



THE PERMANENT REPRESENTATIVE
OF THE
UNITED STATES OF AMERICA
TO THE
ORGANIZATION OF AMERICAN STATES

WASHINGTON, D.C.

February 12, 2016

Mr. Emilio Alvarez Icaza
Executive Secretary
Inter-American Commission on Human Rights
Organization of American States
Washington, D.C. 20006

**Re: Peter Rogovich
Petition P-1663-13**

Dear Mr. Icaza:

The United States Government has the honor of addressing the Inter-American Commission on Human Rights ("Commission") in regard to the above-referenced matter and has enclosed our Response to the Petition. We thank the Commission for its attention to this matter.

Please accept renewed assurances of my highest consideration.

Sincerely,

A handwritten signature in blue ink, appearing to read "Michael J. Fitzpatrick".

Michael J. Fitzpatrick
Interim Permanent Representative

Enclosure, as stated.

**PETITION NO. P-1663-13, PETER ROGOVICH
RESPONSE OF THE UNITED STATES OF AMERICA**

The Government of the United States appreciates the opportunity to submit these observations on the various communications¹ (collectively, “Petition”) forwarded by the Inter-American Commission on Human Rights (“Commission”) in Petition No. P-1663-13, filed on behalf of Peter Rogovich (“Petitioner”). The Petition alleges various “violations”² of provisions of the American Declaration of the Rights and Duties of Man (“American Declaration” or “Declaration”) including the right to life; the right to security of person and freedom from cruel, infamous, or unusual punishment; and the right to a fair trial and due process.³

The Petition is inadmissible and does not demonstrate a breach of any commitment of the United States under the American Declaration. The United States respectfully requests that the Commission rule the Petition inadmissible for failure to exhaust domestic remedies, as a domestic court is currently actively considering several of the claims Petitioner has also brought before the Commission; and because the Petition does not state facts that tend to establish a violation of the American Declaration. Should the Commission nevertheless proceed with an examination of the merits, the United States also submits that the Petition lacks merit because it does not show a failure to live up to the commitments the United States has made under the American Declaration. Accordingly, the Petition should be dismissed.

¹ The United States received the Petition and Request for Precautionary Measures dated October 10, 2013. Under the Commission’s Rules of Procedure (“Rules”) Article 25(1), requests for precautionary measures are distinct from petitions to the Commission. On March 4, 2014, the Commission granted Petitioner’s request that it recommend precautionary measures. To date, the Commission has not addressed the admissibility or the merits of this Petition.

² The American Declaration is a nonbinding instrument and does not create legal rights or impose legal duties on member states of the Organization of American States. Therefore, the United States understands that a “violation” in this context means an allegation that a country has not lived up to its political commitment to uphold the American Declaration. As the Commission is aware, the United States faithfully respects its political commitment to uphold the American Declaration.

³ Petitioner lodged the Petition against not only the United States, but also against the U.S. state of Arizona. According to the Rules, the Commission is to consider petitions alleging violations of human rights “with respect to the Member States of the OAS.” Rules, art. 27. The procedures for reviewing, considering, processing, and admitting petitions involve only petitioners, the Commission, and States. Rules, arts. 26–30. Furthermore, the Commission has authority under its Statute to examine petitions only “in relation to ... member states of the Organization ...” Commission Statute, art. 20. The State of Arizona is not a member of the Organization of American States, and the Rules do not allow for a petition to be considered with respect to a sub-national entity such as Arizona. Accordingly, the Commission must declare the Petition inadmissible *in toto* with respect to the State of Arizona.

The United States further acknowledges that the Commission requested precautionary measures in this case on March 4, 2014. The United States respectfully reiterates that the Commission does not have the authority to request that States not party to the American Convention on Human Rights (“American Convention”) adopt precautionary measures. As the reasons for the U.S. position on precautionary measures have been stated to the Commission in the past,⁴ the United States will not restate them here. As such, the United States has construed the request for precautionary measures as a nonbinding recommendation, and communicated the request to the Governor, Clemency Board, and Attorney General of Arizona by separate letters dated June 19, 2014, for whatever action they may deem appropriate.

A. FACTUAL AND PROCEDURAL BACKGROUND

On March 15, 1992, Petitioner killed four people. That morning, as he walked toward his apartment, Petitioner told a maintenance man he was upset with his girlfriend and intended to get even with her.⁵ Fifteen minutes later, a customer found the lifeless body of 24-year-old shop clerk Tekleberhan Manna on the floor of a local convenience store. Petitioner had shot him in the eye from two feet away.⁶ Four hours later, Petitioner left his apartment, gun drawn. He began randomly firing his gun, nearly killing a couple trying to escape from their vehicle. He then climbed a fence and entered a nearby trailer park, where he shot 62-year-old Phyllis Mancuso through her cheek and neck as she was doing her laundry; shot 48-year-old Rebecca Carreon in her back while she was in her driveway; and shot 83-year-old Marie Pendergast twice in her stomach while she was in her home.⁷ All three women died of their wounds. Petitioner then took stole a van from its driver at gunpoint and robbed a convenience store, also at gunpoint. After this, he led law enforcement on a car chase that reached over 100 miles per hour before he was finally apprehended. When interrogated, Petitioner stated, “I did it, I know it was wrong. I know I’ll burn in hell.” When asked why he did it, Petitioner

⁴ See, e.g., Kadamovas et. al. v. United States, Petition No. P-1285-11, Response of the United States, Sept. 2, 2015, § D.

⁵ Rogovich v. Schriro, 2008 WL 2757362, No. CV-00-1896-PHX-ROS (D. Ariz. July 14, 2008), at1 (“*Rogovich District Habeas*”).

⁶ State v. Rogovich, 932 P.2d 794, 796 (Ariz. 1997).

⁷ *Id.*

responded, “It was wrong. I know it, but I just snapped. I was so angry. I just couldn’t stop. I was full of anger.”⁸

Before standing trial, Petitioner was granted a competency prescreening and a full psychiatric examination and found competent to stand trial.⁹ During his trial, Petitioner was allowed to present the testimony of two medical experts, who found he suffered from [REDACTED].¹⁰ But the state’s two mental health experts concluded that Petitioner only suffered from either [REDACTED] or from the effects of voluntary drug abuse, not from a thought or mental disorder.¹¹ Based on the evidence presented at trial, the jury convicted Petitioner of four counts of first-degree murder plus two counts of armed robbery and one count of unlawful flight from a police officer.¹² An Arizona state court sentenced Petitioner to death for the murder of the three women. He also received a life sentence for the murder of Tekleberhan Manna and prison sentences for his aggravated assault, armed robbery, and unlawful flight from law enforcement.¹³

Petitioner has been able to litigate the issues in his case through an extensive domestic judicial review process. First, Petitioner appealed his convictions, claiming that expert evidence had been improperly admitted at trial; the jury had been given improper instructions; Petitioner’s lawyer had not received his express consent for an insanity plea; and that the judge improperly applied aggravating factors during sentencing.¹⁴ The Arizona Supreme Court, Arizona’s highest court, considered Petitioner’s claims and, on its own initiative, also independently weighed whether capital punishment for the Petitioner was disproportionate to his crime. On February 4, 1997, the Arizona Supreme Court affirmed the convictions and sentences.¹⁵ Petitioner filed an application for writ of *certiorari* to the U.S. Supreme Court, but was denied.¹⁶

Petitioner next pursued post-conviction relief in Arizona state courts, seeking to vacate his conviction based on 11 separate claims, including four

⁸ Rogovich District Habeas, *supra* note 5, at 2

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² State v. Rogovich, 932 P.2d at 797.

