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**REPORT No. 28/20**  
**CASE 12.719**  
REPORT ON MERITS (PUBLICATION)

ORLANDO CORDIA HALL  
UNITED STATES OF AMERICA

Approved by the Inter-American Commission on April 22, 2020.

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United States of America. April 22, 2019.

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**I. SUMMARY**

1. On October 16, 2007, the Inter-American Commission on Human Rights (the “Inter-American Commission” or “IACHR”) received a petition submitted by Marica A. Widder and Robert C. Owen, from the University of Texas at Austin, and Owen Bonheimer from Steptoe & Johnson LLP (the “petitioners”),<sup>1</sup> alleging the international responsibility of the United States of America (the “State” or “the United States”) for violations of the rights of Orlando Cordia Hall.

2. The Commission approved its admissibility report No. 77/09 on August 5, 2009.<sup>2</sup> On August 31, 2009, the IACHR notified the report to the parties 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 of Procedure to present additional observations on the merits. On October 29, 2010, the IACHR held a hearing on the merits of the case. All the information received by the IACHR was duly transmitted to the parties.<sup>3</sup>

3. The petitioners alleged that Mr. Hall was tried, convicted and sentenced to death in circumstances amounting to racial discrimination; that he was deprived of effective legal representation during the penalty phase of his trial; that there was a lack of impartiality on the part of the trial jury; and that Mr. Hall was denied access to effective post-conviction remedies. The petitioners also stated that the lethal injection protocol would not adequately protect Mr. Hall against inhuman pain and suffering and that clemency proceedings lack due process protections.

4. The State alleged that the petitioners failed to establish any violation of the American Declaration on the Rights and Duties of Man (the “American Declaration”). It asserted that Mr. Hall committed a heinous crime against a young girl; that he received effective assistance of two competent attorneys; and that the United States criminal justice system provided him with a comprehensive and expansive system of review and protection of his rights. The State likewise alleged that the petitioners’ claims of racism are entirely speculative and unsubstantiated.

5. On the basis of determinations of fact and law, the Inter-American Commission concluded that the State is responsible for the violation of Articles I (life, liberty, and security), II (equality before the law), IV (freedom of expression), XVIII (fair trial), XXV (protection from arbitrary detention), and XXVI (due process) of the American Declaration. The Commission formulated the corresponding recommendations to the State.

**II. POSITIONS OF THE PARTIES**

**A. Petitioners**

6. The petitioners stated that Orlando Cordia Hall, an indigent African-American man, was sentenced to death in federal proceedings held in the state of Texas for his role in a 1994 kidnapping that resulted in the death of a 16 year-old girl.

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<sup>1</sup> On October 15, 2012, petitioner Owen Bonheimer sent a notice of withdrawal from Mr. Hall’s representation before the IACHR.

<sup>2</sup> IACHR. Report No 77/09, Petition 1349-07. Admissibility. Orlando Cordia Hall. United States. August 5, 2009. Alleged violations admissible: Articles I, II, XVIII, XXV and XXVI of the American Declaration on the Rights and Duties of Man.

<sup>3</sup> On July 7, 2008, the IACHR granted precautionary measures on behalf of Mr. Hall. The Commission requested the United States to refrain from executing the death sentence until it has had an opportunity to issue its decision on the petitioners’ claim of alleged violations of the American Declaration.

7. They alleged that the federal death penalty is administered in a racially discriminatory fashion in violation of the right to **equality before the law** and that the authorization processes by which the Department of Justice selects those defendants who will face the death penalty are impermissibly influenced by the defendant's race. They submitted that the disparate impact of these decisions is clear – despite the fact that whites are arrested for homicide in roughly the same numbers as blacks, they occupy only twenty percent of those condemned to die under federal law, while blacks account for sixty percent of federal death row. Regarding federal death penalty cases arising in Texas, they claimed that black defendants are 5.3 times more likely than white defendants to face the death penalty, although they comprise less than twelve percent of the overall population.

8. The petitioners argued that when federal prosecutors requested authorization to seek the death penalty against Mr. Hall in 1994, the Department of Justice process was arbitrarily subjected to local influence, and reflected a grossly disproportionate number of requests involving African-American defendants. They stated that Mr. Hall was tried by an all-white jury and that the federal government chose to prosecute his case in Texas, rather than Arkansas, where the number of African-Americans in the jury pool was diluted. They stated that, in separate capital cases, the prosecutor responsible for assembling the all-white jury in Mr. Hall's prosecution was found by the U.S. Supreme Court to have engaged in racial discrimination in jury selection. They alleged that the prosecutor had denied under oath that he had struck minority jurors on account of their race, and in each case the reviewing court found his sworn denials of discrimination to be false, reversing the capital murder conviction. Given that Mr. Hall's final round of appeals had already been decided, he could not use this new finding in his habeas petitions. They also submitted that the State did not offer Mr. Hall the chance to plead guilty to the crime to which he had already voluntarily confessed, and thereby obtain a life sentence. They indicated that in federal death penalty cases almost twice as many white defendants as African-American defendants obtained a plea deal. According to the petitioners, indirect discrimination by the State resulted in Mr. Hall being sentenced before an all-white jury.

9. The petitioners likewise submitted that Mr. Hall was deprived of effective legal representation during the penalty phase of his trial in violation of his rights to a **fair trial** and to **due process of law**. They alleged that the two attorneys appointed to represent him were granted leave to withdraw a few months after appointment. Although the two new attorneys were appointed more than six months before trial was scheduled to begin, they did not begin a penalty phase investigation until two and a half weeks before trial commenced. They noted that trial counsel called only two witnesses, Mr. Hall's mother and sister, to testify briefly concerning his background and character, and unreasonably failed to develop or present extensive and powerful mitigating evidence. They alleged that, had trial counsel undertaken a timely, comprehensive investigation into available mitigating evidence, jurors would have heard that Mr. Hall was the target of severe and longstanding physical abuse from his father, suffered neuropsychological deficits that undermined his judgment, had many positive personality traits, was a "model prisoner" during his sole prior incarceration, and originally became involved in selling illegal drugs, in part, to support his younger brothers.

10. According to the petitioners, trial counsel relied on the superficial and incomplete work of prior counsel who had withdrawn due to a conflict of interest. They alleged that trial counsel failed to present the testimony of several individuals – present in the courthouse at the time of the penalty hearing – who were familiar with the Hall family, the privations that Mr. Hall suffered throughout his childhood and youth, and many of his positive attributes. They likewise stated that trial counsel arranged for the assistance of a neuropsychologist but unreasonably failed to ensure that their expert actually evaluated Mr. Hall. The petitioners claimed that, had appropriate neuropsychological testing been performed sufficiently in advance of trial, favorable results could have been incorporated into a meaningful case in mitigation. They concluded in this regard that, had trial counsel performed according to the prevailing standards of practice, they would have developed and presented a richly detailed portrait that could have persuaded jurors to spare Mr. Hall's life notwithstanding the seriousness of his crime. They further submitted that at the penalty phase the prosecution, in support of its allegation that Mr. Hall "constitute[d] a future danger to the lives and safety of other persons," introduced testimony concerning other offenses allegedly committed and/or planned by Mr. Hall, but for which he had never been prosecuted or convicted.

11. The petitioners argued that Mr. Hall's case received virtually no scrutiny at all in post-conviction proceedings. According to the petitioners, the domestic courts refused to conduct an evidentiary hearing during post-conviction proceedings to permit Mr. Hall to prove the facts he had alleged regarding his trial attorney's deficient performance at the penalty phase and how their errors and omissions likely influenced the jury's decision to impose a death sentence. They submitted that the domestic courts refused to conduct an evidentiary hearing into Mr. Hall's charges that key parts of the penalty-phase testimony of a prosecution witness were fabricated and/or intolerably unreliable, despite the fact that Mr. Hall submitted sworn affidavits that contradicted the testimony. Nor did the domestic courts, according to the petitioners, permit a meaningful resolution of whether one or more jurors had committed misconduct.

12. The petitioners also argued that the United States failed to develop a lethal injection protocol that would adequately protect Mr. Hall against **inhumane pain and suffering**. They stated in this regard that the United States Government has designated as "confidential" critical portions of deposition testimony revealing the qualifications, training, and procedures used by personnel involved in its lethal injection process. They claimed that this refusal to disclose vital information regarding the lethal injection protocol significantly impedes Mr. Hall's ability to receive review and, at the appropriate time, to present evidence. Finally, they alleged that the absence of a hearing in the clemency process means that there is no guarantee to view any evidence submitted in opposition to the clemency request, that the structure of the federal clemency process lacks independence, and that no opportunity is afforded for appeal or reconsideration.

## **B. State**

13. The United States submitted that the petitioners failed to demonstrate any facts that would constitute a violation of Mr. Hall's rights under the American Declaration. It asserted that Article I of the Declaration does not proscribe capital punishment when carried out in accordance with due process and when imposed for the most serious crimes such as the offense committed by Mr. Hall. The State argued that the petitioners did not demonstrate evidence of discriminatory intent regarding the death penalty against African-American individuals and that statistical evidence is not sufficient. It also claimed that attorneys conducted reasonable investigations and that Mr. Hall received constitutionally effective assistance of counsel. It further indicated that U.S. law provides special protections for those accused of capital offenses.

14. Regarding the right to **equality before the law**, the State noted that the Department of Justice's procedures on prosecuting capital offenses include significant protections to guard against any sort of racial bias. It further argued that the petitioners did not effectively demonstrate the existence of racially-discriminatory conduct and, based on two studies, claimed that there is no evidence of systemic racial bias in the federal death penalty system. According to a Department of Justice report released in 2001, "given that organized trafficking is largely carried out by gangs whose membership is drawn from minority groups, [there is a higher proportion of minority defendants] in potential capital cases arising from the lethal violence associated with the drug trade." A 2006 report by the RAND Corporation also cited by the State concluded that the US Attorney's Office's recommendations and the Attorney General's final charging decisions "were driven by heinousness of crime rather than race."

15. With regard to Mr. Hall's case, the State submitted that, on January 24, 1995, defense attorneys were invited to meet with the capital case review committee to present arguments as to why the government should not seek the death penalty and, after reviewing all the evidence, the Attorney General decided to seek the death penalty. Therefore, the State asserted that the decision to seek the death penalty was not made by the prosecuting attorney. The State also alleged that the Northern District of Texas was the most logical venue for the trial given that the kidnapping and much of the investigation took place in Texas. Likewise, many of the witnesses and the victim were from Texas. Therefore, the State concludes that the decision to prosecute the case in Texas was not based on the race of potential jury members. Regarding the alleged failure of the judicial system to permit adequate discovery or to fairly resolve factual disputes, the State argued that the District Court of the Northern District of Texas found the statistical evidence insufficient to establish the elements of Mr. Hall's claim. Therefore, according to the State, neither petitioner's statistical evidence, nor the alleged lack of access to discovery, is sufficient to establish either the element of Mr. Hall's claim of selective prosecution or racial discriminatory practice.

