop owner called the police to report his discovery. A police went to the dumpster and retrieved other items that implicated Mr. Loza. As they were going through the items, Mr. Loza came close the dumpster and the detective approached Mr. Loza with his gun in his hand and identified himself as a police officer. He then searched Mr. Loza and informed him that he was stopped because of what he put in the dumpster. After determining that Ms. Jackson was under age and planned to travel to California with Mr. Loza, the detective arrested Mr. Loza for contributing to the delinquency or unruliness of a minor and was taken to the Warren County Justice Center.

⁵⁹ IACHR, Report No. 50/16, Case 12.834, Merits (Publication), Undocumented Workers, United States, Nov. 30, 2016, para. 75.

⁶⁰ See, e.g., I/A Ct. H.R. Furlan and family Vs. Argentina. Judgment of Aug. 31, 2012, para. 267.

⁶¹ IACHR, Report on Terrorism and Human Rights (2002), para. 338.

⁶² IACHR, Police Violence Against Afro-descendants in the United States. November 26, 2018, para. 195.

⁶³ IACHR, Report No. 57/97, Case No. 11.139, William Andrews, Merits, United States, December 6, 1996, para. 165.

⁶⁴ IACHR, Report No. 78/15, Case 12.831, Merits (Publication), Kevin Cooper. United States. October 28, 2015, para. 146.

⁶⁵ IACHR, Police Violence Against Afro-descendants in the United States. November 26, 2018, para. 77.

According to the information provided by the petitioners, not contested by the State, the detective was recorded referring to Mr. Loza as the “wetback from California.”

85. In federal habeas proceedings, the U.S. Court of Appeals held that the police officer questioned Mr. Loza pursuant to a lawful Terry stop. It noted that the officer had a reasonable, articulable suspicion that criminal activity was afoot and had reason to suspect that Mr. Loza may have been involved. Regarding Mr. Loza’s claim that the encounter was more coercive than a typical Terry stop, the court reasoned that, “to the extent that the law [was] not clearly established with regards to Terry stops and custodial interrogations subject to Miranda,” the Ohio Supreme Court’s denying the claim was not unreasonable.

86. As noted above, the Commission has expressed concern regarding the low threshold required to conduct a Terry stop, which may allow or encourage expressions of bias in policing, and therefore could have a disproportionate impact on minorities. Where deprivation of liberty is concerned, it is essential that domestic law clearly defines the conditions for the arrest or detention in order to allow the person to foresee the consequences which a given action may entail.

87. In the instant case, the petitioner has not alleged that there the law itself is contrary with the American Declaration, but that the search and arrest were based on discriminatory grounds. On this point, the Commission notes that the available information shows that there was an objective basis for the search and arrest, given that the police officer found different items that implicated Mr. Loza in a criminal activity. Further, he was planning to travel out of state with a minor, purportedly without the consent of her parents. The officer’s suspicion was thus based on reasonable and objective grounds, which is an essential safeguard against arbitrary arrest and detention.

88. The Commission notes petitioners’ allegation, not contested by the State, that the police detective was recorded referring to Mr. Loza as the “wetback from California.” This is undoubtedly a pejorative and discriminatory expression, and its use is even more reprehensible when it comes from a law enforcement agent. This expression, however, is not by itself sufficient to establish that the arrest and all the subsequent proceedings were tainted by discrimination.

89. Regarding petitioners’ claim that Mr. Loza was selectively prosecuted for capital offenses based on racial discrimination, the district court in the habeas petition granted a motion for leave to conduct discovery on the claim. The evidence produced was considered and the selective prosecution claim was denied. On appeal, the court established that the defendant did not demonstrate that the prosecutorial policy “had a discriminatory effect and that it was motivated by a discriminatory purpose.” The Commission has no elements to arrive to a different conclusion.

90. Based on the above information and considerations, the Commission finds that there are no sufficient elements to conclude that Mr. Loza’s arrest was illegal, arbitrary or discriminatory, or that he was selectively prosecuted for capital offenses based on ethnic discrimination.