¹³ *Id.*

¹⁴ *Id.* at 797–802.

¹⁵ *Id.*

¹⁶ Rogovich v. Arizona, 522 U.S. 829 (1997).

separate claims of ineffective assistance of counsel, improper collection and presentation of evidence, improper jury instructions, and insufficient consent to an insanity plea.¹⁷ The state trial court held an evidentiary hearing and then denied Petitioner's claims.¹⁸ The Arizona Supreme Court affirmed the lower court's judgment.¹⁹ Petitioner then requested *habeas corpus* relief in the federal courts. The U.S. District Court for the District of Arizona denied his petition for a writ of *habeas corpus*. Petitioner then appealed to the Ninth Circuit Court of Appeals, which also denied federal *habeas* relief and refused an additional request from the Petitioner to rehear the case *en banc*. The U.S. Supreme Court again denied his application for *certiorari*.²⁰

This denial of *certiorari* ended the avenues for judicial review of Petitioner's criminal conviction, but Petitioner has continued to pursue other avenues of post-conviction relief. On October 22, 2009, Petitioner filed a motion for post-conviction relief at the Maricopa County Superior Court, arguing that his death sentence violated the U.S. Constitution because of his serious mental illness. The petition was delayed by several years, due in part to numerous changes in legal counsel and extensions of time to file various motions, at Petitioner's request. The Maricopa County court considered the petition during eight days of evidentiary hearings and one day of oral argument from February 23 to March 6, 2015. Petitioner filed an amended petition for post-conviction relief on September 28, and the State filed a response on November 6. The petition remains pending before the court.²¹

¹⁷ Rogovich v. Schriro, No. CV-00-1896-PHX-ROS, 2006 WL 1600316 (D. Ariz. June 6, 2006); 2008 WL 2757362 (D. Ariz. Jul. 14, 2008)

¹⁸ *Id.* (citing state *habeas* case that "summarily denied relief without an evidentiary hearing" in October 2000).

¹⁹ Rogovich v. Schriro, No. CV-00-1896-PHX-ROS, 2006 WL 1600316 (D. Ariz. June 6, 2006); 2008 WL 2757362 (D. Ariz. Jul. 14, 2008)

²⁰ Rogovich v. Ryan, 694 F.3d 1094 (9th Cir. 2012) (denying federal *habeas* relief); *cert. denied* 134 S.Ct. 93 (mem.) (2013).

²¹ See *Ariz. v. Rogovich*, Docket No. S-0700-CR-1992002443 (hereinafter *Rogovich Arizona Docket*), available at <https://www.superiorcourt.maricopa.gov/docket/CriminalCourtCases/caseInfo.asp?caseNumber=CR1992-002443>.

B. DISCUSSION

1. Admissibility

For a petition to be admissible before the Commission, it must satisfy several procedural requirements under the Commission's Rules of Procedure ("Rules"). Among these, the Petitioner must show that he has pursued and exhausted the remedies of the domestic legal system "in accordance with the generally recognized principles of international law";²² and the facts alleged must, if true, "tend to establish a violation of the rights" set out in the American Declaration.²³ The Petition fails to meet these requirements. Accordingly, the United States respectfully requests that the Commission find the Petition inadmissible under Articles 31 and 34(a) of the Rules.

- a. *Petitioner has not satisfied Article 31's exhaustion of domestic remedies requirement because he is still challenging the legality of the death penalty in light of his alleged mental condition in proceedings before domestic courts*

The exhaustion of domestic remedies rule, set forth in Article 31 of the Rules, honors an important principle of international law. The requirement arises from the fundamental principle that vindication of human rights must in the first and principal instance be effectuated in the State that has assumed obligations or commitments with respect to those rights. A State must be given the opportunity to redress, by its own means and within the framework of its own domestic legal system, a violation that allegedly occurred within its territory. Therefore, the Statute and Rules require the Commission to examine the full array of domestic remedies that may address Petitioners' claims.

²² Rules, art 31

²³ Rules, art. 34(a). Article 34(a) of the Rules provides that "[t]he Commission shall declare any petition or case inadmissible when . . . it does not state facts that tend to establish a violation of the rights referred to in Article 27 of these Rules of Procedure . . ." Article 27, in turn, directs the Commission to "consider petitions regarding alleged violations of the human rights enshrined in the American Convention on Human Rights and other applicable instruments . . ." Article 20 of the Commission's Statute and Article 23 of the Rules identify the American Declaration as an "applicable instrument" with respect to nonparties to the American Convention. The United States is not a party to, nor has it endorsed, any of the other instruments listed in Article 23 of the Rules.

Petitioner is currently actively engaged in litigation before the Maricopa County Superior Court, a state court in Arizona; in the past year, he has submitted at least two written pleadings and participated in several evidentiary hearings. In this pending domestic case, Petitioner alleges the very same issue he brings before this Commission: that Arizona's current application of the death penalty to seriously mentally ill individuals violates the right to be free from cruel, inhuman, or degrading treatment or punishment. Should the Petitioner not prevail, he may also appeal this question to the Arizona Court of Appeals and the Arizona Supreme Court and then seek review in federal court.

The Commission should not consider Petitioner's case unless and until he has exhausted his domestic remedies on this dispositive issue.²⁴ The Commission should find that Petitioner has not satisfied the requirement of exhaustion under Article 20(c) of the Statute and Article 31 of the Rules and should, in line with the Commission's practice,²⁵ deem the Petition inadmissible and close this matter. Given its severe backlog of petitions, limited resources, and many other priorities, the Commission should not hold this matter in abeyance while Petitioner continues to exhaust remedies. Petitioner may, of course, re-file a Petition if and when he exhausts domestic remedies.

b. Petitioner's case does not warrant an exception to the exhaustion requirement of Article 31 of the Rules

The Commission's Rules, at Article 31, recognize only three exceptions to the exhaustion of domestic remedies rule: (1) when "the domestic legislation of the State concerned does not afford due process of law"; (2) when "the party alleging violation of his or her rights has been denied access to the remedies under domestic law or has been prevented from exhausting them"; and (3) when "there has been

²⁴ See, e.g., Vera v. Chile, Petition No. 157-06, Report No. 11/13, Inadmissibility Decision, Mar. 20, 2013, ¶ 20-26 (dismissing petition where petitioner had available domestic remedies); Páez García v. Venezuela, Petition No. 670-01, Report No. 13/13, Inadmissibility Decision, Mar. 20, 2013, ¶¶ 33-34 (declaring petition inadmissible for failure to exhaust where petitioner failed to request a payment awarded to him or enforcement of the court ruling that awarded the payment, and as such had failed to pursue the available domestic remedies).