16. According to the State, the petitioners did not demonstrate a violation of Mr. Hall's right to **due process** nor demonstrated **cruel, infamous, or unusual punishment**. It indicated that the United States provided Mr. Hall with a comprehensive and expansive system of review and protection of his rights and that his claims received review by the Federal District Court for the Northern District of Texas, the Fifth Circuit Court of Appeals and the United States Supreme Court. The State further stated that the protections afforded to individuals in the U.S. criminal justice system are among the strongest and most expansive in the world. It added that, beyond the procedural protections afforded by the Constitution and federal law, Mr. Hall received specific protections at trial under the Federal Death Penalty Act of 1994.

17. The State submitted that Mr. Hall's ineffective assistance of counsel claim raised during the habeas proceedings was carefully and exhaustively addressed by the district court before being rejected. It stated that, under U.S. law, the defendant must demonstrate both that counsel's performance was deficient and that such deficit in performance actually prejudiced the final judgment. The State noted that the District Court unanimously concluded that Mr. Hall's legal counsel had not been incompetent. According to the State, trial counsel reviewed Mr. Hall's responses to a questionnaire which provided extensive information about his background. It also hired a mitigation specialist who had over six weeks to conduct an investigation and develop mitigating evidence. It likewise argued that the specialist traveled to Mr. Hall's home town and interviewed numerous people, including Mr. Hall's family, neighbors and minister. It also stated that, besides Mr. Hall's mother and sister, a prison official testified to his good behavior during his previous incarceration.

18. The State further submitted that defense counsel made the strategic decision not to call several potential witnesses to testify at the sentencing hearing for fear that they would have to disclose damaging information about Mr. Hall on cross-examination. According to the State, while defense counsel presented evidence as to his troubled childhood, they placed even greater emphasis on the equal culpability of the co-defendants who were not given the death penalty; a mitigating factor that they believed had the best chance of success.

19. With regard to the alleged introduction of the unreliable testimony of one of Mr. Hall's cell-mates at the penalty phase, the State indicated that during the thorough cross-examination performed by Mr. Hall's attorneys, the witness disclosed a number of facts that had the potential to impeach his credibility. According to the State, after listening to this cross-examination, the jury had discretion to reject the testimony in its entirety. In relation to the trial judge's refusal to hold a full evidentiary hearing on Mr. Hall's claim of juror misconduct, the State claimed that the judge took reasonable and appropriate measures to determine if there was any truth to the allegation and determined that there was no evidence that the jury deliberations had been tainted by extraneous outside influence.

### III. FINDINGS OF FACT

20. 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. Likewise, the Commission will take into account publicly available information that may be relevant for the analysis and decision of the instant case.

#### A. The federal death penalty system

21. In 2000, the United States Department of Justice ("DoJ") issued the report "The federal death penalty system: a statistical survey (1988-2000)".<sup>4</sup> The Commission will reproduce below parts of the report pertaining to the structure of the federal death penalty system and some statistics on race and the federal death penalty:

- In 1972, the Supreme Court invalidated capital punishment throughout the United States – both in the federal criminal justice system and in all of the states that then provided for the death penalty.

<sup>4</sup>The Federal Death Penalty System: a statistical survey (1988-2000). United States Department of Justice. Washington, D.C. September 12, 2000. Exhibit A submitted with petitioners' brief on October 15, 2010.

The federal government revised its procedures to withstand constitutional scrutiny on November 18, 1988, when the President signed the Anti-Drug Abuse Act of 1988. A part of this law made the death penalty available as a possible punishment for certain drug-related offenses. The availability of capital punishment in federal criminal cases expanded significantly further on September 13, 1994, with the passage of the Violent Crime Control and Law Enforcement Act. A part of this law, known as the Federal Death Penalty Act (FDPA), provided that over 40 federal offenses could be punished as capital crimes. The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) added another four federal offenses to the list of capital crimes.

- In 1988, the DoJ instituted a policy that required United States Attorneys in all the federal districts to submit to the Attorney General for review and approval any case in which the U.S. Attorney affirmatively wished to seek the death penalty. From 1988 until the end of 1994, U.S. Attorneys sought approval from Attorneys General to seek the death penalty 52 times and received it 47 times.
- On January 27, 1995, the DoJ adopted the policy still in effect today – known as the death penalty “protocol” – under which U.S. Attorneys are required to submit for review all cases in which a defendant is charged with a capital-eligible offense, regardless whether the U.S. Attorney actually desires to seek the death penalty in that case. The U.S. Attorney’s submissions are initially considered by the Attorney General’s Review Committee on Capital Cases, a committee of senior DoJ attorneys, which makes an independent recommendation to the Attorney General. From January 27, 1995 to July 20, 2000, U.S. Attorneys submitted a total of 682 cases for review and the Attorney General ultimately authorized seeking the death penalty for 159 of those defendants.
- Current DoJ policy provides that bias based on characteristics such as an individual’s race/ethnicity must play no role in a U.S. Attorney’s decision to recommend the death penalty. Moreover, the U.S. Attorney’s Office may not provide information about the race/ethnicity of the defendant to Review Committee members, to attorneys from the Criminal Division’s Capital Case Unit who assist the Review Committee, or to the Attorney General.
- From 1995 to 2000, the DoJ sought the death penalty against 23% of the defendants charged with crimes punishable by death. Of these, 44.65% were black and 27.67% were white.<sup>5</sup>
- The Review Committee meets with defense counsel along with attorneys from the United States Attorney’s Office and the Criminal Division’s Capital Case Unit, and is invited to make an oral presentation as to why the Attorney General should not authorize the U.S. Attorney to seek the death penalty. Before considering the case, the Attorney General receives the recommendation of the U.S. Attorney, the recommendation of the Review Committee, and all of the underlying materials that have been submitted. The Attorney General’s decision to authorize the seeking of the death penalty can be changed, among others, by means of a plea agreement. From 1995 to 2000, 32% of the defendants in which the Attorney General authorized the death penalty entered into plea agreements as a result of which the government withdrew the notice of intent to seek the death penalty; 41% of these defendants were white and 35% black.
- At the sentencing phase, the prosecution must prove beyond a reasonable doubt that the defendant committed the capital offense with a certain level of intent. In addition, the prosecution must prove any aggravating factors beyond a reasonable doubt, and must prove at least one from a list of specific factors set out in the applicable statute. In recommending a sentence, the jury may only consider aggravating factors that it unanimously finds to have been proven beyond a reasonable doubt. Mitigating factors need only be proven by a preponderance of the evidence, and each juror can make an individual decision as to which factors have been proven to his or her satisfaction. In reaching a verdict, which must be unanimous, each juror must certify that he or she did not consider the race,

<sup>5</sup> The Federal Death Penalty System: a statistical survey (1988-2000). United States Department of Justice. Washington, D.C. September 12, 2000, p. 8. Exhibit A submitted with petitioners’ brief on October 15, 2010.

national origin, sex, or religious beliefs of the defendant or the victim in reaching his or her determination.

- In capital cases, federal law explicitly requires the appellate court, in reviewing the case, to review the entire record. If the Court of Appeals affirms the conviction and sentence, the defendant may seek review in the United States Supreme Court by filing a petition for a writ of certiorari.
- If the defendant fails to obtain relief on direct appeal, he or she may also seek collateral review by filing a motion to vacate, set aside or correct the sentence pursuant to 28 U.S.C. § 2255. Such collateral review goes through three levels of the federal judiciary: the motion is made in the district court in which the defendant was convicted; the district court's resolution of the § 2255 motion is subject to direct appeal by the losing party; the judgment by the Court of Appeals concerning the § 2255 motion is subject to discretionary review by the Supreme Court.
- If the defendant's sentence of death is upheld on both direct and collateral review, an execution date is set. Once the defendant has received notification of the scheduled execution date, he or she may petition the President for a grant of executive clemency.

22. Official information published by the DoJ indicates that the President of the United States relies on the DoJ, and particularly the Office of the Pardon Attorney, for assistance in the exercise of the executive clemency power granted to the President by Article II, Section 2 of the United States Constitution.<sup>6</sup> Under the Constitution, the President's clemency power extends only to federal criminal offenses.

23. According to the procedures currently in place, all requests for executive clemency are directed to the Pardon Attorney for review, investigation, and preparation of the Department's recommendation to the President, which is signed by the Deputy Attorney General. Any person under a sentence of death for whom an execution date is set on or after August 1, 2000, may request to make an oral presentation of reasonable duration to the Office of the Pardon Attorney in support of the clemency petition.<sup>7</sup>

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

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

25. Orlando Cordia Hall, along with Bruce Webster and Marvin Holloway, ran a marijuana trafficking enterprise in Pine Bluff, Arkansas. They purchased marijuana in varying amounts in the Dallas/Fort Worth area with the assistance of Steven Beckley, who lived in Irving, Texas. On September 21, 1994, Vitalis and N. Rene, allegedly robbed them \$4700 in a marijuana deal. On the evening of September 24, 1994, Hall, Beckley, Webster and D. Hall (Orlando Cordia Hall's brother) approached Vitalis and N. Rene's apartment in Arlington, Texas. The occupant of the apartment, Lisa Rene, N. Rene's sixteen-year-old sister, refused to let them in and called her sister and 911. Webster and D. Hall shattered a sliding glass door on the patio with his baseball bat, tackled Lisa Rene, and dragged her to the car. She was taken to a motel in Arkansas where she was repeatedly gang raped. On September 26, 1994, they drove Lisa Rene to Byrd Lake Park, took turns hitting her with a shovel in the head and dragged her into a grave they had previously dug. Then they covered her with gasoline and shoveled dirt back into the grave.<sup>8</sup>

26. On September 29, 1994, D. Hall, Beckley, and Webster were arrested. On September 30, 1994, Mr. Hall surrendered to Pine Bluff authorities. On the advice of counsel, he did not give a statement at the time of his arrest, but indicated that he would talk with law enforcement agents after he was transported to Texas.

<sup>6</sup> The United States Department of Justice. Legal authority governing executive clemency. Available at: <https://www.justice.gov/pardon/legal-authority-governing-executive-clemency#procedures>

<sup>7</sup> The United States Department of Justice. Legal authority governing executive clemency. Available at: <https://www.justice.gov/pardon/legal-authority-governing-executive-clemency#procedures>

<sup>8</sup> United States v. Hall, 152 F. 3d 381 (5<sup>th</sup> Cir. 1998).