D. Right not to receive cruel, infamous or unusual punishment⁶⁶

1. Method of execution

91. In capital cases the State has an enhanced obligation to ensure that the person sentenced to death has access to all the relevant information regarding the manner in which he or she is going to die. In particular, the convicted person must have access to information related to the precise procedures to be followed, the drugs and doses to be used in case of executions by lethal injection, and the composition of the execution team as well as the training of its members.⁶⁷

⁶⁶ Article XXV of the American Declaration provides: “[...] Every individual who has been deprived of his liberty has the right [...] to humane treatment during the time he is in custody.”

Article XXVI of the American Declaration provides: “[...] Every person accused of an offense has the right [...] not to receive cruel, infamous or unusual punishment.”

⁶⁷ IACHR, Report No. 44/14, Case 12.873. Merits (Publication). Edgar Tamayo Arias. United States. July 17, 2014, para. 189.

92. Any person subjected to the death penalty must have the opportunity to challenge every aspect of the execution procedure and such information is necessary to file a challenge. The IACHR notes in this regard that the due process requirement is not limited to the conviction and post-conviction proceedings.⁶⁸ Therefore, the State has the duty to inform the person sentenced to death, in a timely manner, about the drug and method of execution that will be used, so he or she is not precluded from litigating the right to be executed in a manner devoid of cruel and unusual suffering.

93. Further, the IACHR highlights the reinforced special duty of the State to ensure that the method of execution does not constitute cruel, infamous or unusual punishment. In this regard, the U.N. Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment stated that “[t]he fact that a number of execution methods have been deemed to constitute torture or CIDT, together with a growing trend to review all methods of execution for their potential to cause severe pain and suffering, highlights the increasing difficulty with which a state may impose the death penalty without violating international law.”⁶⁹

94. The IACHR also notes that the United Nations Committee Against Torture received substantiated information indicating that executions in the United States can be accompanied by severe pain and suffering and requested the State to “carefully review its execution methods, in particular lethal injection, in order to prevent severe pain and suffering.”⁷⁰

95. As of the time of adoption of the present report, the current Governor of Ohio, Mike DeWine, communicated on February 19, 2019 that the State postponed the execution of inmates until a new method of carrying out executions is developed and deemed constitutional by the courts. The state of Ohio had resumed the execution of inmates as of July 26, 2017. The Governor ordered a review of the death penalty protocols after a federal magistrate judge opined that Ohio’s method of execution would subject a condemned prisoner to “severe paid and needless suffering.”⁷¹

96. Based on the above considerations, and the uncertainty surrounding death penalty executions in Ohio, the IACHR concludes that the State is exposing Mr. Loza to anguish and fear that amount to a violation of his right to humane treatment and not to receive cruel, infamous or unusual punishment set forth in Articles XXV and XXVI of the Declaration.

3. The deprivation of liberty on death row

97. In both international human rights law and comparative law, the issue of long term deprivation of liberty on death row, known as the “death row phenomenon,” has been developed for decades, in light of the prohibition of cruel, inhuman or degrading punishment in Constitutions and in multiple international treaties, including the American Declaration (Articles XXV and XXVI).⁷² Based on those standards, in the case of Russell Bucklew the IACHR found that “the very fact of spending 20 years on death row is, by any account, excessive and inhuman.”⁷³

98. Specifically regarding the matter of prolonged solitary confinement on death row, the Inter-American Commission has determined that deprivation of liberty under certain conditions on death row, including solitary confinement for four years, constituted inhuman treatment.⁷⁴

⁶⁸ IACHR, Report No. 44/14, Case 12.873. Merits (Publication). Edgar Tamayo Arias. United States. July 17, 2014, para. 190.

⁶⁹ The death penalty and the absolute prohibition of Torture and Cruel, Inhuman, and Degrading Treatment or Punishment, Juan E. Mendez, Human Right Brief, Volume 20, Issue 1, Article 1, p. 3.