²⁵ See, e.g., Guimarães v. Brazil, Petition No. 1242-07, Report No. 60/13, Inadmissibility Decision, July 16, 2013, ¶¶ 18-19; Cherokee Nation v. United States, Case No. 11.071, Report No. 6/97, Inadmissibility Decision, Mar. 12, 1997, ¶ 41 (finding petition inadmissible because "[t]here are still available, domestic remedies in the United States to be invoked and exhausted" and accordingly closing the case).

unwarranted delay in rendering a final judgment under the aforementioned remedies.” In this case, Petitioner is engaged in active domestic litigation, is being afforded due process, has been given access to remedies, and has not experienced substantially unwarranted delays in rendering a final judgment. As a result, he plainly does not fall within an exception to the exhaustion requirement.

i. U.S. domestic legislation affords procedural protections, including clemency procedures, that satisfy the American Declaration’s due process requirements

The U.S. criminal justice system gives full effect to the procedural guarantees contained in the Declaration. These protections are strong and expansive. The U.S. Constitution, which applies to federal and state criminal proceedings, establishes a wide range of rights for individuals charged with criminal offenses.

In addition, U.S. law provides special protection for those accused of capital offenses. The U.S. Supreme Court has found that the Eighth Amendment to the U.S. Constitution, which forbids cruel or unusual punishment, does not prohibit capital punishment.²⁶ However, due to the punishment’s exceptional nature, the Supreme Court has imposed significant limitations. Per the *ex post facto* clause of the Constitution, the death penalty may be carried out only under laws in effect at the time the crime was committed and must be proportionate to the individual’s culpability²⁷ and the nature of the offense.²⁸ In addition, it may only be imposed for the most heinous crimes.²⁹ Several courts have looked at this question and found that Petitioner’s quadruple murder of complete strangers in broad daylight satisfies these strict requirements.

The U.S. judicial system recognizes the severity of capital punishment, and provides a comprehensive system to protect individuals’ rights with respect to it. Once a death sentence is handed down, automatic review of the conviction as well as the sentence is mandatory in nearly every state whose laws provide for capital

²⁶ Gregg v. Georgia, 428 U.S. 153 (1976) (plurality opinion).

²⁷ Walker v. Georgia, 129 S.Ct. 453 (mem.) (2008).

²⁸ Kennedy v. Louisiana, 554 U.S. 407 (2008), citing Coker v. Georgia, 433 U.S. 584 (1977).

²⁹ There are serious crimes for which imposition of capital punishment cannot occur unless the act results in the victim’s loss of life. These include rape, *see, e.g., Kennedy*, 554 U.S. 407, *Coker*, 433 U.S. 584; kidnapping, *see, e.g., Enmund v. Florida*, 458 U.S. 782 (1982); and robbery, including armed robbery, *see, e.g., Graham v. Florida*, 560 U.S. 480 (2010); *Eberheart v. Georgia*, 433 U.S. 917 (1977).

punishment, to safeguard against the possibility that capital punishment might be imposed capriciously, arbitrarily, or disproportionately. Death sentences may also be challenged through post-conviction and federal *habeas corpus* proceedings. Prisoners routinely bring such actions in U.S. courts.³⁰ Petitioner is one such prisoner. During the 20 years since Petitioner was convicted of capital murder, he has received numerous rounds of judicial review in an extensive appeals process.

The due process protections Petitioner received are consistent with international law, and with the due process principles in Articles I, XXV, and XXVI of the American Declaration. They thus do not fall within Article 31(2)(a)'s exception to the exhaustion requirement.

ii. Petitioner has had and is continuing to have access to remedies to challenge the alleged violations in his case

Should the Commission nevertheless choose to further consider Petitioner's claims to determine whether a different exception to the exhaustion requirement applies, it should find that Petitioner's due process rights, as guaranteed by the U.S. Constitution and also reflected in the American Declaration, have not been denied, and thus Article 31(2)(b) is not triggered. Petitioner has had ample access to remedies in both federal and state courts, and is continuing to challenge alleged violations of his rights via pending litigation before the Maricopa County Superior Court, which is actively considering his case. The fact that Petitioner ultimately did not prevail at trial or on appeal in the earlier cases already heard by the courts does not demonstrate that he was denied access to remedies or that he was not accorded due process, or that his arguments and evidence were not otherwise heard and considered.

Petitioner has been given many opportunities to challenge both his conviction for capital murder and the proposed methods to be used to carry out his sentence. This included direct appeals concerning his sentence to state and federal courts; a rare reexamination by the Arizona Supreme Court, sitting *en banc*, of all evidence presented at his trial; and the opportunity to present 11 separate post-conviction challenges before two state and two federal courts, all of which unanimously confirmed that Petitioner received appropriate due process

³⁰ See, e.g., *Brown v. Plata*, 563 U.S. 493 (2011).

protections. In addition, Petitioner is now receiving a fourth round of post-conviction review, which will likely consider both his claims regarding the constitutionality of executing the mentally ill as well as the potential effect of the U.S. Supreme Court's decision in *Panetti v. Quarterman*.³¹

iii. Petitioner has not experienced undue delays during proceedings

Petitioner further alleges that this Commission may consider his claims despite his non-exhaustion of domestic remedies because he has experienced undue delays during proceedings before the Maricopa County Superior Court. However, these delays have arisen largely due to Petitioner's pursuit of various forms of post-conviction relief and other procedural due process protections before numerous state and federal courts for over 20 years. To the best of our knowledge, Petitioner's current case before the Maricopa County Superior Court appears to have been delayed due to several changes of counsel as well as several motions by Petitioner to extend time for filings.³² That the court granted these motions is not a sign of undue delay but rather that the court is ensuring due process protections for Petitioner, who has a right to his choice of counsel and to adequate time to prepare his legal arguments. In addition, the court has recently granted Petitioner a chance to file both a new motion for post-conviction relief in 2014 and an amended motion for post-conviction relief in 2015, and has allowed Plaintiff to exceed page limits in his amended post-conviction motion. As this motion has been filed, the court has not been idle; instead, it conducted a number of evidentiary hearings in the past several months.

While these procedural protections have delayed consideration of Petitioner's case, they do not indicate a denial of Petitioner's due process rights or any unwarranted delay that would trigger the exception in Article 31(2)(c). Indeed, they indicate quite the opposite—a vigorous, ongoing exercise of those rights.

