

**TO THE HONORABLE MEMBERS OF THE  
INTER-AMERICAN COMMISSION ON HUMAN RIGHTS,  
ORGANIZATION OF AMERICAN STATES:**

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**PETITION ALLEGING VIOLATIONS OF THE HUMAN RIGHTS  
OF JAVIER SUÁREZ MEDINA BY THE UNITED STATES  
OF AMERICA AND THE STATE OF TEXAS, WITH REQUEST FOR AN  
INVESTIGATION AND HEARING ON THE MERITS**

**AND**

**REQUEST FOR PRECAUTIONARY MEASURES UNDER  
ARTICLE 25.1 OF THE COMMISSION'S REGULATIONS**

**AND**

**ADDITIONAL REQUEST FOR HEARING ON THE BINDING NATURE OF THE  
COMMISSION'S PRECAUTIONARY MEASURES**

By the undersigned, appearing as counsel for the petitioner under the provisions of Article 23 of the Commission's Regulations, on behalf of Javier Suárez Medina, a national of Mexico:

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**JAVIER SUÁREZ MEDINA IS SCHEDULED TO BE  
EXECUTED BY THE STATE OF TEXAS AT 6:00 P.M. CENTRAL  
TIME ON AUGUST 14, 2002**

Submitted: July 23, 2002

## INTRODUCTION

Javier Suárez Medina, who faces execution in the state of Texas on August 14, 2002, petitions this Honorable Commission for relief from ongoing violations of his human rights and the imposition of a death sentence in contravention of binding treaty obligations and customary international law. Pursuant to Article 28(b) of the Commission's Rules of Procedure, Mr. Suárez Medina does not request that his identity be withheld.

This complaint arises from four separate but related human rights violations. First, Texas authorities inexcusably failed to notify Javier Suárez Medina of his right to communicate with consular officials and to have them notified of his detention, pursuant to article 36 of the Vienna Convention on Consular Relations. This failure to notify Mr. Suárez Medina of his consular rights demonstrably undermined his right to a fair trial and directly contributed to his death sentence, in violation of Articles XXV and XXVI of the American Declaration of the Rights and Duties of Man (hereafter "American Declaration"). His execution without the provision of a remedy for the manifest violation of his consular rights would constitute a violation of Article I of the American Declaration.

Second, the prosecution was allowed during the crucial penalty phase of the trial to introduce testimony concerning an unadjudicated offense allegedly committed by Mr. Suárez Medina. This testimony was persuasive in convincing the jury to find that Mr. Suárez Medina represented a future danger to society, a necessary element in the imposition of a death sentence in Texas. Furthermore, the evidence now establishes the sheer impossibility that Mr. Suárez Medina actually committed the unadjudicated prior offense on which his death sentence rests.

Consequently, the United States and the State of Texas are responsible for violating Mr. Suárez Medina's right to life, to equality before the law, to a fair trial and to due process of law under Articles I, II, XVIII and XXVI of the American Declaration.

Third, the State of Texas has subjected Mr. Suárez Medina to cruel, inhuman and degrading treatment by scheduling him for execution on 14 occasions during his thirteen years on death row. This deliberate and unwarranted scheduling of new execution dates at every stage of the appellate process has exposed Mr. Suárez Medina to gratuitous and excessive suffering, beyond the already intolerable stress of living under an active sentence of death for more than 13 years. It also represents a deliberate attempt by the State of Texas to undermine his right to full and fair appellate review. The United States has therefore violated its obligation to provide humane treatment to Mr. Suárez Medina during the time he is in custody and his right not to receive cruel, infamous or unusual punishment, in violation of Article XXV and XXVI of the American Declaration. *See*: Report No. 57/96 of 6 December 1996, Case 11.139, *William Andrews*, para 178. The aggressive pursuit of unnecessary execution dates at every stage of the appellate process also represents a deliberate and systematic attempt by the State of Texas to truncate the right of Mr. Suárez Medina to apply for and receive full consideration of the merits of his appeals under due process of law, in violation of Articles XXIV, XXV and XXVI of the American Declaration.

Finally, Mr. Suárez Medina submits that the persistent failure of the United States authorities to comply with this honorable Commission's issuance of precautionary measures in death penalty cases in itself constitutes a violation of Mr. Suárez Medina's most fundamental rights under the American Declaration. Assuming that this Commission sees fit to grant

precautionary measures in this case, “the United States will perpetrate a deliberate and irreparable violation of the right to life under Article I of the American Declaration”, should it proceed with Mr. Suárez Medina’s execution while proceedings before this Commission are still pending. Press Release No. 11/01, on the case of Juan Raul Garza, Inter-American Commission, June 15, 2001.

As outlined in Section II below, Mr. Suárez Medina submits that there is now a clear international consensus that the precautionary measures issued by human rights tribunals (including this honorable Commission) must be treated as obligatory in nature. The failure of the United States Government to take any steps—let alone strenuous ones— to implement these measures “emasculates the efficacy of the Commission's process, deprives condemned persons of their right to petition in the inter-American human rights system, and results in serious and irreparable harm to those individuals and accordingly is inconsistent with the state's human rights obligations.” Report No. 52/01, Case 12.243, *Juan Raul Garza*, para 117.

Mr. Suárez Medina has filed appeals in both state and federal courts, requesting that his conviction and death sentence be vacated. On 28 June 2002, the United States Supreme Court denied his petition for certiorari, thus exhausting available domestic remedies. The petition to this honorable Commission therefore meets the deadline set under Article 32(1) of the Commission’s Rules of Procedure.

Mr. Suárez Medina is now requesting precautionary measures from this Commission to prevent his execution on August 14, in light of these grave, unresolved and unremedied violations of his fundamental human rights. Without the Commission’s intervention, it is likely that Mr. Suárez Medina will be executed. In addition, he is seeking a declaration that the United

States and the State of Texas are in violation of Articles I, II, XVIII, XXIV, XXV and XXVI of the American Declaration. To assist the Commission in making this determination, Mr. Suárez Medina is requesting an expeditious hearing on his claims, including a determination by the Commission on the obligatory nature of its precautionary measures.

### **PROCEDURAL AND FACTUAL BACKGROUND**

#### **Summary of Facts**

Javier Suárez Medina was convicted of capital murder for the 1988 shooting death of Lawrence Cadena, an undercover Dallas police officer. At the time of the crime, Mr. Suárez Medina was not aware that Mr. Cadena was a police officer. According to the trial evidence, the plainclothes officer was shot while on an undercover “buy-bust” operation, in which Mr. Cadena was posing as a purchaser of narcotics for the purpose of effecting an arrest. After Mr. Suárez Medina threw a bag of white powder into Cadena’s car, he shot at the officer and killed him. A police officer who had observed the drug transaction from his undercover vehicle fired back at Mr. Suárez Medina, hitting him twice. From his hospital bed, Mr. Suárez Medina admitted to the shooting but insisted that he fired only because he feared for his own life, after hearing gunshots. On May 24, 1989, following a highly publicized trial, the jury found him guilty of capital murder.