⁷⁰ Committee Against Torture, Considerations of Reports submitted by State Parties under Article 19 of the Convention, United States, CAT/C/USA/CO/2, July 25, 2006, para. 31.

⁷¹ <https://www.cleveland.com/news/2019/02/gov-mike-dewine-freezes-all-ohio-executions-while-new-method-developed.html>

⁷² IACHR, Report No. 71/18, Case 12.958. Merits. Russell Bucklew. United States, May 10, 2018, paras. 86-90. In this report the Commission has cited a number of developments in the inter-American and other protections systems, including the regional and United Nations systems.

⁷³ IACHR, Report No. 71/18, Case 12.958. Merits. Russell Bucklew. United States, May 10, 2018, para. 83.

⁷⁴ IACHR, Report No. 24/17, Case 12.254. Merits. Victor Saldaño. United States. March 18, 2017, para. 246, citing IACHR, Report No. 58/02. Merits. Case 12.275. Denton Aitken. Jamaica. October 21, 2002, paras. 133 and 134.

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

Individuals held in solitary confinement suffer extreme forms of sensory deprivation, anxiety and exclusion, clearly surpassing lawful conditions of deprivation of liberty. Solitary confinement, in combination with the foreknowledge of death and the uncertainty of whether or when an execution is to take place, contributes to the risk of serious and irreparable mental and physical harm and suffering to the inmate. Solitary confinement used on death row is by definition prolonged and indefinite and thus constitutes cruel, inhuman or degrading treatment or punishment or even torture.⁷⁵

100. As established in this report, Mr. Loza has been deprived of his liberty on death row for 28 years. The Commission notes that the very fact of spending 28 years on death row is, by any account, excessive and inhuman, and is aggravated by the prolonged expectation that the death sentence could be executed. Consequently, the United States is responsible for violating, to the detriment of Mr. Loza, the right to humane treatment, and not to receive cruel, infamous or unusual punishment established in Articles XXV and XXVI of the American Declaration.

2. Right to life⁷⁶ and to protection against cruel, infamous or unusual punishment with respect to the eventual execution of José Trinidad Loza Ventura

101. As indicated above, the Inter-American Commission considers that it is incumbent upon the national courts, not the Commission, to interpret and apply national law. Nevertheless, the IACHR must ensure that any deprivation of life resulting from imposition of the death penalty complies with the requirements of the American Declaration.⁷⁷

102. Under these circumstances, the IACHR has maintained that executing a person, after proceedings that were conducted in violation of his rights, would be extremely grave and constitute a deliberate violation of the right to life established in Article I of the American Declaration.⁷⁸ Further, based on the conclusions regarding the deprivation of liberty on death row, the eventual execution of Mr. Loza would constitute, by any account, a violation of the right to protection against cruel, infamous or unusual punishment. In light of the foregoing and taking into account the determinations made throughout this report, the IACHR concludes that the execution of Mr. Loza would constitute a serious violation of his right to life established in Articles I of the American Declaration.

VI. REPORT No. 243/19 AND INFORMATION ABOUT COMPLIANCE

103. On December 31, 2019, the Commission approved Report No. 243/19 on the admissibility and merits of the instant case, which encompasses paragraphs 1 to 102 supra, and issued the following recommendations to the State:

1. Grant José Trinidad Loza Ventura effective relief, including the review of his trial and sentence in accordance with the guarantees of fair trial and due process set forth in Articles XVIII and XXVI of the American Declaration,⁷⁹ and the payment of pecuniary compensation. Taking into account the conclusions of the IACHR on the time José Trinidad Loza Ventura has been held on death row, the Commission recommends that his sentence be commuted.
2. Review its laws, procedures, and practices at the state, and if applicable, at the federal level to ensure that persons accused of capital crimes are tried and, if convicted, sentenced in accordance with the rights established in the American Declaration, including Articles I, XVIII, XXV and XXVI thereof, and, in particular:

⁷⁵ United Nations. Interim report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment of punishment. 9 August 2012. A/67/279, para 48.