As such, this Commission should find no exception to the Article 31 exhaustion requirement but should instead allow the Maricopa County Superior

³¹ 551 U.S. 930 (2007) (hereinafter *Panetti*). In *Panetti*, the U.S. Supreme Court held that criminal defendants sentenced to death may not be executed if they do not understand the reason for their imminent execution, and that once the state has set an execution date death-row inmates may litigate their competency to be executed through *habeas corpus* proceedings. Arizona filed a motion concerning this case in 2015; petitioner filed a response the next day. It appears Petitioner may have relied upon the *Panetti* case in his own arguments concerning his mental state.

³² See Rogovich Arizona Docket, *supra* note 21.

Court rule on the constitutionality of applying the death penalty to severely mentally ill persons. The Commission should dismiss the Petition for failure to exhaust and allow the rest of the domestic process to continue through to conclusion.

c. The Petition is inadmissible because it does not state facts that tend to establish a violation of the rights in the American Declaration

The Commission should also, or alternatively, declare the Petition inadmissible under Article 34(a) of the Rules because the facts stated in the Petition do not tend to establish a violation of the rights in the American Declaration. Three of Petitioner's claims concern practices that do not implicate the Declaration or violate U.S. law. The Declaration does not purport to ban executing a mentally ill prisoner who has committed heinous crimes; nor does it prohibit use of lethal injection to do so. Neither does the Declaration require prisoners to have access to executive clemency. Petitioner's two due process claims likewise do not constitute violations of the Declaration. Petitioner has not shown that his legal representation during his 20 years of trial, appellate, and post-conviction review fails to meet international or U.S. constitutional standards of competence. Likewise, he has shown no specific instances of prison conditions that would amount to a violation of the Declaration's prohibition on cruel, infamous, or unusual punishment. As a result the Commission should find this Petition inadmissible.

i. Capital punishment is compatible with the right to life and does not constitute cruel, infamous, or unusual punishment

International law permits capital punishment when it is duly prescribed for commission of the most serious crimes and carried out by a state in accordance with due process of law and stringent procedural safeguards. This is the case in the United States.

The United States promotes and respects the right to life consistent with Article I of the American Declaration and Article 3 of the Universal Declaration of Human Rights. The right to life does not proscribe capital punishment. For example, Article 6 of the International Covenant on Civil and Political Rights, to

which the United States is a party, promotes the “right to life” while expressly recognizing States’ right to impose capital punishment for the most serious crimes. This Commission has also in past decisions declined to interpret Article I of the American Declaration as prohibiting use of the death penalty *per se*.³³

Moreover, the United States has not signed or ratified any international convention obligating the removal of capital punishment. A number of countries have chosen to become parties to other treaties obligating them to abolish capital punishment, either entirely or in ordinary circumstances. These treaties, however, neither bind non-parties such as the United States nor change the status of capital punishment under international law, customary or otherwise.

- ii. Neither the American Declaration nor U.S. law prohibit capital punishment for individuals who are seriously mentally ill but whose mental condition does not rise to the level of insanity or mental incapacity

As noted above, the U.S. Supreme Court has found that the Eighth Amendment to the U.S. Constitution, which forbids cruel or unusual punishment, does not prohibit capital punishment.³⁴ The majority of U.S. citizens favor the possibility of capital punishment in connection with the most serious crimes. As a consequence, the laws of a majority of the states (31 out of 50), as well as federal and military law, authorize capital punishment for such crimes. However, capital punishment can only occur in accordance with due process of law and stringent procedural safeguards guaranteed by the U.S. Constitution and relevant state constitutions and mirrored in international instruments to which the United States is a party.

International consensus and U.S. law condemn execution of insane persons and those who suffer from severe mental impairment.³⁵ However, there is no

³³ See, e.g., *Domingues v. United States*, Case 12.285, Report No. 62/02, Annual Report of the IACHR (2002) ¶ 52. In this report, the Commission clarified that Article I only prohibits application of the death penalty “when doing so would result in an arbitrary deprivation of life or would otherwise be rendered cruel, infamous or unusual punishment.” *Id.*

³⁴ *Gregg*, 428 U.S. 153.

³⁵ See, e.g., UN Economic and Social Council Resolution No. 1984/50, Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty, May 25, 1984, ¶ 3, available at <http://www.ohchr.org/EN/ProfessionalInterest/Pages/DeathPenalty.aspx>; see also *Ford v. Wainwright*, 477 U.S. 399 (1986) (death penalty is impermissible for those suffering from insanity); *Atkins v. Virginia*, 536 U.S. 304 (2002) (death penalty is impermissible for those suffering from severe mental retardation). In this brief we

similar consensus regarding the execution of seriously mentally ill individuals who are determined not to be insane or suffering from severe mental impairment. Indeed, there is no internationally agreed upon definition of “seriously mentally ill” individuals. Petitioner cites no international instruments and provides no clear definition of this term. International instruments, including the Inter-American Convention on the Elimination of All Forms of Discrimination Against Persons with Disabilities and the United Nations (UN) Principles for the Protection of Persons with Mental Illness and for the Improvement of Mental Health Care, also fail to define what constitutes “serious mental illness,” further evincing the lack of international consensus—much less a rule of international law—regarding the class of persons to whom any alleged prohibition on executions would apply.

In support of his arguments, Petitioner quotes a passage from *Francis v. Jamaica* in which the UN Human Rights Committee stated that the ICCPR “specifically...forbid[s] the execution of persons with severe mental illness.”³⁶ In that case, however, the Committee condemned the execution of a mentally ill individual not due to his mental state but due to the State’s 13-year delay in issuing his death sentence, which it deemed a due process violation.³⁷ Thus, this decision is not relevant here, where Petitioner was sentenced to the death penalty within one year after the crime was committed. In any event the United States has not ratified the first Optional Protocol to the ICCPR and thus is not subject to the individual petition system of the Human Rights Committee.

Petitioner has offered no evidence showing that he suffers from mental illness that rises to the level of insanity established in the U.S. Supreme Court opinion in *Ford v. Wainwright*, which bans the death penalty for those who are “[un]aware of [their] impending execution and of the reason for it.”³⁸ Petitioner has not shown that at any point in time during his trial and appellate proceedings he has not understood that he will be executed for the murder of four innocent

intend the term “severe mental impairment” to have the same meaning as “mental retardation” as used by the U.S. Supreme Court in *Atkins*.

³⁶ Petition at 22.

³⁷ *Francis v. Jamaica*, Communication No. 606/1994, U.N.H.R.C. (Aug. 12, 1994).