On October 5, 1994, following his transfer to the Arlington County jail, Mr. Hall gave a written statement in which he substantially implicated himself in the kidnapping and murder.<sup>9</sup>

27. On October 26, 1994, the United States District Court for the Northern District of Texas (“the district court”) charged Mr. Hall and the four other persons involved with kidnapping.<sup>10</sup> On November 4, 1994, a six-count superseding indictment was returned, charging Mr. Hall and the other four co-defendants with kidnapping in which a death occurred, conspiracy to commit kidnapping, traveling in interstate commerce with intent to promote the possession of marijuana with intent to distribute, using a telephone to promote the unlawful activity of extortion, traveling in interstate commerce with intent to promote extortion, and using and carrying a firearm during a crime of violence.

28. On October 28, 1994, Mark Daniel was appointed to represent Mr. Hall and on January 6, 1995, Michael Heiskell was appointed as co-counsel. On February 23, 1995, the government filed its notice of intent to seek the death penalty against Mr. Hall pursuant to the Federal Death Penalty Act of 1994 (FDPA). On March 8, 1995, the defense attorneys filed a motion to withdraw from their representation, which was granted by the Court. Jeff Kearney and Michael Ware were appointed as new counsel on March 21, 1995.<sup>11</sup> The defense attorneys made a pre-trial motion to dismiss the government’s notice to seek the death penalty because of racial discrimination, along with a discovery request for information regarding the government’s decision-making in death-penalty cases. The district court denied the motion and the discovery request.<sup>12</sup>

29. On April 6, 1995, the district court granted Mr. Hall’s motion to sever his trial from that of his co-defendants, and trial commenced on October 2, 1995.<sup>13</sup> In a memorandum sent to trial counsel on October 6, 1995, Tena Francis, mitigation specialist appointed by the court, stated the following:

“Little or no investigation has been conducted concerning the four co-defendants [...] The two jailhouse informants [...] must be investigated [...] this[...] will be a critical aspect of the government’s punishment phase [...] The government has listed 15 “reputation” witnesses to date. Each witnesses must be interviewed [...]

The mitigation/social history investigation into the life of Orlando Hall is not complete [...] This type of investigation takes time, though, as we [...] are dealing with very private and sensitive issues. Gathering the information is only half the job, as the complete social history will then be used by your expert witnesses to complete their evaluation process.

The initial investigation has led to information that serious domestic violence existed in the family. The violence between Mr. Hall’s parents often extended to the children [...] The extent and effects of this trauma is not yet realized and more information needs to be developed. For the most part, the victims of, and witnesses to, and perpetrators of this abuse have never discussed it outside their family and there has been no counseling for any persons involved. For these reasons, the process of gathering information about Mr. Hall’s childhood is a slow one, as the investigator must first deal with a variety of emotions from the witnesses [...] in order to elicit the needed information.”<sup>14</sup>

30. On October 31, 1995, a jury convicted Mr. Hall of kidnapping in which a death occurred, conspiracy to commit kidnapping, traveling in interstate commerce to promote possession of marijuana with intent to distribute, and carrying a firearm during a crime of violence. After a subsequent punishment hearing, the jury recommended that Mr. Hall receive the death penalty. On February 12, 1996, the district court imposed the death penalty. The case was appealed to the Fifth Circuit Court of Appeals (“Fifth Circuit”), which on August 21, 1998, affirmed Mr. Hall’s conviction and sentence.<sup>15</sup> Mr. Hall filed a petition for rehearing, which was

<sup>9</sup> United States v. Hall, 152 F. 3d 381 (5<sup>th</sup> Cir. 1998).

<sup>10</sup> United States v. Hall, 152 F. 3d 381 (5<sup>th</sup> Cir. 1998).

<sup>11</sup> United States v. Hall, 2004 WL 1908242 (N.D. Texas. 2004). Exhibit 63 submitted with petitioners’ merits brief on November 30, 2009.

<sup>12</sup> United States v. Hall, 2004 WL 1908242 (N.D. Texas. 2004). Exhibit 63 submitted with petitioners’ merits brief on November 30, 2009.

<sup>13</sup> United States v. Hall, 152 F. 3d 381 (5<sup>th</sup> Cir. 1998).

<sup>14</sup> Memo from Tena Francis to Jena Parker, Oct. 6, 1995. Exhibit 73 submitted with petitioners’ brief on January 14, 2011.

<sup>15</sup> United States v. Hall, 2004 WL 1908242 (N.D. Texas. 2004). Exhibit 63 submitted with petitioners’ merits brief on November 30, 2009.

denied on October 1, 1998. He then petitioned the United States Supreme Court for a writ of *certiorari*, which was denied on May 17, 1999.<sup>16</sup>

### C. Post-conviction proceedings

31. Mr. Hall filed an initial motion to vacate his conviction and sentence, pursuant to 28 U.S.C. § 2255, in May 2000. In June 2000, the district court granted the request to file a discovery motion. Mr. Hall filed an initial discovery motion in August 2000 and a supplemental discovery motion in May 2001. The district court denied both motions in April 2002. Mr. Hall then filed an amended motion to vacate in June 2002, and an amended version of this motion to vacate in September 2002. In this second amended motion he raised twelve claims for relief from his conviction and sentence. Mr. Hall claimed, among others, ineffective assistance of counsel; failure to disclose exculpatory and mitigating information concerning government witness Larry Nichols; and racially discriminatory effects of the federal capital sentence scheme.<sup>17</sup>

32. The government argued that most of the claims were procedurally barred because they were not raised in direct appeal, and the district court found that six claims were based on new facts. Although the remaining claims were not raised on direct appeal and were not based on new law or facts, the court decided to address them as Mr. Hall had alleged ineffective assistance of his appellate counsel. On June 7, 2004, the district court conducted an evidentiary hearing limited to the issue of the extraneous influence on the jury raised by Mr. Hall and on August 24, 2004, it issued a memorandum opinion and order, denying all of the claims presented in Mr. Hall's § 2255 motion for relief.

33. Regarding the claim of ineffective assistance of counsel, the court ruled, among others:<sup>18</sup>

- Mr. Hall contended that his trial counsels were ineffective for failing to conduct a timely investigation of potential mitigating evidence. Specifically, he faulted counsel for not conducting adequate investigation on their own between the time they were appointed on March 21, 1995, and the beginning of the trial; failing to seek the assistance of a mitigation expert until September 7, 1995; and not meeting with the appointed mitigation expert until September 15, 1995, when the *voir-dire* portion of the trial began on October 1, 1995. The district court found that prior counsel in Mr. Hall's case had required him to complete a nineteen-page questionnaire entitled "Client Background Information" and traveled to Mr. Hall's hometown of El Dorado, in Arkansas, where he interviewed family members and other persons familiar with Mr. Hall. It also indicated that prior counsel turned over to trial counsel both his notes of the interviews and the questionnaire. The court further noted that a mitigation specialist was officially appointed by the court on September 14, 1995, and first met with defense counsel and Mr. Hall the following day. The court stated that, prior to the punishment phase of trial which began on November 1, 1995, the mitigation specialist submitted two investigative memoranda to trial counsel dated October 23 and 25, 1995. It also noted that, at the punishment phase, defense counsel presented testimony, among others, from an operations manager from the federal detention center where Mr. Hall was housed, who testified that he had no record of any disciplinary problems with Mr. Hall, and Mr. Hall's mother and sister. The court concluded that counsel performed a reasonably substantial and independent investigation into potential mitigating circumstances and therefore did not provide ineffective assistance.
- Mr. Hall also contended that trial counsel were ineffective in first requesting a psychiatrist and psychologist rather than a mitigation specialist, in requesting a mitigation specialist too late in the process, in not having him examined by a neuropsychologist, and in failing to have someone testify about the impact that Mr. Hall's upbringing had on this behavior. The court noted that on July 14, 1995, defense counsel sought and obtained funds to hire a psychiatrist and a neuropsychologist, and in September 1995 obtained funds to hire a mitigation specialist. According to the court, the psychiatrist examined Mr. Hall and was prepared to testify but the defense opted not to have her

<sup>16</sup> Hall v. United States, 526 U.S. 1117, 119 S.Ct. 1767, 143 L.Ed.2d 797 (1999).

<sup>17</sup> United States v. Hall, 2004 WL 1908242 (N.D. Texas. 2004). Exhibit 63 submitted with petitioners' merits brief on November 30, 2009.

<sup>18</sup> United States v. Hall, 2004 WL 1908242 (N.D. Texas. 2004). Exhibit 63 submitted with petitioners' merits brief on November 30, 2009.

testify because the court had ordered that, were she to do so, the government had the right to have Mr. Hall examined by its own expert. The court also found that defense counsel did hire a neuropsychologist. The court concluded that Mr. Hall failed to establish that his trial counsel were ineffective in their use of experts. Further, the court pointed out that the psychologist did not state that Mr. Hall suffered from any mental disorder or was mentally retarded. The court concluded that, even had the psychologist and social worker testified about the information contained in their declarations, there was no reasonable probability that the result would have been different.

- With regard to Mr. Hall's allegation that trial counsel was ineffective in his cross-examination of government witness Larry Nichols about differences between the original statements he gave the FBI and his trial testimony, the court found that defense attorney made a reasonable strategic decision not to impeach Nichols on every difference between his prior testimony and his testimony at Mr. Hall's trial. It further noted that counsel did elicit from Nichols his substantial criminal history, his previous attempt to have a co-defendant perjure himself in an affidavit, and his admitted desire to improve his own situation in life by testifying against Mr. Hall.

34. In relation to the allegation of juror misconduct, the district court concluded that Mr. Hall did not establish that any inappropriate *ex parte* contact occurred. Mr. Hall based his claim on two incidents that allegedly occurred during the trial. First, his sister stated that she saw a television newscast during which one of the female jurors was interviewed and stated that, during the weekend break in punishment deliberations, she had a birthday party for her daughter and that she placed a candle on the cake in Lisa Rene's memory and she and the guests said a prayer for Lisa Rene. Second, one of the jurors sent a letter to Mr. Hall after the trial saying that she had met the victim's mother in the hallway during the trial. The district court stated that in the hearing on these issues conducted on June 7, 2004, the juror testified that the statement she made in the letter was not true. Regarding the first issue, the court concluded that "mere speculation that some discussion between a juror and an unknown person occurred does not establish that extrinsic evidence entered the jury deliberations, especially where [the juror's] sworn testimony is that she does not recall any juror discussing a birthday party, much less any prayer offered on behalf of the victim."