In its effort to obtain a death sentence, prosecutors relied on evidence now known to be false. Although there was strong evidence that Mr. Suárez Medina had shot and killed Officer Cadena, he could not be sentenced to death unless the jury unanimously concluded that he would be a “future danger” to society. In this case, however, the prosecution’s case for Mr. Suárez

Medina's "future dangerousness" was virtually non-existent, consisting mostly of evidence that he had trespassed on school property and was once found joyriding in a stolen car with three other people. Mr. Suárez Medina had never been charged, let alone convicted, for a crime of violence.

In contrast, the defense produced fifteen witnesses who vouched for Mr. Suárez Medina's positive qualities, stating that they were shocked by his involvement in the crime because it was so out of character.<sup>1</sup> Although much more could and should have been said about Mr. Suárez Medina's background and mental state, there was little doubt that at least one juror would be persuaded by the mitigating testimony to vote for life imprisonment and that a death sentence would not be imposed.

After both sides had already concluded their sentencing phase presentations, the prosecution suddenly produced a surprise witness, Michael Mesley. Mr. Mesley came forward after he saw television coverage of jury selection in the trial. Over the strenuous objections of the defense, he was allowed to testify that Mr. Suárez Medina had shot him and his wife in 1987. He swore that he recognized the defendant from a televised photo as the same man who fired a shotgun in his face during a robbery, also injuring his wife in the head and leaving her with permanent disfiguring injuries. Mr. Mesley swore that he positively identified Mr. Suárez Medina, even though he also testified the man he saw had no glasses and that Mr. Suárez Medina had "shaved" since the incident.

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<sup>1</sup>The defense initially sought to present 46 character witnesses on Mr. Suárez Medina's behalf, but were compelled by the trial judge to limit their presentation of mitigating testimony to a total of 18 witnesses, fifteen of whom presented character testimony. See pp. 80-81, Second Amended Application for Writ of Habeas Corpus.

Given only days to confront this crucial testimony, the defense produced Mr. Suárez Medina's employment records from a Burger King restaurant, proving that he was working on the night of the Mesley shooting and did not "punch out" until nearly two hours after the shooting. However, the prosecution implied that another employee could have punched out for him – even though there was absolutely no evidence to support this assumption. The jury was not instructed to apply or consider any standard of proof when weighing the Mesley testimony, nor did the defense request such an instruction. The defense did not present or seek to present expert rebuttal testimony on the inherent unreliability of the Mesley identification. Despite Mr. Suárez Medina's alibi, the jury returned a death sentence based on Mr. Mesley's testimony.

Although the arresting authorities were aware from the outset that Javier Suárez Medina is a Mexican national, he was never informed of his right to consular notification and assistance pursuant to article 36 of the Vienna Convention on Consular Relations. The authorities failed to notify Mexican consular officials of Mr. Suárez Medina's detention, and defense counsel likewise neglected to seek consular assistance.

As outlined below, Mexican consular officials first learned of the case from media reports, undertook enquiries of the arresting authorities on their own initiative and were twice misinformed by those authorities regarding Mr. Suárez Medina's nationality. By failing to comply with the Vienna Convention – a treaty the United States signed and ratified over thirty years ago – Texas authorities prevented Mexican consular authorities from providing effective and far-reaching legal assistance when it was most urgently required. As a consequence, the defense was denied access to the only available source for the help it desperately needed to

challenge the credibility of the Mesley testimony and to present compelling additional testimony in support of a life sentence.

Procedural History:

On May 24, 1989, Javier Suárez Medina was convicted of the first-degree murder of Lawrence Cadena, an undercover police officer. On June 5, 1989, Mr. Suárez Medina was sentenced to death by lethal injection. His conviction was affirmed on direct appeal in an unpublished opinion, *Medina v. State*, No. 70,892 (Tex. Crim. App., delivered May 5, 1993). No petition for writ of certiorari was filed with the United States Supreme Court. On September 16, 1998, the Texas Court of Criminal Appeals denied relief following the filing of a Post Conviction Application for Writ of Habeas Corpus.

On May 15, 2001, the federal district court denied habeas relief. On January 16, 2002, a panel opinion of the Fifth Circuit Court of Appeals denied a Certificate of Appealability. On February 26, 2002, the court denied a petition for rehearing and rehearing en banc. On June 28, 2002, the US Supreme Court denied a petition for writ of certiorari.

At each stage of the appellate process, Texas authorities have aggressively filed for and obtained the following execution dates for Mr. Suárez Medina:

1. January 18, 1995
2. July 12, 1995
3. August 15, 1995
4. November 2, 1995
5. March 1, 1996
6. May 31, 1996
7. August 29, 1996
  
8. December 10, 1996
9. May 14, 1997

10. September 16, 1997
11. December 9, 1997
12. March 18, 1998
13. June 15, 1998
14. August 14, 2002

None of these prior dates were legally required, nor was any appropriate judicial purpose served by them.

## **LEGAL ARGUMENT**

### **I.**

#### **MR. SUÁREZ MEDINA'S PETITION IS ADMISSIBLE UNDER THE COMMISSION'S REGULATIONS.**

##### **A. Mr. Suárez Medina Has Properly Exhausted Domestic Remedies.**

Mr. Suárez Medina has filed appeals in both state and federal court, seeking reversal of his conviction and death sentence based on the reliance on an unadjudicated offense at sentencing. Every court has refused to provide him the remedy he seeks. He has thus exhausted all appeals with regard to the complaint raised in Section IV. As discussed below, the other claims presented in this Petition meet the Commission's requirements for exhaustion of available domestic remedies under Articles 28(h) and 31 of its amended Rules of Procedure. Each of these claims is addressed in turn, below.

First, the violation of article 36 of the Vienna Convention on Consular Relations has not been presented to the domestic courts, because the issue is "procedurally defaulted." Because Texas authorities failed to notify Mr. Suárez Medina of his article 36 rights, he was unaware of

his rights to consular notification and access. Defense counsel was likewise unaware of the consular notification provisions of the Vienna Convention. As a result, counsel failed to object to the article 36 violation at the time of Mr. Suárez Medina's trial, and this legal argument was waived. *See Breard v. Greene*, 523 U.S. 371 (1998)(petitioner's legal arguments regarding article 36 were procedurally barred, due to counsel's failure to raise the issue at the proper time).

State and federal law create nearly insurmountable barriers to judicial review at this stage of the legal proceedings. Both Texas and the United States Congress have passed legislation that virtually precludes the filing of second, or "successive," post-conviction applications. Thus, Mr. Suárez Medina has fallen victim both to his court-appointed lawyers' incompetence and to domestic limitations denying him access to judicial review and remedies for the human rights violations described herein.