³⁸ *Ford*, 477 U.S. at 400.

civilians. Indeed, during questioning, Petitioner clearly demonstrated that that his anger-fueled murders were wrong and deserved severe punishment.³⁹

Nor has Petitioner claimed to suffer from mental handicap that would satisfy the standard in the U.S. Supreme Court's opinion in *Atkins v. Virginia*, which bans the death penalty for defendants that exhibit "not only subaverage intellectual functioning, but also significant limitations in adaptive skills such as communication, self-care, and self-direction that became manifest before age 18 ..." plus "diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others."⁴⁰ Petitioner has not shown that he exhibited subaverage intellectual functioning or significant adaptive limitations before the age of 18. Indeed, evidence presented at trial showed that the lethal anger he exhibited may indicate a personality disorder or the effects of illegal drugs, but does not necessarily rise to the level of mental incapacity.⁴¹ As a result, Petitioner offers no proof that he is mentally incompetent or that his mental condition has deteriorated to the point of insanity that would render application of the death penalty impermissible.

Petitioner seems to tacitly acknowledge that his mental condition would not prohibit the imposition of the death penalty under current U.S. Supreme Court jurisprudence, as he argues that the Court's cases' rationale, but not the substance of their holdings, should govern his case. In so doing, Petitioner mischaracterizes the current state of U.S. law concerning execution of the mentally ill. To date, the U.S. Supreme Court has not determined that execution of severely mentally ill individuals constitutes a due process violation. In recent cases on the subject, the Court has instead said that mentally ill individuals may be executed as long as they understand the reason for their execution (i.e., cannot make a showing of insanity).⁴²

The Court has also not yet found that U.S. public opinion overwhelmingly supports banning its application to the mentally ill. And while several states have banned execution of the severely mentally ill, others continue to hand out death

³⁹ *Rogovich District Habeas*, *supra* note 5, at 2.

⁴⁰ *Atkins*, 536 U.S. 304.

⁴¹ *Rogovich District Habeas*, *supra* note 5, at 2.

⁴² *Panetti*, 551 U.S. at 934.

sentences to mentally ill individuals who have committed the most heinous crimes.⁴³ Petitioner's sentence cannot therefore be considered to violate a consensual international or constitutional standard banning application of the death penalty to mentally ill individuals, as no such standard on this issue currently exists. As such, Petitioner's claims in this regard fail to state facts that tend to establish a violation of the rights in the American Declaration.

iii. Petitioner's legal representation during 20 years of trial, appellate, and post-conviction relief proceedings does not constitute a due process violation, as his counsel met constitutional standards of competence

Petitioner alleges that the conduct of his trial and appellate counsel violates his due process rights as protected by Article XXV and XXVI of the American Declaration and the Sixth Amendment of the U.S. Constitution. More specifically, Petitioner alleges that his trial counsel violated his rights by presenting an insanity defense without his consent and by excluding him from jury selection. In addition, he claims that appellate counsel violated his rights by failing to challenge two aspects of his sentencing.

These claims do not rise to the level of constitutional due process violations regarding effective assistance of counsel, much less of any protections set forth in the American Declaration. Furthermore, four domestic courts have already considered both claims and all found that they did not violate Petitioner's due process rights. The Commission should respect the fourth-instance formula and not second-guess the judgment of these courts.⁴⁴

The U.S. Supreme Court has defined adequate representation by counsel via the "*Strickland* test," named after the Court decision where it was articulated.⁴⁵ Under this test, a petitioner must show that counsel's performance was deficient and that deficiency prejudiced the defense. To establish deficiency, counsel's representation must not fall below an objective standard of reasonableness in order

⁴³ See, e.g., *State ex rel. Strong v. Griffith*, 462 S.W.3d 732 (Mo. Sup. Ct. 2015) (en banc); *Power v. State of Florida*, 992 So. 2d 218 (Fla. 2008); *Brannan v. State*, 275 Ga. 70; *cert. denied* 537 U.S. 1021 (2002) (upholding death sentence for inmate suffering from post-traumatic stress disorder and bipolar disorder).

⁴⁴ See, e.g., *Caballero v. Honduras*, Report No. 66/14, Petition No. 1180-03, Report on Inadmissibility, July 25, 2014, ¶ 36 ("The Commission cannot take upon itself the functions of an appeals court ... unless there is unequivocal evidence that guarantees of due process ... have been violated.").

⁴⁵ See *Strickland v. Washington*, 466 U.S. 668, 687–68 (1984).

to guarantee a defendant due process of law. The Court in *Strickland* cautioned that when assessing counsel's performance after the fact, courts must make every effort to eliminate "the distorting effects of hindsight."⁴⁶ Decisions by counsel at trial and sentencing—including decisions not to develop certain lines of argument—may in retrospect seem like bad ones but may nonetheless have been valid strategic decisions at the time. In addition, counsel may make certain decisions based on privileged information to which she, but not a court or the Commission, is privy. The decisions in question here meet this standard of reasonableness.

Petitioner alleges that his trial counsel violated his rights by presenting an insanity defense at trial without his affirmative consent and by excluding him from jury selection. These claims seem confusing and contradictory given Petitioner's other assertions of his severe mental illness. Indeed, if Petitioner's statements about his mental state were true, they are difficult to reconcile with these assertions about his ability to knowingly, willingly, or intelligently consent to such a defense. At any rate, an attorney should have "wide latitude" to make strategic decisions, such as deciding whether to present a certain defense to the jury.⁴⁷ Thus while attorneys should keep clients informed of important decisions, they are not required to obtain affirmative consent from those clients regarding strategic decisions such as this one.⁴⁸

This issue in Petitioner's case has also already received extensive consideration by state and federal courts. An Arizona post-conviction relief court and the Arizona Supreme Court held that invocation of the insanity defense without Petitioner's consent was not a due process violation. More specifically, the Arizona Supreme Court found that this defense "did not involve a concession of the State's basic facts" or "operate as a waiver of fundamental rights"; and noted that there was no way Petitioner could have not known the insanity defense would be presented, as he sat through pretrial hearings addressing the insanity defense, as well as trial, and never indicated any objection.⁴⁹ Two federal courts agreed,

⁴⁶ *Id.* at 689

⁴⁷ *Id.* at 709.

⁴⁸ See *Cuyler v. Sullivan*, 446 U.S. 335, 346 (1980).

⁴⁹ *State v. Rogovich*, 932 P.2d 794, 799 (Az. Sup. Ct. 1997).

holding that this was not an unreasonable application of the law on due process.⁵⁰ This issue has received review in four domestic courts, which all found no violation of due process. The Commission should not disturb this unanimous conclusion.

Petitioner also alleges that appellate counsel should have challenged two aspects of his sentencing. First, he alleges that counsel should have appealed the trial court's decision to allow the prosecutor to state that "not guilty by reason of insanity is still not guilty," thereby prejudicing his insanity defense. This argument seems somewhat contradictory given Petitioner's objection to introduction of the insanity plea. In addition, one state and two federal courts confirmed that the prosecutor's statement was an appropriate characterization of the burden of proof in the case and thus appellate counsel's failure to challenge this statement was not a due process violation.⁵¹ Similarly, Petitioner alleges that appellate counsel should have challenged the state court's use of aggravating factors during sentencing. A federal court found that "Rogovich provides no basis for concluding that had appellate counsel challenged the ... aggravat[ing factor] himself, he could have convinced the state court to [not apply the death penalty]."⁵² Nor does he in his current Petition. The Commission should find, as two federal and one state court have already found, that Petitioner's due process claims on this point likewise fail to state facts that tend to establish a violation of the rights in the American Declaration, as required by Article 34(a) of the Rules.