35. On November 9, 2004, Mr. Hall filed a notice of appeal from the district court's order and applied for a certificate of appealability ("COA") raising, as one of the main issues, the alleged penalty-phase ineffective assistance of counsel. The district court denied Mr. Hall's COA application on December 6, 2004, finding that Mr. Hall had failed to make a substantial showing of the denial of a federal constitutional right. On July 18, 2005, he filed an application for a COA with the Fifth Circuit Court of Appeals, which was denied on July 5, 2006. Regarding the denial of an evidentiary hearing to address the ineffective assistance of counsel claim, the Fifth Circuit established that, because Mr. Hall's "expert declarations failed to create a contested fact issue about the objective reasonableness of his trial counsel's mitigation investigation, no reasonable jurist could debate the district court's decision not to provide an evidentiary hearing to address this issue."<sup>19</sup> On September 1, 2006, the Fifth Circuit denied a petition for rehearing *en banc*.<sup>20</sup>

36. Mr. Hall filed a petition for writ of *certiorari* to the United States Supreme Court on November 30, 2006. He alleged, among other claims, that the district court rejected his claim of penalty-phase ineffective assistance of counsel without conducting an evidentiary hearing, crediting instead trial counsels' own affidavits, which broadly disputed his factual allegations, and despite his submission of additional evidence refuting many of trial counsels' claims.<sup>21</sup> The petition was denied on April 16, 2007.<sup>22</sup>

37. Mr. Hall has been incarcerated on federal death row in the U.S. Penitentiary Terre Haute, Indiana, for approximately 23 years.

<sup>19</sup> United States v. Hall, 455 F.3d 508 (5<sup>th</sup> Cir. 2006). Exhibit 63 submitted with petitioners' merits brief on November 30, 2009.

<sup>20</sup> Unpublished order of the United States Court of Appeals for the Fifth Circuit, denying rehearing *en banc*. Exhibit 63 submitted with petitioners' merits brief on November 30, 2009.

<sup>21</sup> Petition for *certiorari* and related exhibits. Exhibit 63 submitted with petitioners' merits brief on November 30, 2009.

<sup>22</sup> Hall v. United States, Case No. 06-8178 (order of Apr. 16, 2007), 2007 WL 1110560 (U.S.).

#### D. Cases of Miller-El and Reed

38. In the 2005 case *Miller-El v. Dretke*, a separate capital case, the Supreme Court overturned the defendant's death sentence, finding that prosecutors had made peremptory strikes of potential jurors based on race and therefore the jury selection process had been tainted by racial bias.<sup>23</sup> Paul Macaluso, the assistant district attorney who selected the jury in Mr. Miller-El's case, was Assistant United States attorney in Mr. Hall's trial.

39. In 2009, in another capital case, the Fifth Circuit established that defendant Mr. Reed was entitled to habeas corpus relief given the peremptory strikes of potential jurors based on race made by the same prosecutor.<sup>24</sup>

#### E. Legal proceedings regarding the lethal injection protocol

40. Mr. Hall filed a complaint with the U.S. Penitentiary Terre Haute challenging the lethal injection protocol as a violation of his rights to be free from cruel and unusual punishment and requesting information about the process that would be used for his execution. The Warden and the Bureau of Prisons Regional Administrator summarily denied his challenge and his request. In November 2006, the Bureau of Prisons Central (National) Administration similarly denied his challenge and request.<sup>25</sup>

41. After exhausting his administrative appeals, Mr. Hall filed a civil action before the United States District Court for the District of Columbia on June 4, 2007. Mr. Hall alleged that the three-drug protocol threatened to subject him to consciously experiencing asphyxiation and cardiac arrest and that, by refusing to provide adequate information about the protocol, the government violated his right to due process of law.<sup>26</sup>

42. In 2007, Mr. Hall joined federal death row inmates Roane, Tipton and Johnson in a federal lawsuit before the District of Columbia Circuit Court originally filed on December 6, 2005, challenging the execution procedures. In April 2011, the government notified the district court that sodium thiopental, one of the three drugs used to carry out executions as called for by the federal protocol, was no longer available. In July 2011, the government informed the court that in light of the unavailability of sodium thiopental it had decided to alter the drug mixture used in its executions. Since then, activity in the case has been limited to the government filing status reports every four months as it continues the process to determine what drug combination will be used. In the meantime, the inmates' claims remain unresolved.<sup>27</sup>

### IV. ANALYSIS OF LAW

#### A. Preliminary considerations

43. Before embarking on its analysis of the merits in the case of Orlando Cordia Hall, 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.

44. That gives rise to the particular importance of the IACHR's obligation to ensure that any denial of life that may arise from the enforcement of the death penalty strictly abides by the requirements set forth in the applicable instruments of the inter-American human rights system, including the American Declaration. That heightened scrutiny is consistent with the restrictive approach adopted by other international human rights bodies in cases involving the imposition of the death penalty,<sup>28</sup> and it has been set out and applied by the

<sup>23</sup> *Miller-El v. Dretke*, 545 U.S. 231 (2005). Exhibit 58a submitted with petitioners' merits brief on November 30, 2009.

<sup>24</sup> *Reed v. Quarterman*, 555 F.3d 364 (5<sup>th</sup> Cir. 2009). Exhibit 58b submitted with petitioners' merits brief on November 30, 2009.

<sup>25</sup> Complaint filed by Orlando Cordia Hall on June 4, 2007 (Case 1:05-cv-02337-RWR-DAR).

<sup>26</sup> Complaint filed by Orlando Cordia Hall on June 4, 2007 (Case 1:05-cv-02337-RWR-DAR).

<sup>27</sup> *Roane v. Leonhart*, 741 F.3d 147 (D.C. Cir. 2014); *Roane v. Holder*, Civil Action No. 05-2337 (D.D.C. 2016).

<sup>28</sup> See, for example: I/A Court H. R., Advisory Opinion OC-16/99 (October 1, 1999), *The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law*, para. 136; United Nations Human Rights Committee, *Baboheram-Adhin et al. v.*

[continues ...]

Inter-American Commission in previous capital cases brought before it.<sup>29</sup> As the Inter-American Commission has explained, this standard of review is the necessary consequence of the specific penalty at issue and the right to a fair trial and all attendant due process guarantees, among others.<sup>30</sup> In the words of the Commission:

due in part to its irrevocable and irreversible nature, the death penalty is a form of punishment that differs in substance as well as in degree in comparison with other means of punishment, and therefore warrants a particularly stringent need for reliability in determining whether a person is responsible for a crime that carries a penalty of death.<sup>31</sup>

45. 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>32</sup>

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

**A. Right to equality before the law<sup>33</sup> and access to effective remedy<sup>34</sup>**

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

47. The principles of equality before the law, equal protection, and non-discrimination are among the most basic human rights, and are in fact recognized by the Inter-American Court as *jus cogens* norms, "because the whole legal structure of national and international public order rests on it."<sup>35</sup> In line with the Human Rights Committee, the Commission has further understood "discrimination" to mean "any distinction, exclusion, restriction, or preference which is based on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and which has the purpose

[... continuation]

*Suriname*, Communications Nos. 148-154/1983, adopted on April 4, 1985, para. 14.3; *Report of the United Nations Special Rapporteur on Extrajudicial Executions*, Bacre Waly Ndiaye, submitted pursuant to Commission on Human Rights Resolution 1994/82, Question of the Violation of Human Rights and Fundamental Freedoms in any part of the World, with particular reference to Colonial and Other Dependent Countries and Territories, UN Doc.E/CN.4/1995/61 (December 14, 1994), para. 378.

<sup>29</sup> IACHR, Report No. 57/96, Andrews, United States, IACHR Annual Report 1997, para. 170-171; Report No. 38/00 Baptiste, Grenada, IACHR Annual Report 1999, paras. 64-66; Report No. 41/00, McKenzie *et al.*, Jamaica, IACHR Annual Report 1999, paras. 169-171.

<sup>30</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.

<sup>31</sup> IACHR, Report No. 78/07, Case 12.265, Merits (Publication), Chad Roger Goodman, The Bahamas, October 15, 2007, para. 34.

<sup>32</sup> IACHR, Report No. 44/14, Case 12,873, Report on Merits (Publication), Edgar Tamayo Arias, United States, July 17, 2014, para. 214.

<sup>33</sup> Article II of the American Declaration provides: "All persons are equal before the law and have the rights and duties established in this Declaration, without distinction as to race, sex, language, creed or any other factor."

<sup>34</sup> Article XVIII of the American Declaration provides: "Every person may resort to the courts to ensure respect for his legal rights. There should likewise be available to him a simple, brief procedure whereby the courts will protect him from acts of authority that, to his prejudice, violate any fundamental constitutional rights."

<sup>35</sup> See I/A Ct. H.R. *Judicial 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.

or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms.”<sup>36</sup>

48. The principle of equality and non-discrimination incorporates both “the prohibition of arbitrary differences of treatment,” and “the obligation of States to create conditions of real equality for groups that have been historically excluded or that are at greater risk of being discriminated against.”<sup>37</sup> With regard to the former, while Article II of the American Declaration does not prohibit all distinctions in treatment in the enjoyment of protected rights and freedoms, it does require that any permissible distinctions be based on an objective and reasonable justification, that they further a legitimate objective, “regard being had to the principles which normally prevail in democratic societies, and that the means are reasonable and proportionate to the end sought.”<sup>38</sup> Further, distinctions based on grounds explicitly enumerated under pertinent articles of international human rights instruments are subject to a particularly strict level of scrutiny whereby States must provide an especially weighty interest and compelling justification for the distinction.<sup>39</sup>

## 2. Race and equality before the law in the United States’ criminal justice system

49. In its report on The Situation of People of African Descent in the Americas, the IACHR, based on the General Recommendation No. XXXI issued by the United Nations Committee on the Elimination of Racial Discrimination (“CERD”),<sup>40</sup> indicated that “offences involving members of stigmatized or marginalized groups are more severely punished and that whatever the legal and procedural system in force in a given country, the structural inequalities, stereotypes and prejudices are mirrored in the criminal justice system.”<sup>41</sup> The Commission also observed “the impact of racism in the criminal justice systems in the region” and reiterated that “the use of race and skin color as grounds to set and adjust a criminal sentence are banned by the inter-American system of human rights protection.”<sup>42</sup>

50. As a result of its growing concern over the treatment of African-Americans by the United States criminal justice system and, particularly, by law enforcement officers, on October 27, 2014, the IACHR convened, on its own initiative, a public hearing on Reports of Racism in the United States Justice System. The IACHR received troubling information regarding the problem of racial profiling by law enforcement officials at the local, state, and federal levels. On March 16, 2015, the IACHR held a public hearing on Criminal Justice and Race in the United States in which it received concerning information indicating that many police departments engage in discriminatory practices toward racial minorities, including the use of racial profiling.