At this late stage, any attempt to meet the strictest requirement for exhaustion of domestic remedies by raising new legal arguments – such as the violation of consular rights– would be likely to fail.<sup>2</sup> *See* Texas Code of Criminal Procedure, Art. 11.01, Sec. 5(a) (Texas courts may not consider the merits of a subsequent application unless the current claims and issues have not been and could not have been presented previously in a timely initial application or in a previously considered application); 28 U.S.C. §2244(b)(2)(claim presented in second habeas corpus application that was not presented in a prior application shall be dismissed unless the

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<sup>2</sup>For example, the successive habeas petitions filed by German nationals Karl and Walter LaGrand to obtain a remedy for the violation of their consular rights were held to be procedurally defaulted by the appellate courts. *See: LaGrand v. Lewis*, 883 F.Supp. 451 (D.Ariz. 1995) *LaGrand v. Stewart*, 133 F.3d 1253 (9th Cir. 1998); *LaGrand v. Stewart*, 119 S.Ct. 422 (1998).

claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable).

It is clear that the procedural default provisions under state and federal law “do not afford due process of law for protection of the right or rights that have allegedly been violated” (Article 31.2.a). In the *LaGrand Case*, the International Court of Justice specifically recognized that the operation of procedural default rules violate Article 36 if, as applied in a particular case, they prevent a foreign national from challenging his conviction and sentence based upon a prior violation of Article 36. *LaGrand Case (F.R.G. v. U.S.)*, 2001 I.C.J. (Judgment of June 27, 2001). Thus, under Article 31.2.a., Mr. Suárez Medina is not required to present this claim to the domestic courts before this Commission may exercise jurisdiction over his petition.

Mr. Suárez Medina is also excused from exhausting his claim that he has been subjected to cruel, inhuman, or degrading treatment or punishment, by virtue of his prolonged incarceration and exposure to repeated execution dates. Both the Texas Court of Criminal Appeals and the United States Supreme Court have refused to consider similar arguments in other cases. To require Mr. Suárez Medina to seek every conceivable domestic remedy as a prerequisite to international intervention, however unlikely it is that he will succeed, would be an exercise in futility. Moreover, it would undercut the power of this Commission to accomplish the purpose sought: to protect the petitioner from illegal execution. *See C.F. Amerasinghe, Local Remedies in International Law*, 200-01 (1990).

Finally, it is well established that exhaustion is not required when “there has been unwarranted delay in rendering a final judgment” under domestic law (Article 31.2.c). Even if Mr. Suárez Medina filed a petition for writ of habeas corpus, the courts would not issue a final

decision until the eve of his execution. Were this Commission to require the filing of a second post-conviction application at this juncture as a prerequisite for exhaustion of domestic remedies, the sole effect would be to delay this Commission's review of his arguments, when only days or hours would then remain before Mr. Suárez Medina's scheduled execution.

While Mr. Suárez Medina intends to file a petition for executive clemency with the Texas Board of Pardons and Paroles, the Board has rejected virtually every request for clemency it has received in a death penalty case. Moreover, the Board will most likely not announce its decision until a day or two before Mr. Suárez Medina's execution. Even with a favorable recommendation from the Board, the final decision on whether or not to grant clemency would rest with the Governor of Texas. That final decision would most likely come hours or even minutes before the actual execution, leaving Mr. Suárez Medina with no subsequent opportunity to petition this honorable Commission.

None of these problems, which are endemic to the administration of the death penalty in the United States, can be attributed to Mr. Suárez Medina. He is a mentally-impaired, indigent foreign national, who has no expertise with the American judicial system. Had Texas authorities properly notified Mr. Suárez Medina of his article 36 rights, for example, Mexican consular officials would have been able to obtain qualified defense counsel. Moreover, had Texas provided competent legal counsel at trial and on appeal, counsel would have properly presented these arguments to state and federal courts. Had the United States Congress not passed draconian legislation that penalizes defendants such as Mr. Suárez Medina, his current counsel would be able to raise these issues now, despite the incompetence of Mr. Suárez Medina's previous lawyers.

Finally, this Commission has the power to act under Article 25.1 of its regulations, which permits it to intercede in “serious and urgent cases, and whenever necessary according to the information available. . . to prevent irreparable harm to persons”, on the understanding that such action “shall not constitute a prejudgment on the merits of a case.” (Article 25.4). This is just such a serious and urgent case.

**B. The American Declaration of the Rights and Duties of Man Is Binding on the United States.**

The United States is not a party to the American Convention on Human Rights, but it is a member State of the Organization of American States. As such, “[t]he international obligation of the United States as a member of the OAS, under the jurisdiction of the IACHR is governed by the Charter of the OAS (Bogota, 1948), as amended by the protocol of Buenos Aires on 27 February 1967, ratified by the United States on 23 April 1968.”<sup>3</sup>

The OAS Charter, the American Declaration of the Rights and Duties of Man, and the Statute and Regulations of the IACHR have acquired binding force for OAS members.<sup>4</sup> In relation to States such as the United States, which are OAS members but not parties to the American Convention on Human Rights, the IACHR is competent to promote the observance of

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<sup>3</sup>Case 9647 (United States) Res. 3/87 of 27 March 1987, in 1986-1987 Annual Report of the Inter-American Commission on Human Rights, OEA/Ser. L/L/V/II.71, doc. 9, rev. 1, (22 September 1987), at 147 *et seq.*

<sup>4</sup>Case 9647, *supra*, para. 48, citing Thomas Burgenthal, “The Revised OAS Charter and the Protection of Human Rights,” 69 A.J.I.L. 828 (1975) and case 2141 (United States) Res, 23/81 of 6 March 1981 OAS Ser, L/V/II, 52, doc. 48, para. 16 (1981) in 1980-81 Annual Report of the Inter-American Commission on Human Rights OEA Ser. L/V/II.52, doc. 9, rev. 1 (16 October 1981) at 25 *et seq.*

and respect for those rights set forth in the American Declaration of the Rights and Duties of Man.<sup>5</sup>

Mr. Suárez Medina has alleged numerous violations of the American Declaration. The Statute of the IACHR specifies that the Commission must carefully scrutinize such violations in OAS member states that are not parties to the American Convention on Human Rights.<sup>6</sup>

## II.

### **PROVISIONAL MEASURES ISSUED BY THIS COMMISSION MUST BE TREATED AS BINDING**

The obligatory nature of precautionary measures issued by international tribunals such as the Inter-American Commission is a well-settled principle:

In accordance with the principle of good faith . . . if a State signs and ratifies an international treaty, especially one concerning human rights . . . it has the *obligation to make every effort* to apply with the recommendations of a protection organ such as the Inter-American Commission, which is, indeed, one of the principal organs of the Organization of American States, whose function is "to promote the observance and defense of human rights" in the hemisphere.