Finally, counsel's decision not to present further evidence regarding Petitioner's mental competency should not be considered a due process violation. Counsel's choice not to present evidence only amounts to ineffective assistance of counsel if it is manifestly unreasonable.⁵³ Here, this choice was instead quite reasonable. Petitioner had already had many opportunities to present such evidence: before the trial even began he underwent a competency prescreening and full psychiatric examination which showed him competent to undergo trial.⁵⁴

⁵⁰ Rogovich v. Schriro, 2008 WL 2757362 (D. Ariz. July 14, 2008), *7-*8; Rogovich v. Ryan, 694 F.3d 1094, 1103–05 (9th Cir. 2012) (noting that "there was no clearly established federal law requiring the defendant's express consent to the insanity defense. There is none today.").

⁵¹ See *Rogovich*, 694 F.3d at 1106 (citing *Rogovich v. Schriro* and the state post-conviction relief decision).

⁵² *Id.* at 1147.

⁵³ *Strickland*, 466 U.S. at 700.

⁵⁴ *Rogovich* District Habeas, *supra* note 5, at 2.

Likewise, during trial four mental health experts considered his case; two found he might suffer from [REDACTED] while two others found his lethal, violent behavior was the result of [REDACTED], not mental illness, or even just the result of drug intoxication.⁵⁵ Given the ineffectiveness of these efforts, counsel's decision not to raise more evidence of Petitioner's alleged mental illness was far from unreasonable. Counsel should not therefore be found to have rendered ineffective assistance for failing to raise issues that would not reasonably affect—or even adversely affect—the outcome of a defendant's case.⁵⁶

In addition, Petitioner is not barred from presenting further evidence of his mental state before a domestic court. Indeed, he has had the opportunity to present this information—and likely has already presented this information—before the Maricopa County Superior Court during recent evidentiary hearings concerning the constitutionality of applying of his death penalty in light of his severe mental illness.

For these reasons, the Commission should not find that Petitioner's counsel's reasonable decisions under the specific factual circumstances of the case violate his rights to fair trial and due process of law set forth in the American Declaration. As Petitioner has not stated facts that tend to establish a violation of the Declaration, the Petition is therefore inadmissible under Article 34(a) and must be dismissed.

iv. Use of lethal injection to carry out Petitioner's sentence would not be not cruel, infamous, or unusual punishment as defined by the American Declaration and other international instruments

As noted above, capital punishment is legally permissible under international and U.S. law.⁵⁷ It must therefore follow that “there must be methods of execution that are compatible with [human rights norms].”⁵⁸ States that retain capital punishment have often adopted lethal injection as a more humane method than other methods that have been tried or used in the past.⁵⁹ And the UN Human

⁵⁵ *Id.*

⁵⁶ *See Strickland*, 466 U.S. at 699–700.

⁵⁷ *See* Section B(1)(c)(i), *supra*.

⁵⁸ *Chitat Ng v. Canada*, Communication No. 469/1991, U.N. Doc. CCPR/C/49/D/469/1991 (1994) (Kurt Hendl, dissenting) ¶ 18.

⁵⁹ *Id.*

Rights Committee has taken the view that lethal injection does not violate Article 7 of the International Covenant on Civil and Political Rights, which prohibits torture and cruel, inhuman or degrading punishment; and medical experimentation without consent.⁶⁰

In this context, the Commission should provide the State with a wide margin of appreciation, deferring to the discretion of local actors who are required to make difficult decisions based on their own factual assessments.⁶¹ Such a margin of appreciation is particularly useful when implementation of a legitimate state goal requires fact-intensive judgment calls. The complicated medical and scientific circumstances in this matter counsel strongly in favor of deferring to the discretion of those responsible for decision-making. In these types of difficult cases, international bodies such as the Commission and the Inter-American Court of Human Rights use this standard to respect state sovereignty and conserve their limited resources while still ensuring that human rights are protected.⁶²

U.S. courts have carefully reviewed and rejected other claims alleging that U.S. states' lethal injection protocols constitute cruel and unusual punishment. In *Baze v. Rees*, the U.S. Supreme Court held that Kentucky's lethal injection protocol—a combination of three drugs used, at the time, by at least thirty other states—did not constitute cruel and unusual punishment, taking into consideration extensive information regarding risks of improper administration.⁶³ The Court observed that almost all states that administer capital punishment in the United States as well as the federal government use lethal injection as the method of execution because it is more humane than other methods.⁶⁴ Noting that capital punishment is constitutional, the Supreme Court stated the obvious point that some

⁶⁰ See *Cox v. Canada*, Communication No. 539/1993, U.N. Doc. CCPR/C/52/D/539/1993 (1994), ¶ 17.3; *Kindler v. Canada*, Communication No. 470/1991, U.N. Doc. CCPR/C/48/D/470/1991 (1993), ¶ 16.

⁶¹ See, e.g., *Hertzberg v. Finland*, Communication No. R. 14/61, U.N. Doc. A/37/40 (1982), ¶ 10.3 (“[P]ublic morals differ widely. There is no universally applicable common standard, consequently, in this respect, a certain margin of discretion must be accorded to the responsible national authorities.”); *Ireland v. U.K.*, *Sunday Times v. U.K.*, 245 Eur. Ct. H.R. (1980) (holding that the United Kingdom’s injunction against the publication of an article violated the European Convention of Human Rights, but recognizing that courts should be granted a margin of appreciation because of their proximity to the events in question).

⁶² See, e.g., *Vejarano v. Peru*, Case No. 11.166, Report No. 48/00, Apr. 13, 2000, ¶ 55; *Artavia Murillo v. Costa Rica*, Preliminary Objections, Merits, Reparations and Costs, Judgment, Nov. 28, 2012, Inter-Am. Ct. H.R. (Ser. C) No. 257 (2012).

⁶³ 553 U.S. 35 (2008).

⁶⁴ *Id.* at 42; *accord* *Glossip v. Gross*, 135 S.Ct. 2726, 2732 (2015).

means is necessary for carrying it out, and that the Constitution does not demand the avoidance of any possible pain.⁶⁵

Arizona, the state at issue in this case, has complied with constitutional requirements and has sought to make lethal injections as humane as possible. Arizona's lethal injection protocol has historically called for administration of a formula nearly identical to the one the U.S. Supreme Court has deemed constitutional.⁶⁶ However, individual inmates' varied reactions to these drugs during recent executions led Arizona officials to consult with independent medical and pharmacological experts in order to determine which lethal injection combinations will prove most painless and effective despite these variations.⁶⁷ A moratorium on all executions in Arizona has been in effect during this study to ensure that all lethal injections it administered were done so as humanely as possible.