51. The Commission has also noted the special seriousness of the fact that the United States Government’s own studies demonstrate that the race of defendants and the race of victims of crimes has an undeniable influence on conviction and sentencing patterns and that this is not a recent finding.<sup>43</sup> Further, the CERD has established that in the United States, African Americans continue to be disproportionately arrested, incarcerated, and subjected to harsher sentences, including life imprisonment without parole and the death penalty, and that this situation is exacerbated by the exercise of prosecutorial discretion.<sup>44</sup>

52. With regard to the death penalty applied to African-Americans in the United States, in the case of William Andrews 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

<sup>36</sup> IACHR, Report No. 50/16, Case 12.834, Merits (Publication), Undocumented Workers, United States, Nov. 30, 2016, para. 75.

<sup>37</sup> See, e.g., I/A Ct. H.R. Furlan and family Vs. Argentina. Judgment of Aug. 31, 2012, para. 267.

<sup>38</sup> IACHR, Report No. 50/16, Case 12.834, Merits (Publication), Undocumented Workers, United States, Nov. 30, 2016, para. 74; IACHR, Report No. 51/01, Case 9903, *Rafael Ferrer-Mazorra et al.*, United States, Apr. 4, 2001, para. 238.

<sup>39</sup> IACHR, *Report on Terrorism and Human Rights* (2002), para. 338.

<sup>40</sup> CERD, General Recommendation No. XXXI, U.N. Doc. CERD/C/GC/31/Rev.4 (2005).

<sup>41</sup> IACHR, The Situation of People of African Descent in the Americas, OEA/Ser.L/V/II. Doc. 62, December 5, 2011, para. 184.

<sup>42</sup> IACHR, The Situation of People of African Descent in the Americas, OEA/Ser.L/V/II. Doc. 62, December 5, 2011, para. 189.

<sup>43</sup> IACHR, Report No. 78/15, Case 12.831, Merits (Publication). Kevin Cooper. United States. October, 28, 2015, para. 140 and 141.

<sup>44</sup> CERD, *Concluding Observations 2014*, Sept. 25, 2014, para. 20.

right to an impartial trial and to equality before the law.<sup>45</sup> The Commission ruled that “the international standard on the issue of “judge and juror impartiality” employs an objective test based on “reasonableness, and the appearance of impartiality” and that a reasonable suspicion of bias is sufficient for juror disqualification.<sup>46</sup>

### 3. Analysis of the case

53. The Commission observes that the distinction alleged in this case is race, which is subject to a particularly strict level of scrutiny and thus triggers a “reversal of the burden of proof” and a “presumption of invalidity.”<sup>47</sup> The purpose of applying strict scrutiny is to guarantee that the distinction is not based on the prejudices and/or stereotypes that generally surround suspect categories of distinction.<sup>48</sup> The IACHR has indicated that where this bias may relate to a prohibited ground of discrimination, such as race, it may also implicate a violation of the principle of equality and non-discrimination.<sup>49</sup>

54. The Commission has found that allegations relating to the right to equality in the context of a criminal process require an analysis of the fair trial requirements which include the requirement that the tribunal concerned is impartial and affords a party equal protection of the law, without discrimination of any kind.<sup>50</sup> In systems that employ a jury system, these requirements apply both to judges and to juries. In this regard, the Commission has recognized that the international standard on the issue of “judge and juror impartiality” employs an objective test based on “reasonableness and appearance of impartiality.”<sup>51</sup> According to this standard, “it must be determined whether there is a real danger of bias affecting the mind of the relevant juror or jurors.”<sup>52</sup>

55. In the instant case, the petitioners allege that the federal death penalty was administered in a racially discriminatory fashion. In particular, they question the venue of the trial, the authorization process by which the DoJ selects those defendants who will face the death penalty, the composition of the jury, the manner in which the members of the jury were chosen, and the fact that the State did not offer Mr. Hall the chance to plead guilty.

56. According to the facts established in this report, at the time of Mr. Hall’s trial the rate of black defendants against whom the DoJ sought the death penalty was more than 60% higher than white defendants; and of the defendants who entered into plea agreements after the Attorney General had authorized the death penalty, 41% were white and 35% black. It has also been proven that, before the commencement of trial, the district court denied a discovery request made by Mr. Hall’s defense counsel regarding the government’s decision-making in death-penalty cases.

57. After an all-white jury recommended that Mr. Hall receive the death penalty, Mr. Hall was convicted and sentenced to the death penalty on February 12, 1996. It is uncontested that the Assistant U.S. Attorney responsible for assembling the jury in Mr. Hall’s prosecution was later found by the U.S. Supreme Court and Fifth Circuit, in two separate capital cases decided in 2005 and 2009, to have engaged in racial discrimination in jury selection. According to the petitioners, given that Mr. Hall’s final round of appeals had already been decided, he could not use this new finding in his habeas petition. This allegation has not been disputed by the State.

58. The fact that Mr. Hall, an African-American, had been tried by an all-white jury does not constitute *per se* a violation to the right of equality before the law. However, the facts established above and the context of disparate impact, when considered as a whole, raise a sufficient suspicion on the possible consideration of

<sup>45</sup> IACHR, Report No. 57/97, Case No. 11.139, William Andrews, Merits, United States, December 6, 1996, para. 165.

<sup>46</sup> IACHR, Report No. 57/97, Case No. 11.139, William Andrews, Merits, United States, December 6, 1996, para. 159.

<sup>47</sup> See, e.g., IACHR, Report No. 64/12, Case 12.271, Merits. Benito Tide Méndez. Dominican Republic. Mar. 29, 2012, para. 228.

<sup>48</sup> See, e.g., IACHR, Application filed with I/A Ct. H.R., *Case of Karen Atala and Daughters v. Chile*, Sept. 17, 2010, para. 88.

<sup>49</sup> IACHR, Report No. 24/17, Case 12.254, Merits. Victor Saldaño. United States. March 18, 2017, para. 187.

<sup>50</sup> IACHR, Report No. 24/17, Case 12.254, Merits. Victor Saldaño. United States. March 18, 2017, para. 186.

<sup>51</sup> IACHR, Report No. 24/17, Case 12.254, Merits. Victor Saldaño. United States. March 18, 2017, para. 186.

<sup>52</sup> IACHR, Report No. 24/17, Case 12.254, Merits. Victor Saldaño. United States. March 18, 2017, para. 186.

race in the application of the death penalty in Mr. Hall's case. Given the seriousness of a suspicion of racial discrimination and the fact that in this specific case, the State had the means to prove that the death penalty was administered in an objective manner, such suspicion triggers a strict level of scrutiny and a presumption of invalidity, and the State has the burden of proving that criminal proceedings had not been tainted by racial bias at any stage. The State argued that statistical evidence is not sufficient to demonstrate evidence of discriminatory intent regarding the death penalty against African-American individuals. With regard to the instant case, it asserted that defense attorneys met with the capital case review committee to present arguments as to why the government should not seek the death penalty, that the decision to seek it was made by the Attorney General and not by the prosecuting attorney, that Texas was the most logical venue for the trial, and that the lack of access to discovery is not sufficient to establish a claim of selective prosecution.

59. The Commission notes that the State does not dispute the fact that the district court dismissed defense counsel's discovery request regarding the death penalty decision-making process. The State has also failed to provide information to the IACHR regarding the basis of the prosecution's recommendation to apply the death penalty. When a judicial authority encounters an allegation of covert discrimination, the duty of due diligence requires it not only to investigate, but to investigate beyond the formally stated motivation and to take into consideration all indicia, circumstantial evidence and other elements.<sup>53</sup> This duty is reinforced in a case such as this, since the defendant's life is at stake. In Mr. Hall's case, the discovery request was the only way to obtain key information to establish whether or not race had any influence on the decision to recommend the death penalty. The district court, however, dismissed the pre-trial motion.

60. Although in the present case there is no direct evidence of the presence of a prohibited criterion of discrimination, in this case race, the IACHR is faced with indicia of suspected use of race in the application of the death penalty. To this is added the aforementioned lack of information and the fact that the prosecuting attorney responsible for assembling the all-white jury was later found to have engaged in racial discrimination in jury selection in two separate cases. Therefore, the IACHR finds that the United States is responsible for failing to fully respond to the allegations concerning possible racial discrimination raised throughout this process pursuant to its obligations under Article II of the American Declaration. In this respect, the IACHR also finds that Mr. Hall's lack of access to an effective remedy with regard to the allegation of racial discrimination amounts to a violation of Article XVIII of the American Declaration. The effects of the violation of the right to equality before the law on Mr. Hall's due process guarantees and right to access to information will be analyzed below.

## **B. Right to a fair trial<sup>54</sup> and right to due process of law<sup>55</sup>**

### **1. General considerations regarding ineffective assistance of court-appointed counsel**

61. Adequate legal representation is a fundamental component of the right to a fair trial. The IACHR has found that "[t]he right to due process and to a fair trial includes the right to adequate means for the preparation of a defense, assisted by adequate legal counsel."<sup>56</sup> According to the Commission, "[t]he State cannot be held responsible for all deficiencies in the conduct of State-funded defense counsel. National authorities are, however, required [...] to intervene if a failure by legal aid counsel to provide effective representation is manifest or sufficiently brought to their attention. Rigorous compliance with the

<sup>53</sup> See, e.g., IACHR, Report No. 75/15, Case 12.923. Merits. Rocio San Miguel Sosa *et al.* Venezuela. October 28, 2015, para. 188.

<sup>54</sup> Article XVIII of the American Declaration provides: "Every person may resort to the courts to ensure respect for his legal rights. There should likewise be available to him a simple, brief procedure whereby the courts will protect him from acts of authority that, to his prejudice, violate any fundamental constitutional rights."

<sup>55</sup> Article XXVI of the American Declaration provides: "Every accused person is presumed to be innocent until proved guilty.

Every person accused of an offense has the right to be given an impartial and public hearing, and to be tried by courts previously established in accordance with pre-existing laws, and not to receive cruel, infamous or unusual punishment."

<sup>56</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.



defendant's right to competent counsel is compelled by the possibility of the application of the death penalty."<sup>57</sup>

62. 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.