⁷⁶ Article I of the American Declaration establishes: Every human being has the right to life, liberty and the security of his person.

⁷⁷ IACHR, Report No. 53/13, Case 12.864, Merits (Publication), Ivan Teleguz, United States, July 15, 2013, para. 129.

⁷⁸ IACHR, Report No. 11/15, Case 12.833, Merits (Publication), Félix Rocha Díaz, United States, March 23, 2015, para. 106.

⁷⁹ 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.

- a. Ensure that every foreign national deprived of his or her liberty is informed, without delay and prior to his or her first statement, of the right to request that consular authorities be immediately notified of his or her arrest or detention; and
 - b. Ensure that court-appointed appellate counsel provides adequate legal representation in death penalty cases.
3. Ensure that the drugs used in lethal injection are subject to government approval and regulation, that the execution team has appropriate medical training and that lethal injection protocols are available to the public.
 4. Given the violations of the American Declaration the IACHR has established in the present case and in others involving application of the death penalty, the Inter-American Commission also recommends to the United States that it adopt a moratorium on executions of persons sentenced to death.⁸⁰

104. On February 27, 2020 the IACHR transmitted the report to the State with a time period of two months to inform the Commission on the measures taken to comply with its recommendations. On August 23, 2021 the petitioners invoked the friendly settlement procedure, asking for the good offices of the IACHR in arranging for a dialogue between the parties. This communication was transmitted to the State on September 22, 2021. To date, the Commission has not received any response from the United States regarding report No. 243/19.

VII. ACTIONS SUBSEQUENT TO REPORT No. 332/21

105. On November 22, 2021, the Commission approved Final Merits Report No. 332/21, which encompasses paragraphs 1 to 104 *supra*, and issued its final conclusions and recommendations to the State. On December 3, 2021, the Commission transmitted the report to the State and the petitioners with a time period of three weeks to inform the Inter-American Commission on the measures taken to comply with its recommendations. To date, the IACHR has not received any response from the United States or the petitioners regarding Report No. 332/21.

VIII. FINAL CONCLUSIONS AND RECOMMENDATIONS

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

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

1. Grant José Trinidad Loza Ventura effective relief, including the review of his trial and sentence in accordance with the guarantees of fair trial and due process set forth in Articles XVIII and XXVI of the American Declaration,⁸¹ and the payment of pecuniary compensation. Taking into account the conclusions of the IACHR on the time José Trinidad Loza Ventura has been held on death row, the Commission recommends that his sentence be commuted.
2. Review its laws, procedures, and practices at the state, and if applicable, at the federal level to ensure that persons accused of capital crimes are tried and, if convicted, sentenced in accordance with the rights established in the American Declaration, including Articles I, XVIII, XXV and XXVI thereof, and, in particular:

⁸⁰ 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.

⁸¹ 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.

- a. Ensure that every foreign national deprived of his or her liberty is informed, without delay and prior to his or her first statement, of the right to request that consular authorities be immediately notified of his or her arrest or detention; and
 - b. Ensure that court-appointed appellate counsel provides adequate legal representation in death penalty cases.
3. Ensure that the drugs used in lethal injection are subject to government approval and regulation, that the execution team has appropriate medical training and that lethal injection protocols are available to the public.
4. Given the violations of the American Declaration the IACHR has established in the present case and in others involving application of the death penalty, the Inter-American Commission also recommends to the United States that it adopt a moratorium on executions of persons sentenced to death.⁸²

IX. PUBLICATION

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

Approved by the Inter-American Commission on Human Rights on the 31st day of December 2021. (Signed): Antonia Urrejola Noguera, President; Julissa Mantilla Falcón, First Vice President; Flávia Piovesan, Second Vice President; Margarette May Macaulay, Esmeralda E. Arosemena Bernal de Troitiño, Joel Hernández García and Edgar Stuardo Ralón Orellana, Commissioners.

⁸² 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.