In light of these considerations, Petitioner's claims in this regard do not state facts that attend to establish a violation of Article XXV of the American Declaration and are thus inadmissible under Article 34(a).

- v. Petitioner's claims regarding his conditions of confinement on death row do not rise to the level of cruel, infamous, or unusual punishment as set forth in the American Declaration in light of his lengthy post-conviction proceedings, the gravity of his crimes, and the threat he poses to himself and others

The United States' appellate process affords those convicted of capital offenses all the protections set forth under international law and in the international commitments undertaken by the United States. In addition, federal *habeas corpus* procedures enable federal courts to review substantive and procedural challenges to every death sentence imposed by state courts. It is a capital prisoner's right to take full advantage of mandatory and discretionary appeals at the state and federal

⁶⁵ *Glossip*, 135 S.Ct. at 2733; *Baze*, 553 U.S. at 51–52

⁶⁶ Az. Dep't of Corr., Exec. Order 710, Execution Procedures (Sept. 21, 2012), available at <https://corrections.az.gov/sites/default/files/policies/700/0710u.pdf>.

⁶⁷ Az. Dep't of Corr., Assessment and Review of the Arizona Department of Corrections Execution Protocols (Dec. 15, 2014), at 46–49, available at http://www.supremecourt.gov/opinions/URLs_Cited/OT2014/14-7955/14-7955-3.pdf.

level as well as *habeas* death penalty proceedings. It is not uncommon that many years may pass before this extensive appeals process is completed.

When lengthy delays between initial sentencing and execution are caused by a capital prisoner's use of the many avenues open to him for appeal, he cannot then credibly claim that that delay itself amounted to cruel, infamous, or unusual punishment as set forth in Article XXV of the American Declaration. The Declaration does not call for States to alter detention arrangements, which may be mandated by the security risks presented by convicted prisoners on death row, merely to avoid potential hardship which might be associated with a prolonged detention during a capital prisoner's post-conviction relief proceedings.

Courts in the United States have consistently rejected the argument that a delay in execution can itself constitute cruel and unusual punishment under the U.S. Constitution.⁶⁸ The U.S. Constitution along with federal and state laws also establishes standards of care to which all inmates in the United States are entitled. These standards are consistent with the rights recognized in the American Declaration as well as other non-binding principles of fair prisoner treatment such as the UN Standard Minimum Rules for the Treatment of Prisoners. Furthermore, the delayed execution Petitioner faces is very different than that in *Francis v. Jamaica*, which the petition cites. There, an inmate waited in difficult detention conditions for thirteen years without receiving any sentence whatsoever. That inmate faced grinding uncertainty regarding his fate—a mental strain which may have led to his mental illness. In contrast, Petitioner has received a prompt sentence from an impartial state judge, and any delay or uncertainty he experiences arise from his choice to challenge that sentence in various fora per the United States' strong procedural protections for prisoners facing the death penalty.

In addition, solitary confinement does not necessarily violate prisoners' due process rights. U.S. courts have found that prisons may not subject inmates to solitary confinement with deliberate indifference to resulting serious harms, including suicides and other serious self-injury.⁶⁹ Inmates also cannot be subjected

⁶⁸ See, e.g., *Foster v. Florida*, 537 U.S. 990 (2002); *Knight v. Florida*, 528 U.S. 990 (1999); see also *Allen v. Ornoski*, 435 F.3d 946, 958 (9th Cir. 2006) ("The Supreme Court has never held that execution after a long tenure on death row is cruel and unusual punishment.").

⁶⁹ *Farmer v. Brennan*, 511 U.S. 825, 843 (1994).

to solitary confinement absent an administrative hearing and other procedural protections that preserve their right to due process.⁷⁰

However, for certain inmates, maximum security facilities and solitary confinement may be necessary to protect themselves, the safety of the community at large, or other members of the prison population. In situations involving prisoners sentenced to death, serious considerations of safety to others within the prison, such as guards and other prisoners, may also be present because such prisoners may be less likely to be deterred from committing serious crimes out of concern for the potential punishment that may be imposed, as they have already been sentenced to death.

In these instances, U.S. courts protect due process rights but show deference to individual states' interest in punishment, deterrence, and rehabilitation, as well as the need for deference to experienced and expert prison administrators faced with the difficult and dangerous task of housing large numbers of convicted criminals.⁷¹ The Commission has itself noted that determining what prison conditions are appropriate for each prisoner is a case-specific inquiry; determining whether prison conditions are inhumane "should be done on a case-by-case basis," in light of prisoner's physical and mental condition and other personal circumstances.⁷²

Petitioner's due process rights do not, however, lessen the security threat he poses. Petitioner has shown that his anger can lead to lethal, sustained, unpredictable outbursts against unrelated bystanders. As a result, his incarceration in high-security facilities does not violate his due process rights. Arizona authorities have deemed it necessary to incarcerate Petitioner, along with most other death row inmates, in Arizona State Prison Complex Eyman's Special Management Unit II (SMU II), a high-security facility. This facility features some restrictive conditions Arizona has deemed necessary to prevent the most violent inmates convicted of the most serious crimes from harming guards, other inmates, or themselves. Petitioner, who violently killed four unarmed and innocent persons who had the misfortune of being in the vicinity during his lethal rampage,

⁷⁰ *Wilkinson v. Austin*, 545 U.S. 209, 223-224 (2005).

⁷¹ *Brown v. Plata*, 563 U.S. 493 (2011).

⁷² IACHR, Report on Terrorism and Human Rights, OEA/Serv.L/V/II.116, Doc.5, rev. 1 ¶ 160 (Oct 22, 2002).

threatened the lives of four other unarmed bystanders, and then led police on a dangerous high-speed car chase, is such an inmate. And like many other inmates sentenced to death, he has no incentive to respect other inmates' physical safety, as there is no realistic possibility that he will receive a reduced sentence in exchange for good behavior.

Prison authorities could also reasonably limit Petitioner's contact with others given his demonstrated tendency to act violently and erratically towards others and himself. Petitioner has not only killed four people without motive but also exhibited such strong tendencies toward self-harm that he had to be placed in four-point restraints at several points during his detention and incarceration.⁷³ This could reasonably lead prison authorities to conclude that Petitioner should not be housed with or have substantial contact with other prisoners. The Commission should show deference to these authorities' choices regarding Petitioner's place and conditions of detention, as these authorities possess information regarding the health and safety risks that Petitioner poses to others (and, potentially, they to him). The Commission is not in a position to second-guess these difficult decisions.

The Commission should likewise find that Petitioner's other claims regarding the conditions of his incarceration and their effect on his mental condition do not establish a violation of the rights set forth in the American Declaration. Petitioner provides no other specific evidence regarding his own living conditions, access to exercise, and access to medical and psychological treatment, instead relying on general observations from a 2012 Amnesty International report. Conditions may vary widely within prisons depending on prison capacity, security concerns, and prisoner population; as a result, this report does not necessarily represent Petitioner's own experience or the general state of conditions at SMU II and other Arizona high-security prisons.