63. The Commission has established that "the fundamental due process requirements for capital trials include the obligation to afford a defendant a full and fair opportunity to present mitigating evidence for consideration in determining whether the death penalty is the appropriate punishment in the circumstances of his or her case."<sup>58</sup> The Commission has also indicated that due process protections, under the Declaration:

guarantee an opportunity to make submissions and present evidence as to whether a death sentence may not be a permissible or appropriate punishment in the circumstances of the defendant's case, in light of such considerations as the offender's character and record, subjective factors that might have motivated his or her conduct, the design and manner of execution of the particular offense, and the possibility of reform and social readaptation of the offender.<sup>59</sup>

64. It may be noted that the fundamental nature of this guarantee has been reflected in practice guidelines for lawyers. The American Bar Association has prepared and adopted guidelines and related commentaries that emphasize the importance of investigating and presenting mitigating evidence in death penalty cases.<sup>60</sup> According to these guidelines, the duty of counsel in the United States to investigate and present mitigating evidence is now "well-established" and "[b]ecause the sentencer in a capital case must consider in mitigation, "anything in the life of the defendant which might militate against the appropriateness of the death penalty for the defendant," "penalty phase preparation requires extensive and generally unparalleled investigation into personal and family history."<sup>61</sup> The Guidelines also emphasize that the "mitigation investigation should begin as quickly as possible, because it may affect the investigation of first phase defenses (e.g., by suggesting additional areas for questioning police officers or other witnesses), decisions about the need for expert evaluations (including competency, mental retardation, or insanity), motion practice, and plea negotiations."<sup>62</sup>

## 2. Analysis of the case

65. The Commission will analyze whether the assistance of counsel was effective in the overall context of Mr. Hall's case and taking into account the specific interests at stake.

66. As established in the findings of fact, on October 28, 1994, two days after Mr. Hall was charged, Mark Daniel was appointed to represent him and, on January 6, 1995, Michael Heiskell was appointed as co-

<sup>57</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.

<sup>58</sup> IACHR, Report N.º 90/09, Case 12.644, Admissibility and Merits (Publication), Medellín, Ramírez Cárdenas and Leal García, United States, August 7, 2009, para. 134.

<sup>59</sup> IACHR, Report N.º 90/09, Case 12.644, Admissibility and Merits (Publication), Medellín, Ramírez Cárdenas and Leal García, United States, August 7, 2009, para. 134.

<sup>60</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>61</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.

<sup>62</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.

counsel. It has further been established that counsel required Mr. Hall to complete a nineteen-page questionnaire and traveled to his hometown to interview family members and other persons familiar with Mr. Hall. This information was turned over to the new defense attorneys appointed on March 21, 1995, after prior counsel withdrew from their representation.

67. With regard to the investigation concerning potential mitigating evidence conducted by defense counsel between their appointment on March 21, 1995, and the commencement of trial on October 2, 1995, the IACHR observes the following: on July 14 counsel sought and obtained funds to hire a psychiatrist and a neuropsychologist; on September 7 counsel sought the assistance of a mitigation specialist who was appointed by the court on September 14, and on September 15 counsel and Mr. Hall met with her. On October 6, after the trial had begun, the specialist sent a memorandum to trial counsel pointing out to critically important mitigating information that would take additional time to fully develop. The specialist submitted two investigative memoranda to counsel dated October 23 and 25, and, on November 1, 1995, the punishment phase of trial began.

68. The Commission notes that it took trial counsel almost four months from their appointment to seek funds to hire a psychiatrist and a neuropsychologist, and almost six months to obtain the assistance of a mitigation specialist. Accordingly, the mitigation specialist had only two weeks and three days before the start of the trial and less than seven weeks before the start of the punishment phase. After the beginning of trial, the specialist indicated that critical aspects had not yet been investigated: “little or no investigation ha[d] been conducted concerning the four co-defendants,” the “mitigation/social history investigation into the life of Orlando Hall [which takes time] [wa]s not complete,” and “more information need[ed] to be developed [regarding] the extent and effects” of serious domestic violence. The mitigation specialist also highlighted that “the process of gathering information about Mr. Hall’s childhood [wa]s a slow one.”

69. The IACHR finds that the inaction of defense counsel at decisive moments in the proceedings cannot be understood as a decision of strategy. In a death penalty case in which the most rigorous enforcement of judicial guarantees is required, the defense counsels’ immediate action to thoroughly investigate every possible mitigating factor is a basic component of the right to an effective legal representation. As emphasized in the ABA Guidelines, “penalty phase preparation requires extensive and generally unparalleled investigation into personal and family history.” The mitigation specialist cautioned that the process of gathering information was a slow one, since the investigator must first deal with a variety of emotions from the witnesses in order to elicit the needed information. It is not reasonable to have considered that, in just a few weeks, a serious and thorough investigation could have been undertaken.

70. As previously established, in federal death penalty cases, mitigating factors need only be proven by a preponderance of the evidence and each juror can make an individual decision as to which factors have been proven to his or her satisfaction. Therefore, with only one mitigating factor, a juror could have voted to spare Mr. Hall’s life. A timely, diligent and thorough mitigation investigation could thus mean the difference between life and death. The IACHR concludes that this failure to meet fundamental due process requirements in a capital trial amounted to a violation of the right to a fair trial and to due process of law.

### **3. Access to effective remedies**

71. The right to appeal a sentence is a fundamental guarantee of due process for avoiding the consolidation of an injustice. In that regard, the IACHR has stated that “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>63</sup>

72. 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 it was intended to serve,

<sup>63</sup> IACHR, Report 48/01, Case N.º 12.067, Michael Edwards et al., Bahamas, April 4, 2001, para. 149.

which is to avoid the consolidation of an unjust situation.<sup>64</sup> 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 occur in other aspects of the process such as the determination of the facts or the weighing of evidence.<sup>65</sup> Hence, the remedy of appeal will be effective in accomplishing the purpose for which it was conceived if it makes a review of such issues possible without *a priori* limiting that review to certain aspects of the court proceedings.<sup>66</sup>

73. 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>67</sup>

74. With respect to the accessibility of the remedy, the Commission has considered that, in principle, the regulation of some minimum requirements for the presentation of the appeal is not incompatible with the right to appeal. Some of these requirements are, for example, the presentation of the appeal itself or the regulation of a reasonable period within which it must be filed.<sup>68</sup> 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>69</sup>

75. As established in the findings of fact, in September 2002 Mr. Hall filed an amended version of his motion to vacate, raising twelve claims for relief from his conviction and sentence. The district court found that six claims had not been raised on direct appeal and were not based on new facts. However, it decided to address them as Mr. Hall had alleged ineffective assistance of appellate counsel. The IACHR recognizes that the court's decision not to apply procedural restrictions in post-conviction review is consistent with the inter-American human rights standards cited above.

76. The Commission notes, however, that the court conducted an evidentiary hearing limited to only one of the twelve claims. The Fifth Circuit Court of Appeals in the decision denying the application for a COA established, with regard to the denial of an evidentiary hearing to address the ineffective assistance of counsel claim, that Mr. Hall's "expert declarations failed to create a contested fact issue about the objective reasonableness of his trial counsel's mitigation investigation."

77. The Commission has already determined that the right of Mr. Hall to effective assistance of court-appointed counsel has been violated. Therefore, the IACHR finds that, given the specific interests at stake, the lack of access to an evidentiary hearing to address this claim in post-conviction review constitutes a violation of Mr. Hall's right to an effective remedy. The Commission underscores in this regard that States have an enhanced obligation to ensure that any deprivation of life which may occur through the application of the death penalty is in strict compliance with the right to a timely, effective and accessible remedy.<sup>70</sup>

#### **4. The executive clemency process**

78. Article II, Section 2 of the United States Constitution grants the President of the United States the exercise of executive clemency in federal criminal offenses. In order to decide whether to grant a request for executive clemency, the President relies on the recommendation of the Department of Justice through the

<sup>64</sup> IACHR, Report 79/15, Case 12.994, Merits (Publication), Bernardo Aban Tercero, United States, October 28, 2015, para. 134.

<sup>65</sup> IACHR, Report 53/13, Case 12.864, Merits (Publication), Ivan Teleguz, United States, July 15, 2013, para. 103.

<sup>66</sup> IACHR, Report 53/13, Case 12.864, Merits (Publication), Ivan Teleguz, United States, July 15, 2013, para. 103.

<sup>67</sup> IACHR, Report 55/97, Case 11.137, Merits, Juan Carlos Abella, Argentina, November 18, 1997, para. 261.

<sup>68</sup> IACHR, Report 53/13, Case 12.864, Merits (Publication), Ivan Teleguz, United States, July 15, 2013, para. 105.

<sup>69</sup> IACHR, Report 53/13, Case 12.864, Merits (Publication), Ivan Teleguz, United States, July 15, 2013, para. 103.

<sup>70</sup> IACHR, Report 53/13, Case 12.864, Merits (Publication), Ivan Teleguz, United States, July 15, 2013, para. 106.

Deputy Attorney General, particularly the Office of the Pardon Attorney. As indicated in the established facts, any person under a sentence of death may request to make an oral presentation to the Office of the Pardon Attorney in support of the clemency petition.

79. According to the inter-American human rights standards, the right to apply for pardon or commutation of sentence is subject to certain minimal fairness guarantees in order for the right to be effectively respected and enjoyed. These procedural protections have been held to include “the right on the part of condemned prisoners to submit a request for amnesty, pardon or commutation of sentence, to be informed of when the competent authority will consider the offender’s case, to make representations, in person or by counsel to the competent authority, and to receive a decision from that authority within a reasonable period of time prior to his or her execution.”<sup>71</sup> In particular, the IACHR has previously held that “[i]n the case of Clemency proceedings pending the execution of a death sentence, the minimal fairness guarantees afforded to the applicant should include the opportunity to receive an impartial hearing.”<sup>72</sup>

80. The IACHR has previously established, regarding the clemency process in Virginia, that the fact that the person vested with the power to commute the death sentence “is the same person who was in charge of [the] prosecution, does not satisfy the minimal fairness guarantees such as the right to be heard by an impartial authority.”<sup>73</sup> In the instant case the Commission notes that the pardon attorney and the federal criminal prosecutors who are pursuing Mr. Hall’s execution serve under the same supervisor, the Deputy Attorney General. This does not guarantee that the United States President will have the benefit of independent and impartial recommendations and advice. Therefore, the Inter-American Commission concludes that the structure of the executive clemency process fails to guarantee the right to minimal fairness guarantees pursuant to Article XXVI of the American Declaration.