Inter-American Court of Human Rights, *Loayza Tamayo Case*, Judgment of September 17, 1997, paragraph 80. (Emphasis added).

The decisions of the Human Rights Committee ("HRC") may provide a useful analogy to the Inter-American Commission. The HRC discussed its interim measures in *Piandiong et al v.*

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<sup>5</sup>Case 9647, *supra*, para. 49.

<sup>6</sup>Pursuant to Article 20, paragraph (a) of the Statute of the IACHR, this Commission, in relation to those member states of the OAS that are not parties to the American Convention on Human Rights, is "to pay particular

the Philippines (869/1999) at paras 5.4 and 8:

Interim measures pursuant to rule 86 of the Committee's rules adopted in conformity with article 39 of the Covenant, *are essential to the Committee's role under the Protocol. Flouting of the Rule, especially by irreversible measures such as the execution of the alleged victim or his/her deportation from the country, undermines the protection of Covenant rights* to the Optional Protocol. . . The Committee reiterates its conclusion that the State committed a grave breach of its obligations under the Protocol by putting the alleged victims to death before the Committee had concluded its consideration of the communication. (Emphasis added).

Other international tribunals have similarly recognized interim stays of execution as fundamental prerequisites to the efficacy of proceedings pertaining to the imposition of capital punishment. See e.g. I/A Court H.R., *James et al. Case*, Order for Provisional Measures of 29 August 1998; Annual Report 1998, p. 317; *Case Concerning the Vienna Convention on Consular Relations* (Germany v. United States of America), Request for the Indication of Provisional Measures, Order of 3 March 1999, I.C.J. General List, N° 104, paras. 22-28; Eur. Court H.R., *Ocalan v. Turkey*, Indication of Interim Measures Pursuant to Rule 39 of the Rules of the European Court of Human Rights, 30 November 1999.

The International Court of Justice has likewise held that its provisional measures orders are binding on the parties to a dispute before the Court. In the *LaGrand* decision, the ICJ construed Article 41(1) of its Statute, which empowers the Court to issue provisional measures. After reviewing the language and history of the article, the ICJ determined:

The object and purpose of the Statute is to enable the Court to fulfill the functions provided for therein, and in particular, the basic function of judicial settlement of international disputes by binding decisions in accordance with Article 59 of the Statute. The context in which Article 41 has to be seen within the Statute is to prevent the Court from being hampered in the exercise of its functions because

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attention to the observance of the human rights referred to in articles I, II, III, IV, XVIII, XXV, and XXVI of the American Declaration of the Rights and Duties of Man.”

the respective rights of the parties to a dispute before the Court are not preserved. It follows from the object and purpose of the Statute, as well as from the terms of Article 41 when read in their context, that the power to indicate provisional measures entails that *such measures should be binding, inasmuch as the power in question is based on the necessity, when the circumstances call for it, to safeguard, and to avoid prejudice to, the rights of the parties as determined by the final judgment* of the Court. The contention that provisional measures indicated under Article 41 might not be binding would be contrary to the object and purpose of that Article.

International Court of Justice, *LaGrand Case* (Germany v. United States), General List No. 104, Judgment of 27 June 2001, para 102. (Emphasis added).

The language of Article 41 is remarkably similar to that employed in Article 25(1) of this honorable Commission's own Rules of Procedure. Article 25(1) states:

1. In serious and urgent cases, and whenever necessary according to the information available, the Commission may, on its own initiative or at the request of a party, request that the State concerned adopt precautionary measures to prevent irreparable harm to persons.

For its part, Article 41(1) of the ICJ Statute states:

1. The Court shall have the power to indicate, if it considers that circumstances so require, any provisional measures which ought to be taken to preserve the respective rights of either party.

In both instances, the language of the provisions may appear at first glance to be precatory (“may. . .request”; “ought to be taken”). Nonetheless, the ICJ determined that the principles which underlie the authority to issue such provisional measures render them binding on the parties to a dispute before the Court. *See Lagrand*, para 109.

The United States Government has consistently maintained that the precautionary measures issued by this honorable Commission have no binding force with respect to the United States. However, Mr. Suárez Medina's submission that the interim measures of protection requested by this honorable Commission impose binding obligations is consistent with the

Commission's own findings.

The Inter-American Court of Human Rights and this Commission have previously determined that the American Declaration of the Rights and Duties of Man is a source of international obligation for the United States and other OAS member States that are not parties to the American Convention on Human Rights, as a consequence of Articles 3, 16, 51, 112, and 150 of the OAS Charter. *See* I/A Court H.R., *Advisory Opinion OC-10/89*, Interpretation of the American Declaration of the Rights and Duties of Man Within the Framework of Article 64 of the American Convention on Human Rights, July 14, 1989, Ser. A N° 10 (1989), paras. 35-45; I/A Comm. H.R., *James Terry Roach and Jay Pinkerton v. United States*, Case 9647, Res. 3/87, 22 September 1987, Annual Report 1986-87, paras. 46-49. *See also* Statute of the Inter-American Commission on Human Rights, Art. 20.

The Commission noted in response to submissions by the United States:

With respect to the State's submissions on the non-binding nature of the Commission's precautionary measures, the Commission previously expressed in this Report its profound concern regarding the fact that its ability to effectively investigate and determine capital cases has frequently been undermined when states have scheduled and proceeded with the execution of condemned persons, despite the fact that those individuals have proceedings pending before the Commission. It is for this reason that in capital cases the Commission requests precautionary measures from states to stay a condemned prisoner's execution until the Commission has had an opportunity to investigate his or her claims. Moreover, in the Commission's view, OAS member states, by creating the Commission and mandating it through the OAS Charter and the Commission's Statute to promote the observance and protection of human rights of the American peoples, have *implicitly undertaken to implement measures of this nature where they are essential to preserving the Commission's mandate.*

Particularly in capital cases, the failure of a member state to preserve a condemned prisoner's life pending review by the Commission of his or her complaint emasculates the efficacy of the Commission's process, deprives condemned persons of their right to petition in the inter-American human rights system, and results in serious and irreparable harm to those individuals, and

accordingly *is inconsistent with the state's human rights obligations*.

Report No. 52/01, Case 12.243, *Juan Raul Garza*, para 117 (Emphasis added).