In addition, Petitioner submits no evidence regarding the alleged negative psychological or physical effects he has suffered due to his incarceration. Indeed, the only specific evidence Petitioner provides regarding his psychological state shows that while incarcerated, Prisoner has begun receiving regular psychological examinations, treatment, and medication for the first time in his life. This hardly

⁷³ Petition at 19.

amounts to facts that tend to establish a violation of Article XXV of the Declaration and is thus inadmissible under Article 34(a).

- vi. Access to clemency proceedings is not a due process right included in the American Declaration, and Arizona clemency proceedings violate neither the Declaration nor the U.S. Constitution

International and U.S. law do not grant prisoners a right to clemency proceedings. Clemency proceedings are fundamentally different than judicial proceedings: they are not judicial proceedings to which due process protections can apply but instead involve an exercise of the discretionary power of the executive that is not subject to judicial review.⁷⁴ As a result, the U.S. Supreme Court has never recognized a case in which clemency proceedings conducted pursuant to a state's executive powers have implicated due process.⁷⁵ Instead, before the clemency stage is even reached, U.S. defendants receive "an adequate opportunity to participate in the mercy process" under independent judicial oversight capable of guaranteeing due process rights.⁷⁶ In U.S. state and federal courts, the "mercy process" happens during the trial and sentencing phases, when defendants can present mitigating evidence that allows judges and juries to take such evidence into account when determining guilt or innocence and sentencing, within the bounds of the law. Once convicted and sentenced, prisoners can, *inter alia*, challenge their sentences as being unduly harsh and can argue against any exclusion of mitigating evidence during direct appeal and during state and federal *habeas* review.

Although it is not required to do so by international or U.S. law, Arizona affords prisoners a robust clemency process. Arizona's Board of Executive Clemency consists of five individuals appointed to review prisoners' requests for clemency.⁷⁷ While members are appointed by the Governor of Arizona, governors may only remove board members for cause.⁷⁸ All Board members must undergo a four-week training course administered by the Attorney General which teaches

⁷⁴ See, e.g., *Bacon v. Lee*, 549 S.E.2d 840 (N.C. Sup. Ct. 2001).

⁷⁵ *Schad v. Brewer*, 732 F.3d 946 (9th. Cir. 2012).

⁷⁶ *Rudolph Baptiste v. Grenada*, Case No. 11.743, Report No. 38/00, OE/Ser/L/V/II.106 Doc.3 rev at ¶ 120 (1999), cited in Petition at 50.

⁷⁷ Ariz. Rev. Stat. § 31-401(A).

⁷⁸ *Id.* § 31-401(E).

them the legal and ethical requirements of their position.⁷⁹ This prepares them to conduct a hearing in which they reconsider all evidence and arguments presented at trial. If the Board members find that the sentence imposed was clearly excessive given the nature of the offense and the record of the offender by “clear and convincing evidence,” a standard lower than that required in criminal trials, they may recommend clemency.⁸⁰ Thus executive pardons are reviewed by a board of ordinary citizens who have been trained to properly examine prisoners’ trial and sentencing proceedings.

Arizona has recently improved the independence and effectiveness of its Board. As concerns Petitioner’s allegations that former Arizona Governor Brewer unduly pressured Board members, two federal courts failed to find these allegations convincing enough to amount to a fundamental deprivation of prisoners’ rights.⁸¹ Nevertheless, Arizona has conducted an extensive, transparent, independent investigation into Board functioning that produced recommendations for stronger conflict of interest protections and more effective and efficient case consideration strategies.⁸² Accordingly, should Petitioner’s case come under review by a Board, its treatment will likely be substantially different than what is described in his Petition.

Petitioner’s sentence was prescribed for the commission of the most serious crimes in accordance with due process of the law and stringent procedural safeguards. Petitioner was convicted of killing four innocent civilians and committing armed robbery. Over the last 20 years, Petitioner has benefited from the United States’ robust due process protections. He continues to do so today in his second *habeas* petition before a state court. Petitioner also received repeated opportunities to present mitigating evidence at trial and during sentencing. In addition, Arizona has chosen to make clemency proceedings available to Petitioner, providing him the opportunity for yet another review of his case. As a result, Petitioner’s claims regarding possible clemency review do not state facts that tend to establish a violation of the American Declaration. Since this claim, like

⁷⁹ *Id.* § 31-401(C).

⁸⁰ *Id.* § 31-402(C)(2).

⁸¹ *Schad v. Brewer*, 2013 WL 5524547 (D.Ariz. 2013); *aff’d* *Schad v. Brewer*, 732 F.3d 946 (9th. Cir. 2013); *cert. denied* 134 S.Ct. 417 (2013).

⁸² Performance Audit and Sunset Review, Arizona Board of Executive Clemency, Sept. 2014, *available at* http://www.azauditor.gov/sites/default/files/14-105_Report_0.pdf, p ii-iv.

Petitioner's other claims, fails to meet the requirement in Article 34(a) of the Rules, the Commission must deem the Petition inadmissible and close this matter.

2. Merits

For the reasons set forth above, the Commission should not reach the merits of the Petition because it is inadmissible in its entirety. Should the Commission nevertheless declare the Petition admissible, the United States urges it to find the Petition meritless. While the United States reserves the right to provide further views on the merits in such an eventuality, it reiterates that the American Declaration does not prohibit capital punishment for mentally ill individuals who have committed the most serious crimes nor does it prohibit use of lethal injection. In addition, Petitioner has presented no allegations regarding the competence of his legal representation during his 20 years of post-conviction proceedings that demonstrate due process violations. Furthermore, he offers no specific examples of how his own conditions of confinement violate international standards apart from the length of his incarceration; and extended incarceration due to his choice to pursue post-conviction relief should not be considered a due process violation. Finally, Petitioner has no internationally-protected right to clemency proceedings; and will be afforded robust clemency consideration should his case reach that stage. These arguments are elaborated in Section B(1) above. The Commission should therefore find Petitioner's claims meritless.

C. CONCLUSION

The criminal justice system in the United States embodies the protections set forth in the American Declaration. The United States has afforded Petitioner comprehensive opportunities to have his case reviewed and his rights protected. Petitioner has received ample due process over 20 years, with more than 14 judgments issued with respect to him at both the state and federal levels.

Because Petitioner continues to avail himself of domestic remedies before the Maricopa County Superior Court and because this Petition fails to state facts that tend to establish violations of the American Declaration, the Commission

should consider this Petition inadmissible. It is not within the Commission's jurisdiction to assume the role of an appeals court or to assess the merits of an allegation that have not been pursued and exhausted domestically. Accordingly, the United States respectfully requests that the Commission declare the petition inadmissible and Petitioner's claims unfounded. Alternatively, for all the reasons set forth above, the Commission should rule the claims meritless and dismiss the Petition in its entirety.