### **C. Right of protection against cruel, infamous or unusual punishment<sup>74</sup>**

#### **1. The lethal injection protocol**

81. The Commission notes that even though the American Declaration does not prohibit the death penalty, the State has a heightened obligation 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 observed that “[t]he fact that a number of execution methods have been deemed to constitute torture or CIDT, together with a growing trend to review all methods of execution for their potential to cause severe pain and suffering, highlights the increasing difficulty with which a state may impose the death penalty without violating international law.”<sup>75</sup>

82. Along these same lines, various supervisory bodies have considered that an execution method is incompatible with the right to humane treatment and the prohibition of torture when it is not designed to inflict the least possible suffering,<sup>76</sup> and have raised questions on the compatibility of the method of lethal injection with the prohibition of torture.<sup>77</sup> With regard to the injection of untested lethal drugs, in its concluding observations on the fourth periodic report of the United States, the Human Rights Committee noted with concern reports “about the administration, by some states, of untested lethal drugs to execute prisoners and the withholding of information about such drugs.” The Committee recommended that the State

<sup>71</sup> IACHR, Report No. 53/13, Case 12.864, Merits (Publication), Ivan Teleguz, United States, July 15, 2013, para. 116.

<sup>72</sup> IACHR, Report No. 53/13, Case 12.864, Merits (Publication), Ivan Teleguz, United States, July 15, 2013, para. 116.

<sup>73</sup> IACHR, Report No. 53/13, Case 12.864, Merits (Publication), Ivan Teleguz, United States, July 15, 2013, para. 117.

<sup>74</sup> Article XXV of the American Declaration provides: “[...] Every individual who has been deprived of his liberty has the right [...] to humane treatment during the time he is in custody.”

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

<sup>75</sup> The death penalty and the absolute prohibition of Torture and Cruel, Inhuman, and Degrading Treatment or Punishment, Juan E. Mendez, Human Right Brief, Volume 20, Issue 1, Article 1, p. 3.

<sup>76</sup> In that respect, guideline xi) of the “UE Guidelines on Death Penalty” establishes that “Where capital punishment occurs, it shall be carried out so as to inflict the minimum possible suffering. It may not be carried out in public or in any other degrading manner [EU Guidelines on the Death Penalty: revised and updated version](#).”

<sup>77</sup> IACHR, Report No. 71/18, Case 12.958. Merits. Russell Bucklew. United States, May 10, 2018, paras. 66 and 67.

“ensure that lethal drugs used for executions originate from legal, regulated sources, and are approved by the United States Food and Drug Administration and that information on the origin and composition of such drugs is made available to individuals scheduled for execution.”<sup>78</sup>

83. Similarly, the Committee Against Torture has expressed its concern that death penalty executions in the United States can be accompanied by severe pain and suffering and has called on the State to “carefully review its execution methods, in particular lethal injection, in order to prevent severe pain and suffering.”<sup>79</sup> The Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment has considered that the method of lethal injection “as currently administered, does not work as efficiently as intended. Some prisoners take minutes to die and others become very distressed. New studies conclude that even if lethal injection is administered without technical error, those executed may experience suffocation, and therefore the conventional view of lethal injection as peaceful and painless death is questionable.”<sup>80</sup> The Special Rapporteur has underlined that States must ensure that the method of execution employed causes the least possible physical and mental suffering and has the burden of proof of establishing that there are no more humane alternatives available.<sup>81</sup>

84. As already established, Mr. Hall filed a civil action on June 4, 2007, alleging that the three-drug protocol threatened to subject him to consciously experiencing asphyxiation and cardiac arrest. That same year he joined a federal lawsuit challenging the execution procedures. In July 2011, the government informed the court that in light of the unavailability of sodium thiopental it had decided to alter the drug mixture used in its executions. Since then, the government continues the process to determine what drug combination will be used.

85. Given that the federal government is still reviewing its lethal injection protocol, there is currently no information to assess the compatibility of the execution method with the inter-American human rights standards cited above. However, the IACHR finds that the uncertainty about the manner in which Mr. Hall is going to die preceded by summary denials to requests of information about the execution process, exposes Mr. Hall 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. The obligation in capital cases to ensure access to all the relevant information regarding the execution will be addressed in the section related to the right to freedom of expression.

## 2. The deprivation of liberty on death row

86. In both international human rights law and comparative law, the issue of long term deprivation of liberty on death row, known as the *death row phenomenon*, has been developed for decades, in light of the prohibition of cruel, inhuman, or degrading punishment in Constitutions and in multiple international treaties, including the American Declaration (Articles XXV and XXVI).<sup>82</sup> Based on those standards, in the case of Russell Bucklew the IACHR found that “the very fact of spending 20 years on death row is, by any account, excessive and inhuman.”<sup>83</sup>

87. As established in this report, Mr. Hall has been deprived of his liberty on death row for almost 23 years. The Commission notes that the time spent on death row greatly exceeds the length of time that other international and domestic courts have characterized as cruel, inhuman, and degrading treatment. The very

<sup>78</sup> Human Rights Committee, Concluding observations on the fourth periodic report of the United States of America, CCPR/C/USA/CO/4, para. 8.

<sup>79</sup> Committee against Torture, Conclusions and recommendations of the Committee against Torture, United States of America, 25 July 2006, CAT/C/USA/CO/2, para. 31.

<sup>80</sup> Interim Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, A/67/229, 9 August 2012, para. 38.

<sup>81</sup> Interim Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, A/67/229, 9 August 2012, para. 80 (b).

<sup>82</sup> IACHR, Report No. 71/18, Case 12.958. Merits. Russell Bucklew. United States, May 10, 2018, paras. 86-90. In this report the Commission has cited a number of developments in the inter-American and other protections systems, including the regional and United Nations systems.

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

fact of spending 23 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. Hall, the right to humane treatment, and not to receive cruel, infamous, or unusual punishment established in the American Declaration.

**D. The right to access to information<sup>84</sup> with respect to the death penalty decision-making process and the lethal injection protocol**

88. The Commission notes that Mr. Hall was twice denied access to relevant information during the proceedings. First, a request for discovery regarding the government's decision-making in death-penalty cases was denied by the district court. This information was necessary to know the arguments presented by the government to seek the death penalty and identify any possible racial bias. Second, a request for information filed by Mr. Hall with the U.S. Penitentiary Terre Haute about the process that would be used for his execution was summarily denied by the Warden and the Bureau of Prisons Regional Administrator. The Bureau of Prisons Central (National) Administration similarly denied the request.

89. The right to access to information is a fundamental right protected by Article IV of the American Declaration, and the States have the obligation to guarantee the full exercise of this right.<sup>85</sup> The IACHR's Declaration of Principles on Freedom of Expression establishes in Principle 3 that every person has the right to access to information about himself or herself in an expeditious manner.<sup>86</sup>

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

91. With regard to the denial of the request of information about the lethal injection protocol, the IACHR recalls that in capital cases the State has an enhanced obligation to ensure that the person sentenced to death has access to all the relevant information regarding the manner in which he or she is going to die. In particular, the convicted person must have access to information related to the precise procedures to be followed, the drugs and doses to be used in the case of execution by lethal injection, and the composition of the execution team as well as the training of its members.<sup>87</sup>

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 obligation of the State to provide due process is not limited to the conviction and post-conviction proceedings.<sup>88</sup> Accordingly, the State has the duty to inform the person sentenced to death, in a timely manner, about the drug and method of execution that will be used, so he or she is not precluded from litigating the right to be executed in a manner devoid of cruel and unusual suffering.

93. The IACHR notes that in the instant case three different administrative authorities summarily denied Mr. Hall's request of information about the process that would be used for his execution. The Commission

<sup>84</sup>Article IV of the American Declaration provides: "Every person has the right to freedom of investigation, of opinion, and of the expression and dissemination of ideas, by any medium whatsoever."

<sup>85</sup> See generally IACHR, The Inter-American Legal Framework Regarding the Right to Access to Information. December 30, 2009.

<sup>86</sup> IACHR, Declaration of Principles on Freedom of Expression, Principle 3, October 20, 2000.

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

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

considers that the summary dismissal of such claims demonstrates a failure to act with due diligence to fully examine them in light of the prohibition of torture and cruel and inhuman punishment.

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

**E. The right to life<sup>89</sup> and the right to protection against cruel, infamous or unusual punishment with respect to the eventual execution of Orlando Cordia Hall**

95. The Commission reiterates that it is not competent to review judgments handed down by domestic courts acting within their spheres of competence and with due judicial guarantees. In principle that is because the IACHR does not have the authority to superimpose its own interpretations on the assessment of facts made by national courts. The fourth instance formula, however, does not preclude the Commission from considering a case in which the petitioner's allegations entail a possible violation of any of the rights set forth in the Declaration.<sup>90</sup> This authority is heightened in cases involving imposition of the death penalty, given its irreversibility.

96. As indicated above, the Inter-American Commission considers that it is incumbent upon the national courts, not the Commission, to interpret and apply national law. Nevertheless, the IACHR must ensure that any deprivation of life resulting from imposition of the death penalty complies with the requirements of the American Declaration.<sup>91</sup>

97. Throughout this report, the Commission established that the United States failed to fully respond to the allegations concerning possible racial discrimination raised in Mr. Hall's case. The Commission also established that Mr. Hall was deprived of effective assistance of counsel and that his right to an effective remedy has been violated. The Commission further concluded that the executive clemency process fails to guarantee the right to minimal fairness guarantees and that the uncertainty about the execution process amounts to a violation of Mr. Hall's right to humane treatment. Moreover, the IACHR found that by refusing to provide information on the arguments presented by the government to seek the death penalty and to reveal the execution protocol, the State has violated Mr. Hall's right to access to information. Finally, the Commission established that the almost 23 years that Mr. Hall has been in death row constitute cruel and inhuman treatment.

98. Under these circumstances, the IACHR has maintained that executing a person after proceedings that were conducted in violation of his rights would be extremely grave and constitute a deliberate violation of the right to life established in Article I of the American Declaration.<sup>92</sup> Further, based on the conclusions regarding the deprivation of liberty on death row, the eventual execution of Mr. Hall 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 Orlando Cordia Hall would constitute a serious violation of his rights to life established in Articles I of the American Declaration.

**V. ACTIONS SUBSEQUENT TO REPORT No. 155/18**

99. On December 7, 2018, the Commission approved Report No. 155/18 on the merits of the instant case, which encompasses paragraphs 1 to 98 *supra*, and issued the following recommendations to the State:

<sup>89</sup> Article I of the American Declaration provides: "Every human being has the right to life, liberty and the security of his person."

<sup>90</sup> See, *mutatis mutandis*, IACHR, Report No. 57/96, Case 11.139, William Andrews, United States, December 6, 1996.

<sup>91</sup> IACHR, Report No. 53/13, Case 12.864, Merits (Publication), Ivan Teleguz, United States, July 15, 2013, para. 129.

<sup>92</sup> IACHR, Report No. 11/15, Case 12.833, Merits (Publication), Félix Rocha Díaz, United States, March 23, 2015, para. 106.