Confronted with the refusal by the United States to act on its recommendations and the reiteration by the United States of its rejection of the binding nature of such precautionary measures, the Commission added:

In the present case, the Commission has not only requested precautionary measures from the State as an interim measure, but has examined Mr. Garza's complaint pursuant to the Commission's Statute and Regulations and has determined the State's international responsibility for violations of Mr. Garza's rights under the American Declaration. The Commission has also determined that these violations have vitiated the propriety of Mr. Garza's death sentence and has therefore recommended commutation as the appropriate remedy. *For the State to proceed with Mr. Garza's execution in these circumstances would give rise to its responsibility for serious and deliberate violations of its international obligations under the OAS Charter and the American Declaration.*

*Id.*, para 119. (Emphasis added).

Despite the Commission's efforts, Mr. Garza was executed with dispatch. Indeed, his efforts to obtain a stay of execution through the domestic courts based on the Commission's proceedings were also frustrated by the domestic court's assumption that the precautionary measures issued by the Commission were non-binding in nature. *See Garza v. Lappin*, No. 01-2441 (7th Cir. 2001).

Mr. Suárez Medina respectfully submits that the time has come to put an end to any confusion over the mandatory or precatory nature of precautionary measures requests issued by this honorable Commission. If other member States of the OAS were to adopt the same intransigent attitude as that displayed by the United States, the efficacy of the Inter-American system for the protection of human rights would be fatally undermined. Mr. Suárez Medina respectfully submits that the wholesale failure of the United States to act on the requests and

recommendations of this honorable Commission imperil his right to life and his right to petition for a remedy, in violation of Articles I and XXIV of the American Declaration.

### III.

#### **THE UNDISPUTED VIOLATION OF MR. SUÁREZ MEDINA’S CONSULAR RIGHTS RENDERS HIS SCHEDULED EXECUTION UNLAWFUL AND MANDATES A REMEDY**

##### **A. Texas authorities failed to comply with their binding obligations under Article 36 of the Vienna Convention on Consular Relations**

From the very outset of this case, the arresting authorities were aware that Mr. Suárez Medina is a Mexican national and is not a citizen of the United States. During his statement to the police on the day following his arrest, Mr. Suárez Medina informed the interrogating officer that he was born in Piedras Negras, Mexico. Mr. Suárez Medina was also carrying a “green card” in his wallet (the identification card issued to resident aliens by the United States Immigration and Naturalization Service), which was confiscated by the police when he was arrested. Furthermore, Mr. Suárez Medina’s death row committal form clearly indicates his “native county” as Piedras Negras, Mexico,<sup>7</sup> and the Texas Department of Criminal Justice lists him as a Mexican national.<sup>8</sup>

However, there is nothing to indicate that Mr. Suárez Medina was ever informed of his right to communicate with his consulate, let alone notified “without delay”, as required under

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<sup>7</sup>Posted at: <http://www.tdcj.state.tx.us/statistics/deathrow/drowlist/medinajs.jpg>

<sup>8</sup>Posted at: <http://www.tdcj.state.tx.us/stat/nationalities.htm>

Article 36(1) (b) of the Vienna Convention on Consular Relations. *See* Vienna Convention on Consular Relations, April 24, 1963, TIAS 6820, 21 U.S.T. 77. Mr. Suárez Medina is certain that he was not so informed. Furthermore, he would have requested that his consulate be notified of his arrest without delay and would have accepted all forms of assistance that the consulate could have provided. A diligent search of the case records by present counsel has revealed no indication that any such notification was ever provided. Indeed, Mexican consular authorities only became cognizant of the case through their own efforts, finally ascertaining Mr. Suárez Medina's nationality many months after his arrest.

The United States unconditionally ratified the Vienna Convention on Consular Relations on November 24, 1969 and the treaty entered into force for the United States on December 24, 1969. *See* 21 UST 77; TIAS 6820; 596 UNTS 261. The treaty has therefore been part of the "supreme Law of the Land" of the United States for more than thirty years, under the provisions of Article VI of the United States Constitution.<sup>9</sup> As a matter of both domestic and international law, its provisions are binding on all federal, state and local authorities. The failure of the arresting authorities to inform Mr. Suárez Medina of his right to consular notification, communication and assistance is therefore an undisputable violation of the Vienna Convention, as well as a breach of domestic law.

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<sup>9</sup>The so-called Supremacy Clause in Article VI states that all treaties entered in to by the United States form part of the "supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

## **B. The Violation of Mr. Suárez Medina’s Consular Rights Is a Breach of Fundamental Rights Protected by the Inter-American Human Rights System**

Such violations of this binding treaty obligation are far from uncommon in Texas. This honorable Commission has received a number of previous petitions alleging the same breach of consular rights in other Texas death penalty cases and has accordingly issued precautionary measures. *See, e.g.* Case No. 12.333, *Miguel Angel Flores*, October 25, 2000.

The right to consular assistance embodied in Article 36 of the Vienna Convention is analogous to several provisions of the American Declaration of the Rights and Duties of Man. For example, Article XXVI of the American Declaration protects the right of the accused to due process, and Article XXV provides that “no person may be deprived of his liberty except in the cases and according to the procedures established by pre-existing law.” Because the Vienna Convention was ratified by the United States Senate in 1969, it constitutes “pre-existing law” under Article XXV. There is no dispute that Texas violated the explicit terms of Article 36 of the Vienna Convention. Thus, the allegations raised by Mr. Suárez Medina fall squarely within this Commission’s power to review violations of the American Declaration by OAS Member States. *See supra* nn. 4-6.

On December 9, 1997, the Government of Mexico requested an advisory opinion from the Inter-American Court on Human Rights to resolve critical questions regarding the scope, implementation, and enforcement of article 36 rights. Eight nations – including the United States – appeared before the Court in June 1998, along with eighteen non-governmental organizations, academics, and individuals appearing as *amici curiae*. On October 1, 1999, the Court issued its opinion in OC-16/99, Inter-Am. Ct. H.R. (October 1, 1999). After analyzing the text of the treaty, the intent of the parties, and its application in capital cases, the Court concluded that

article 36 confers individual rights on detained foreign nationals. *Id.* at §XIII, para. 1.

Moreover, the Court concluded that international law prohibits the execution of an individual whose consular notification rights were violated. *Id.* at para. 7.

In describing the purpose of article 36, the Court observed that consular notification and access are necessary to correct the real disadvantages facing foreign nationals in judicial proceedings. *Id.*, §X, at paras 119-120. As the concurrence observed,

[a]liens facing criminal prosecution. . . [have] severe limitations posed by their lack of familiarity with the culture, language, and environment and other very real restrictions on their chances of defending themselves. If these limitations persist, without countervailing measures that establish realistic avenues to justice, then procedural guarantees become rights ‘in name only’, mere normative formulas devoid of any real content. When that happens, access to justice becomes illusory.

*Id.* at 89 (Garcia-Ramirez, J., concurring). The Court concluded that consular notification is one of the “minimum guarantees essential to providing foreign nationals the opportunity to adequately prepare their defense and receive a fair trial” – a right embodied in Article 14(3)(b) of the International Covenant on Civil and Political Rights.<sup>10</sup> *Id.* at para. 122.

Finally, the Court observed that international law required strict observance of due process in death penalty cases. *Id.* at paras. 134-35. Since the lack of consular notification is “prejudicial to the guarantees of due process,” a state may not impose the death penalty in the cases of individuals deprived of their article 36 rights. *Id.* at para. 137. The Court concluded that the execution of a foreign national under these circumstances would constitute an arbitrary deprivation of life in violation of article 6 of the ICCPR. *Id.*

The General Assembly of the Organization of American States recently resolved “[t]o reaffirm, emphatically, the duty of states to ensure full respect and observance of the 1963 Vienna Convention on Consular Relations, particularly with regard to the right of foreign nationals, regardless of their immigration status, to communicate with a consular official of their own state in case of detention and the obligation of the state in whose territory the detention occurs to inform the foreign national of that right.” Organization of American States, AG/RES. 1717 (XXX-O/00), *The Human Rights of All Migrant Workers and Their Families*. See also AG/RES. 1775 (XXXI-O/01), 5 June 2001. There can be no question that the rights conferred on individual detainees under Article 36 of the Vienna Convention on Consular Rights must be counted as among the fundamental human rights protected under the Inter-American system.

**D. The Violation Of The Vienna Convention In Mr. Suárez Medina’s Case Requires That His Death Sentence Be Vacated.**

Article 36(2) of the Vienna Convention requires that States Parties “give full effect” to the purposes of article 36(1). The purpose of article 36(1) is to enable foreign detainees to communicate with their consular officers, and to benefit from their assistance. In this capital case, the State of Texas deprived Mr. Suárez Medina of even the most basic consular assistance. Indeed, Texas authorities actively impeded Mexican consular officials from providing consular assistance.

Shortly after Mr. Suárez Medina’s arrest, consular officials learned of the case through

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<sup>10</sup>International Covenant on Civil and Political Rights, Dec. 19, 1966, art. 14, 999 U.N.T.S. 171 (*entered into force* Mar. 23, 1976). The United States ratified the ICCPR on June 8, 1992, and has not adopted any

media reports. Concerned that Mr. Suárez Medina could be a Mexican national, they contacted Dallas County authorities and requested verification of Mr. Suárez Medina's nationality. They were informed that he was a Cuban national. Relying on this misinformation, consular officials were left with the mistaken belief that Mr. Suárez Medina was not eligible for their assistance. It was only months later, during a television broadcast of trial coverage which included a statement by Mr. Suárez Medina in Spanish, that consular officials recognized from his accent that he was more likely to be a Mexican national than a Cuban. Once again, the consulate contacted the local authorities and once again they were rebuffed; this time, they were told that Mr. Suárez Medina's nationality was "uncertain." Still the consulate persisted, finally verifying his Mexican nationality and then obtaining a consular visit with Mr. Suárez Medina after he had already been sentenced to death.

Since the violation of article 36 in Mr. Suárez Medina's case is both well established and clearly harmful, international law requires that his death sentence be commuted. As the Inter-American Court unequivocally stated:

the Court concludes that nonobservance of a detained foreign national's right to information, recognized in Article 36(1)(b) of the Vienna Convention on Consular Relations, is prejudicial to the guarantees of due process of law; in such circumstances, imposition of the death penalty is a violation of the right not to be "arbitrarily" deprived of one's life, in the terms of the relevant provisions of the human rights treaties (*eg* the American Convention on Human Rights, Article 4; the International Covenant on Civil and Political Rights, Article 6) *with the juridical consequences inherent in a violation of this nature, i.e., those pertaining to the international responsibility of the State and the duty to make reparations.*

OC-16/99, Inter-Am. Ct. H.R. (October 1, 1999), para 137. (Emphasis added).

#### IV.

### **THE PROSECUTION'S INTRODUCTION OF AN UNADJUDICATED OFFENSE TO SECURE A DEATH SENTENCE VIOLATED MR. SUÁREZ MEDINA'S DUE PROCESS RIGHTS**

#### **A. The Prosecution Relied on Testimony Regarding an Unadjudicated Offense to Secure a Death Sentence Against Mr. Suárez Medina**

As described above, the prosecution persuaded the jury to sentence Mr. Suárez Medina to death by introducing evidence of a crime he did not commit: the shooting of Michael Mesley. Mr. Suárez Medina had never been charged, let alone convicted, for this offense. His lawyers produced his employee time card at trial, demonstrating that he had been working at the time Mesley was shot. Nevertheless, the jury relied on the Mesley shooting in sentencing him to death.

An investigation conducted after the trial further established that Mr. Suárez Medina did not shoot Mr. Mesley. Interviews with several Burger King employees at the time of the shooting, including an assistant manager, have revealed that the practice of “punching out” for another employee was strictly forbidden and closely monitored. The night of the Mesley shooting was an extremely busy one at the Burger King because it was the night of the annual Texas-Oklahoma football game at the nearby Cotton Bowl, and Mr. Suárez Medina would not have been allowed to leave early. Furthermore, fingerprints taken from the Mesley's vehicle shortly after the shooting did not match those of Mr. Suárez Medina and no physical evidence links him to that crime, facts which were not presented to the jury. Indeed, Mr. Suárez Medina has never even been charged with the Mesley shooting.

Since Mr. Suárez Medina's death sentence was imposed, there have been hundreds of

documented cases of misidentification by eyewitnesses. Scientists who study memory, such as Dr. Geoffrey Loftus (whose affidavit on the Mesley testimony is attached) have established that an identification such as that made by Mr. Mesley is inherently unreliable -- although such testimony may have a persuasive effect on a jury if not vigorously challenged. As noted above, defense counsel made no attempt to retain expert witnesses to assess or testify to the credibility of the Mesley identification.

The testimony of a memory expert would have undoubtedly greatly diminished the impact of the Mesley testimony. To quote from Dr. Loftus' declaration:

There are a number of factors present in Mr. Mesley's identification of Mr. Medina as the person who shot him that support the conclusion that Mesley's identification of Medina, no matter how sincerely Mesley believes he is correct, is false. Mr. Mesley viewed the person who shot him for a short period of time, much less than a minute. The event was, to say the least, enormously stressful. Mr. Mesley and Mr. Medina come from different racial backgrounds, increasing the likelihood of a mistaken identification. Shortly after the shooting, when the event was freshest in his mind, Mr. Mesley was able to give only the briefest description of the person who shot him, a description almost devoid of facial features.

Nearly two years passed from the time that Mesley was shot to the time that he identified Medina as the person who shot him. Obviously, Mesley's memory would have dimmed significantly during this time. Contrary to popular opinion, such events are not "stamped" or "branded" into memory. Finally, Mr. Mesley identified Mr. Medina as the person who shot him only after a highly suggestible situation (seeing Medina on television described as a man who shot and killed a police officer) and shortly thereafter being shown a photo montage containing a photograph of the man he saw on television.