1. Grant Orlando Cordia Hall effective relief, including the review of his trial and sentence in accordance with the right to equality before the law and the guarantees of fair trial and due process set forth in Articles II, XVIII and XXVI of the American Declaration. Taking into account the conclusions of the IACHR on the time Orlando Cordia Hall has been held on death row, the Commission recommends that his sentence be commuted.
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, II, XVIII, XXV and XXVI thereof.
3. Ensure that the legal counsel provided by the State in death penalty cases is effective and adequately trained to serve in death penalty cases.
4. Review the executive clemency procedure to ensure impartiality and compliance with the right to minimal fairness guarantees.
5. Ensure that the federal lethal injection protocol complies with the right to humane treatment and not to receive cruel, infamous or unusual punishment set forth in Articles XXV and XXVI of the Declaration, and that the person sentenced to death has access to all the relevant information regarding the method of execution.
6. Given the violations of the American Declaration the IACHR has established in the present case and in others involving application of the death penalty, the Inter-American Commission also recommends to the United States that it adopt a moratorium on executions of persons sentenced to death.<sup>93</sup>

100. On January 18, 2019, the Commission transmitted the report to the State with a time period of two months to inform the Inter-American Commission on the measures taken to comply with its recommendations. On that same date the IACHR notified the petitioners about the adoption of the report. To date, the IACHR has not received any response from the United States regarding Report No. 155/18.

## VI. ACTIONS SUBSEQUENT TO REPORT No. 90/19

101. On June 10, 2019, the Commission approved Final Merits Report No. 90/19, which encompasses paragraphs 1 to 100 *supra*, and issued its final conclusions and recommendations to the State. On July 3, 2019, the Commission transmitted the report to the State and the petitioners with a time period of two months to inform the Inter-American Commission on the measures taken to comply with its recommendations.

102. On September 3, 2019, the petitioners informed that the United States has adopted no measures to comply with the Commission's recommendations and that Mr. Hall remains in the custody of the State, which has given no indication that it does not intend to carry out his death sentence. Petitioners also informed that, on July 25, 2019, U.S. Attorney General directed the Federal Bureau of Prisons to adopt an addendum to the federal execution protocol and scheduled the executions of five death-row inmates. The addendum, which closely mirrors protocols utilized by several states, including currently Georgia, Missouri, and Texas, replaces the three-drug procedure previously used in federal executions with a single drug – pentobarbital.<sup>94</sup>

103. Petitioners also informed that the new lethal-injection protocol remains subject to a pending court challenge in *Roane, et al., v. Barr*. According to the petitioner, there is reason for concern that the dangers of severe suffering associated with the prior protocol have not been eliminated. They also consider questionable

<sup>93</sup> See in this regard, IACHR, The death penalty in the Inter-American Human Rights System: From restrictions to abolition, OEA/Ser.L/V/II.Doc 68, December 31, 2011.

<sup>94</sup> U.S. Department of Justice. Justice News. Federal Government to Resume Capital Punishment After Nearly Two Decade Lapse. July 25, 2019. Available at: <https://www.justice.gov/opa/pr/federal-government-resume-capital-punishment-after-nearly-two-decade-lapse>



whether the State will provide plaintiffs access to all the relevant information regarding the method of execution, particularly in light of the fact that the pharmaceutical manufacturer will no longer sell the drug for use in executions and the State would likely seek to keep secret its alternate source of the drug.

104. The petitioners conclude that the United States has not only failed to adopt any measure to comply with the Commission's recommendation but "it is about to embark on a deliberate campaign to execute the death-sentenced prisoners on the federal Death Row, a campaign which at some point will target Mr. Hall."

105. To date, the IACHR has not received any response from the United States regarding Report No. 90/19.

106. Based on the available information, the Commission will now analyze the level of compliance with the final recommendations issued in Report No. 90/19.

107. As the Commission established in its report, the State has a heightened obligation to ensure that the method of execution does not constitute cruel, infamous or unusual punishment. Also, the Commission noted that various supervisory bodies have considered that an execution method is incompatible with the right to humane treatment and the prohibition of torture when it is not designed to inflict the least possible suffering, and have raised questions on the compatibility of the method of lethal injection with the prohibition of torture.

108. At the time of adopting its final merits report, there was no information to assess the compatibility of the execution method with inter-American human rights standards given that the federal government was still reviewing its lethal injection protocol. However, the IACHR found that the uncertainty about the manner in which Mr. Hall is going to die preceded by summary denials to requests of information about the execution process, exposes Mr. Hall 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.

109. In its report the Commission also referred to the State's obligation in capital cases to ensure access to all relevant information regarding the execution. Accordingly, the State has the duty to inform the person sentenced to death, in a timely manner, about the drug and method of execution that will be used, so he or she is not precluded from litigating the right to be executed in a manner devoid of cruel and unusual suffering. The Commission found that, in the instant case, three different administrative authorities summarily denied Mr. Hall's request of information about the process that would be used for his execution. The Commission considered that this summary dismissal violated Mr. Hall's right to access to information set forth in Article IV of the American Declaration, in connection to Mr. Hall's right to a fair trial and due process of law set forth in Articles XVIII and XXVI of the Declaration.

110. The addendum to the federal execution protocol adopted by the federal Government on July 25, 2019, states, in its relevant parts, the following:

A. Federal death sentences are implemented by an intravenous injection of a lethal substance or substances in a quantity sufficient to cause death, such substance or substances to be determined by the Director, Federal Bureau of Prisons (BOP) and to be administered by qualified personnel selected by the Warden and acting at the direction of the United States Marshal. 28 CFR 26.3. The procedures utilized by the BOP to implement federal death sentences shall be as follows unless modified at the discretion of the Director or his/her designee, as necessary to (1) comply with specific judicial orders; (2) based on the recommendation of on-site medical personnel utilizing their clinical judgment; or (3) as may be required by other circumstances.

B. The identities of personnel considered for and/or selected to perform death sentence related functions, any documentation establishing their qualifications and the identities of personnel participating in federal judicial executions or training for such judicial executions shall be protected from disclosure to the fullest extent permitted by law.

C. The lethal substances to be utilized in federal lethal injections shall be Pentobarbital Sodium.

D. Not less than fourteen (14) days prior to a scheduled execution, the Director or designee, in conjunction with the United States Marshal Service, shall make a final selection of qualified personnel to serve as the executioner(s) and their alternates. See BOP Execution Protocol, Chap. 1, §§ III (F) and IV (B) & (E). Qualified personnel includes currently licensed physicians, nurses, EMTs, Paramedics, Phlebotomists, other medically trained personnel, including those trained in the United States Military having at least one year professional experience and other personnel with necessary training and experience in a specific execution related function. Non-medically licensed or certified qualified personnel shall participate in a minimum of ten (10) execution rehearsals a year and shall have participated in at least two (2) execution rehearsals prior to participating in an actual execution. Any documentation establishing the qualifications, including training, of such personnel shall be maintained by the Director or designee.

111. The IACHR notes with deep concern that the addendum expressly provides for the secrecy of the identity of personnel involved in the administration of the lethal injection and in the training of such personnel for the person condemned to death penalty. This provision directly contravenes the Commission's recommendation to ensure that persons sentenced to death have access to all the relevant information regarding the method of execution. As previously indicated, in its merits report the IACHR recalled the State's enhanced obligation in capital cases 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, among others, to information related to "the composition of the execution team as well as the training of its members". Further, this duty is a prerequisite to ensure the right of the person sentenced to death to challenge every aspect of the execution procedure. The Commission also notes with concern that non-medically licensed or certified personnel are expressly included among the professionals authorized to administer the lethal injection.

112. Finally, the Commission reiterates its profound concern for the reinstatement of the death penalty at the federal level in the United States after a nearly two decade lapse. In this regard, the Commission has publicly reiterated the United States' duty to review its laws, procedures and practices to ensure that people accused of capital crimes are tried and, if convicted, sentenced in accordance with the rights established in the American Declaration.<sup>95</sup>

113. Therefore, the Commission concludes that the United States has not only failed to take measures to comply with the recommendations issued by the Commission in its Final Merits Report No. 90/19, but has adopted actions that directly contravene those recommendations, in particular, Recommendations number 5 and 6.

## VII. FINAL CONCLUSIONS AND RECOMMENDATIONS

114. On the basis of determinations of fact and law, the Inter-American Commission concluded that the State is responsible for the violation of Articles I (life, liberty, and security), II (equality before the law), IV (freedom of expression), XVIII (fair trial), XXV (protection from arbitrary detention), and XXVI (due process) of the American Declaration.

115. Orlando Cordia Hall is the beneficiary of precautionary measures adopted by the Inter-American Commission under Article 25 of its Rules of Procedure. The 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

<sup>95</sup> IACHR. Press Release No. 201/19. IACHR expresses its profound concern for the reinstatement of the death penalty at the federal level in the United States. August 15, 2019.

also deny his right to petition the Inter-American human rights system and to obtain an effective result, and that such a measure is contrary to the fundamental human rights obligations of an OAS member state pursuant to the Charter of the Organization and the instruments deriving from it.<sup>96</sup> Accordingly, the Commission formulated the corresponding recommendations to the State.

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<sup>96</sup>IACHR, Report No. 24/17, Case 12.254. Merits. Victor Saldaño. United States. March 18, 2017, para. 269.

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

1. Grant Orlando Cordia Hall effective relief, including the review of his trial and sentence in accordance with the right to equality before the law and the guarantees of fair trial and due process set forth in Articles II, XVIII and XXVI of the American Declaration. Taking into account the conclusions of the IACHR on the time Orlando Cordia Hall has been held on death row, the Commission recommends that his sentence be commuted.
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, II, XVIII, XXV and XXVI thereof.
3. Ensure that the legal counsel provided by the State in death penalty cases is effective and adequately trained to serve in death penalty cases.
4. Review the executive clemency procedure to ensure impartiality and compliance with the right to minimal fairness guarantees.
5. Ensure that the federal lethal injection protocol complies with the right to humane treatment and not to receive cruel, infamous or unusual punishment set forth in Articles XXV and XXVI of the Declaration, and that the person sentenced to death has access to all the relevant information regarding the method of execution.
6. Given the violations of the American Declaration the IACHR has established in the present case and in others involving application of the death penalty, the Inter-American Commission also recommends to the United States that it adopt a moratorium on executions of persons sentenced to death.<sup>97</sup>

**VIII. PUBLICATION**

116. 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 22 day of the month of April, 2020. (Signed): Joel Hernández García, President; Antonia Urrejola Noguera, First Vice President; Flávia Piovesan, Second Vice President; Margarete May Macaulay, Esmeralda E. Arosemena Bernal de Troitiño and Julissa Mantilla Falcón, Commissioners.

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



Marisol Blanchard

<sup>97</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.

Assistant Executive Secretary