Dr. Loftus' conclusion on the effect of the Mesley testimony on the jury is equally noteworthy:

There are also persuasive reasons to conclude that Mr. Medina's jury believed Mr. Mesley's testimony. Studies prove that juries tend to believe that a witness who is confident is also correct. Mr. Mesley repeatedly told Mr. Medina's jury that he was sure that Medina shot him. However, confidence does not necessarily

correlate with accuracy.

In summary, this case is troubling, especially given the number of death row cases nationally where individuals were sentenced to death based on eyewitness identifications that were later conclusively shown to be false by scientific evidence such as DNA. The evidence certainly supports a conclusion in this case that Mr. Medina was sentenced to death by a jury who had been allowed to consider a crime that he did not commit.

In its initial presentation during the punishment phase of the trial, the best the prosecution had to offer were allegations that Mr. Suárez Medina:

- a. Refused to obey the instructions of a principal to leave an elementary school campus;
- b. Was counseled because he went upstairs after being told not to do so;
- c. Failed to obey a school official to leave an area where other students were;
- d. Ran past a friend or neighbor and allegedly made the statement that he “was going to get a car;”
- e. Was with three other people joy riding in a stolen automobile.

Absent the Mesley testimony, no reasonable juror could have been persuaded that Mr. Suárez Medina represented a future danger to society. Without that *unanimous* determination by the jury, no death sentence may be imposed in Texas. Indeed, the record establishes that the prosecution chose to introduce the Mesley testimony only after both sides had concluded their presentations during the penalty phase-- clear evidence that the prosecution felt it necessary to rely on an unadjudicated offense to secure this death sentence.

### **C. The Use of an Unadjudicated Offense to Secure a Death Sentence Violates Due Process Rights Protected Under the American Declaration**

After thoroughly reviewing circumstances similar to those detailed in the present case, this honorable Commission determined that "the State's conduct in introducing evidence of unadjudicated foreign crimes during [a] capital sentencing hearing was antithetical to the most basic and fundamental judicial guarantees applicable in attributing responsibility and punishment

to individuals for crimes.” Accordingly, the Commission found that the introduction of unadjudicated offenses violated the defendant's right to a fair under Article XVIII of the American Declaration, as well as his right to due process of law under Article XXVI of the Declaration. Report No. 52/01, Case 12.243, *Juan Raul Garza*, para 110.

Based on that determination, there is little need to elaborate on the clear violation of Mr. Suárez Medina's selfsame rights to due process and a fair trial. However, Mr. Suárez Medina submits that the circumstances in his case are even more egregious. In *Garza*, this Commission determined that "during the sentencing hearing, the jury concluded beyond a reasonable doubt that Mr. Garza committed the four killings in Mexico, and considered his responsibility for these crimes in determining whether he should be sentenced to death." *Id.*, para 86. Unlike the standard applied in the *Garza* case, capital juries in Texas are *not* required to determine specifically that each element introduced by the prosecution as an aggravating factor was committed "beyond a reasonable doubt". On the contrary; no such jury instruction on the burden of proof to establish the commission of an extraneous offense was sought by the defense or provided by the trial judge, nor is any such specific instruction required under Texas law.

Texas law does require that the burden of proof must be met when unadjudicated offenses are introduced at the *guilt* phase of trials; cases in which extraneous offense instructions were not sought or provided have been accordingly reversed on appeal by the Texas Court of Criminal Appeals. *See, e.g., Ex parte Varelas* (January 31, 2001, No. 73,632). (In prosecution for capital murder, post-conviction habeas relief granted for ineffective assistance of counsel, where state introduced extraneous acts by defendant, and trial counsel failed to request either an instruction on the burden of proof or limiting instructions regarding that evidence).

However, the prosecution may introduce any evidence during the penalty phase of a Texas death penalty trial which would tend to support a death sentence (including hearsay), without a requirement that each specific element of the proffered evidence meet a burden of proof. The generalized instructions provided to juries following the penalty phase of Texas death penalty trials merely requires that they find the totality of the evidence establishes beyond a reasonable doubt that the defendant committed the offense deliberately and represents a future danger to society.<sup>11</sup>

Had this been a non-capital case, the Mesley testimony would not have been admissible *at all* during the penalty phase. TEX. CODE CRIM. PROC. Art. 37.07, § 3(a) (Vernon Supp. 1993) (Before September 1, 1993 in a non-capital case, the State could not offer evidence of a defendant's unadjudicated extraneous offense or an act of misconduct.)

As has been cogently put, the use of evidence of unadjudicated crimes becomes a ploy that "allows the state to secure a conviction on a strong murder case, then seek the death penalty by providing a weak case before a jury which is undeniably prejudiced. This opens the door to death penalty recommendations upon a level of proof lower than proof beyond a reasonable doubt." State v. McCormick, 272 Ind. 272, 397 N.E.2d 276, 280 (1979). Even compared to the legal standards applied in other U.S. states, Texas' procedures for the introduction of

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<sup>11</sup> The instruction states in relevant part that "The burden of proof in this phase of the trial still rests upon the state and never shifts to the defendant. Each special issue submitted must be proved by the State beyond a reasonable doubt; therefore, before any issue may be answered, "yes", all jurors must be convinced by the evidence beyond a reasonable doubt that the answer to such issue should be "yes." . . . You are instructed that opinion testimony is not conclusively binding on you as a juror, but that such evidence should be weighed and evaluated as you would any other testimony and you are free to accept or reject such testimony. . . . You are further instructed as part of the law in this case that in making your determination as to whether or not the State has proven by evidence beyond a reasonable doubt that the answer to special issues, one or two, should be 'yes,' *you shall consider all of the evidence admitted at this phase of the trial as well as evidence presented at the first phase of trial.*"

unadjudicated offenses during the penalty phase of capital trials are shockingly deficient.

In *Garza v. United States*, (Report 52/01), this Commission held that the consideration of unadjudicated offenses by a jury that had already found the defendant guilty of capital murder violated the right to trial by an impartial tribunal. The Commission also held that the absence of rules of evidence that would normally apply during a criminal trial violated the fair trial requirements of the American Declaration.

The majority of state court decisions to consider the issue have refused to allow the use of unadjudicated crimes in capital sentencing. *See State v. Bobo*, 727 S.W.2d 945, 952-953 (Tenn.), cert. denied, 484 U.S. 872 (1987); *State v. Bartholomew*, 683 P.2d 1079, 1082 (Wash. 1984); *Scott v. State*, 465 A.2d 1126, 1135 (Md. 1983); *State v. McCormick*, 397 N.E.2d 276, 279 (Ind. 1979); *Cook v. State*, 369 So.2d 1251, 1257 (Ala. 1979); *Prevence v. State*, 377 So.2d 783, 786 (Fla. 1976); *State v. Debler*, 856 S.W.2d 641 (Mo. 1993) (en banc) (reversing death sentence where state relied upon uncharged offense evidence and failed to give notice to defense). *See also* Stephen P. Smith, Note, Unreliable and Prejudicial: The Use of Extraneous Unadjudicated Offenses in the Penalty Phase of Capital Trials, 63 Colum. L. Rev. 1249 (1993).

Other state courts that have reached a contrary decision required that the unadjudicated crime itself be proven either “beyond a reasonable doubt” or by “clear and convincing evidence.” *See State v. Brooks*, 541 So.2d 801 (La. 1989) (clear and convincing evidence); *People v. Balderas*, 711 P.2d 480, 515 (Cal. 1985) (beyond a reasonable doubt).

Because of the disparity between Texas law and that of other executing states on the introduction and weighing of unadjudicated offenses at penalty phase, Mr. Suárez Medina's death sentence was imposed on the basis of where the crime was committed. *See* Case 9647,

*James Terry Roach and Jay Pinkerton v. United States*, Res. 3/87, 22 September 1987, Annual Report 1986-87. Texas therefore also violated Mr. Suárez Medina's right to equality before the law, as guaranteed under Article II of the American Declaration.

V.

**THE AGGRESSIVE AND REPEATED SETTING OF EXECUTION DATES  
CONSTITUTES CRUEL PUNISHMENT AND REPRESENTS A DELIBERATE  
ATTEMPT TO UNDERMINE DUE PROCESS**

Mr. Suárez Medina has been subjected to a total of 14 execution dates during his 13-year incarceration on death row. With the arguable exception of his current date, none of these execution dates were required as a matter of law.

While the United States has a legitimate interest in obtaining finality in sentencing, no such justification is possible in this case. The penalties imposed by the U.S. courts for failure to meet filing deadlines in the submission of appeals are so draconian that the deliberate setting of premature execution dates cannot be said to facilitate expeditious filings by the defense. *See e.g. Coleman v. Thompson*, 501 U.S. 722 (1991) (delay of three days in the filing of an appeal sufficient to default further appellate review of the claims raised, however meritorious). Nor is there any indication on the record that Mr. Suárez Medina sought to obstruct the appellate process; all of his appeals were filed in a timely manner, consistent with the schedules set by the appellate courts.

The only attributable legal purpose of this deliberate policy by Texas is an illegitimate one: to harass the defense and undermine due process. By continually seeking the setting of premature execution dates in this case, Texas has misused its vastly superior legal resources to

overmatch the defense, compelling already-overworked defense attorneys to file motions contesting the setting of these dates and to seek stays of execution as they draw near. The other plausible purpose of this policy is equally insidious; it may be intended to serve as a constant reminder to the prisoner of his impending execution.

Whatever its legal purpose and effect, the impact on the prisoner of this gratuitous setting of unnecessary execution dates is undeniable: Mr. Suárez Medina has undergone the psychological torment of anticipating his own execution 14 separate times. As each date approached, he has entered the gruesome ritual of the execution countdown: preparing to say farewell to family, friends and fellow prisoners; to choose his last meal; to distribute his few belongings and to inform the authorities of the disposition of his remains. Although rationally aware that the courts would likely intervene to stay the execution, a prisoner repeatedly subjected to this macabre dance with death cannot fail to suffer profound stress and anxiety. None of this pain and suffering can be justified, in either legal or moral terms.

This Commission has already considered and upheld a similar claim in Case 11.139 (United States), Report No. 57/96 of 6 December 1996, OEA/Ser/L/V/II.98, Doc. 7, rev., (19 February 1998). The Commission concluded that the United States had violated Article XXVI of the American Declaration, after finding that William Andrews had been incarcerated on death row in the state of Utah for eighteen years, and had received notice of eight execution dates. Case 11,139, para. 178.

It is widely recognized that the imminence of execution itself constitutes cruel, infamous or unusual punishment. The European Court of Human Rights, for example, has recognized that anticipation of punishment can have "adverse psychological effects" . Tyrer v. United Kingdom,

2 EHRR 1, paragraph 33 (1979-80). The European Court has also concluded that "the very long time spent on death row in such extreme conditions, with the ever present and mounting anguish of awaiting execution of the death penalty," taken with the age and mental state of the defendant, constituted a sufficiently grave violation of Article 3 of the European Convention on Human Rights to merit the withholding of extradition from Great Britain to Virginia of a German national charged with capital murder in the United States. Soering v. United Kingdom, 11 EHRR 439 (1989), para 111. *See also* Vateeswaran v. State of Tamil Nadu 2 S.C.R. 348, 353; Catholic Comm'n for Justice & Peace In Zimbabwe v. Attorney General, No. S.C. 73/93 (Zimb.June 24, 1993) (reported in 14 Hum.Rts L.J. 323(1993)).

Mr. Suárez Medina's prolonged incarceration on death row, combined with the repeated, gratuitous setting of execution dates, violates his right to be free from inhumane treatment and cruel, infamous and unusual punishment, in violation of Articles XXV and XXVI of the American Declaration.

## VI.

### CONCLUSION

The above facts establish that the State of Texas and the United States of America have violated Mr. Suárez Medina's rights under Articles I, II, XVIII, XXIV, XXV and XXVI of the American Declaration. As this Commission held, “inherent in the construction of Article I is a requirement that before the death penalty can be executed, the accused person must be given all the guarantees established by pre-existing laws, which includes those rights and freedoms enshrined in the American Declaration.” Case 11.139 (United States) at para. 171, Report No. 57/96 of 6 December 1996, OEA/Ser/L/V/II.98, Doc. 7, rev., (19 February 1998).

In conclusion, Mr. Suárez Medina submits that his imminent execution would constitute an arbitrary deprivation of life, his right to due process of law and other fundamental rights, for the numerous reasons set forth in this petition.

Thus, the petitioner asks that the Commission provide the following relief:

1. Declare Mr. Suárez Medina's petition to be admissible;
2. Issue precautionary measures to the United States and Texas governments which call upon them to stay the execution of Javier Suárez Medina, pending a full review of his claims by the Commission;
3. Convene a hearing to establish definitively the binding nature of the Commission's precautionary measures in this and other similar cases;
4. Investigate, with hearings and witnesses as necessary, the facts alleged by Mr. Suárez

Medina in this petition; and

5. Declare the State of Texas and the United States to be in violation of Articles I, II, XVIII, XXIV, XXV and XXVI of the American Declaration.

Dated:

Respectfully submitted:

Sandra L. Babcock, United States citizen

Signature:

Lydia M.V. Brandt, United States citizen

Signature: