



United States Department of State

*United States Permanent Mission to the
Organization of American States*

Washington, D.C. 20520

November 19, 2019

Dr. Paulo Abrão
Executive Secretary
Inter-American Commission on Human Rights
Organization of American States
Washington, D.C. 20006

Re: Lezmond C. Mitchell, P-627-17
Further Observations of the United States

Dear Dr. Abrão:

The United States Government has the honor of submitting to the Inter-American Commission on Human Rights ("Commission") further observations on the communications forwarded to the United States in the above-referenced matter on July 19, 2019, including the submission on behalf of Mr. Mitchell dated October 26, 2018. Please find enclosed the United States' observations. We trust this information is useful to the Commission and 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 'Carlos Trujillo', with a stylized flourish at the end.

Carlos Trujillo
Ambassador

Enclosure: as stated

LEZMOND C. MITCHELL, P-627-17
FURTHER OBSERVATIONS OF THE UNITED STATES

The Government of the United States appreciates the opportunity to provide further observations on the communications forwarded to the United States in the above-referenced matter, including the submission on behalf of Lezmond Mitchell dated October 26, 2018¹ (hereinafter, “Petitioner Merits Submission” or “Merits Submission”).

The United States recalls its submission of September 21, 2017, in this matter² (hereinafter, “U.S. Admissibility Submission”). In that submission, the United States explained that the April 12, 2017 “Petition Alleging Violations of Human Rights of Lezmond C. Mitchell” (“Petition”) is inadmissible and does not demonstrate a failure of the United States to live up to any commitment under the American Declaration of the Rights and Duties of Man (“American Declaration”). Although the Commission subsequently invoked Article 36(3) of the Rules of Procedure (“the Rules”) to defer a decision on the admissibility of the Petition,³ the United States reiterates the positions of its September 21, 2017 submission and respectfully requests again that the Commission find the Petition inadmissible.

For the reasons explained below, the Petition remains inadmissible under Articles 31 and 34 of the Rules because the Petition does not state facts that tend to establish a violation of the rights referred to in Article 27 of the Rules and the Petitioner continues to exhaust his domestic remedies.

I. Petitioner Continues to Exhaust Domestic Remedies

The Commission should declare the Petition inadmissible because the Petitioner has not satisfied his duty to demonstrate that he has “invoked and exhausted” domestic remedies under Article 20(c) of the Commission’s Statute and Article 31 of the Rules.

The Commission has repeatedly emphasized that a petitioner has the duty to pursue all available domestic remedies. Article 31(1) of the Rules states that “[i]n order to decide on the admissibility of a matter, the Commission shall verify whether the remedies of the domestic legal system have been pursued and exhausted in accordance with the generally recognized principles of international law.” As the Commission is aware, this provision of the Rules is based on the general requirement of exhaustion of domestic remedies reflected in customary international law, as a means of ensuring that international proceedings respect State sovereignty. The requirement of exhaustion ensures that the State having jurisdiction over an alleged human rights violation has the opportunity to redress the allegation by its own means within the framework of its own

¹ Mitchell v. United States, P-627-17, Further Submission in Support of Admissibility and Merits in Response to the State’s Filing (Oct. 26, 2018).

² Mitchell v. United States, P-627-17, Response of the United States (Sept. 21, 2017).

³ Letter from the IACHR to the United States of April 25, 2018.

domestic legal system.⁴ A State conducting domestic proceedings within its national system has the sovereign right to be given the opportunity to determine the merits of a claim and decide the appropriate remedy before there is resort to an international body.⁵ The Inter-American Court of Human Rights has remarked that the exhaustion requirement is of particular importance “in the international jurisdiction of human rights, because the latter reinforces or complements the domestic jurisdiction.”⁶

The Commission has repeatedly emphasized that the petitioner has the duty to pursue all available domestic remedies.⁷ Although remedies may be considered ineffective when a claim has “no reasonable prospect of success” before domestic courts, “for example because the State’s highest court has recently rejected proceedings in which the issue posed in a petition had been raised[,] [m]ere doubt as to the prospect of success in going to court is not sufficient to exempt a petitioner from exhausting domestic remedies.”⁸ The Commission has also found that, “in order to give the State the opportunity to correct alleged violation of rights ... before an international proceeding is brought, judicial remedies pursued by alleged victims must meet reasonable procedural requirements established under domestic law.”⁹

In the instant case, Petitioner continues to pursue post-conviction relief in the domestic courts of the United States. Specifically, Petitioner continues to challenge, in a Rule 60(b)(6) motion,¹⁰ a ruling by the district court of Arizona that barred him from conducting a post-conviction investigation regarding his jurors. The United States Court of Appeals for the Ninth Circuit granted Petitioner a Certificate of Appealability, entitling him to appeal the district court’s denial of his Rule 60(b)(6) motion. Petitioner moved to stay his execution pending the disposition of that appeal and, on October 4, 2019, the circuit court stayed Petitioner’s execution pending resolution of the appeal.¹¹ The circuit court further scheduled an oral argument on the matter to be heard on December 13, 2019. Because Petitioner continues to pursue and exhaust remedies in the United States, he cannot satisfy the requirement that a Petitioner invoke and

⁴ See, e.g., *Interhandel Case (Switzerland v. United States)* [1959] I.C.J. 6, 26–27; *Panevezys-Saldutiskis Railway Case (Estonia v. Lithuania)*, 1939 P.C.I.J., Ser. A/B, No. 76.

⁵ THOMAS HAESLER, *THE EXHAUSTION OF LOCAL REMEDIES IN THE CASE LAW OF INTERNATIONAL COURTS AND TRIBUNALS* (1968) at 18–19.

⁶ *Velásquez Rodríguez Case*, Judgment of July 29, 1988, ¶ 61, Inter-Am. Ct. H.R. (Ser. C) No. 4 (1988).

⁷ See, e.g., *Paez Garcia v. Venezuela*, Petition No. 670-01, Report No. 13/13, Mar. 20, 2013, Analysis § B(1) and Conclusion ¶ 35 (finding petition inadmissible for failure to exhaust because petitioner did not avail himself of remedies available to him in the domestic system).

⁸ *Sanchez et al. v. United States*, Petition No. 104/05, Report No. 104/05, Oct. 27, 2005, ¶ 67. See also *Kenneth Walker v. United States*, Case No. 12.049, Report No. 62/03, Admissibility, Oct. 10, 2003 (finding inadmissible the petition of a Canadian who asserted that he could not return to the United States to pursue a claim due to the risk of criminal penalties, in light of the availability of alternative actions that would permit him to continue to pursue the claim).

⁹ *Magi v. Argentina*, Petition No. 951-01, Report No. 106/13, Inadmissibility, Nov. 5, 2013, ¶ 33.

¹⁰ See F.R.C.P 60(b)(6) (“(b) Grounds for Relief from a Final Judgment, Order, or Proceeding. On motion and just terms, the court may relieve a party or its legal representatives from a final judgment, order, or proceeding for the following reasons: ... (6) any other reason that justifies itself.”).

¹¹ *Mitchell v. United States*, Order, No. 18-17031 (CA9 Oct. 4, 2019) (enclosed).

exhaust all domestic remedies under Article 20(c) of the Commission’s Statute and Article 31 of the Rules. Therefore, this Petition must be dismissed.

II. The Competence of the Commission is Limited

In his Merits Submission, Petitioner again alleges that the United States has “violated”¹² certain specific rights recognized in the American Declaration. As an initial matter, as stated in numerous prior submissions, the United States has undertaken a political commitment to uphold the American Declaration, an instrument that does not itself create legal rights or impose legal obligations on member States of the Organization of American States (OAS).¹³ Article 20 of the Statute of the Commission sets forth the Commission’s powers that relate specifically to OAS member States that, like the United States, are not parties to the legally binding American Convention on Human Rights (“American Convention”), including to pay particular attention to observance of certain enumerated human rights set forth in the American Declaration, to examine communications and make recommendations to the State, and to verify whether in such cases domestic legal procedures and remedies have been duly applied and exhausted. The proposition that the American Declaration subsequently attained binding force, through some form of *ipse dixit*,¹⁴ is unsupported as a matter of international law. Contrary to assertions by the Commission and the Inter-American Court to this end,¹⁵ it is not the case that the States that negotiated and ratified the OAS Charter or its amendments, or the States that adopted the Commission’s Statute, intended the Commission to apply the American Declaration as a binding

¹² As 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, *see infra* note 13, 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. The United States respects its political commitment to uphold the American Declaration.

¹³ The United States has consistently maintained that the American Declaration is a nonbinding instrument and does not create legal rights or impose legal duties on member States of the OAS. U.S. Federal Courts of Appeals have independently held that the American Declaration is nonbinding and that the Commission’s decisions do not bind the United States. *See, e.g.*, *Garza v. Lapin* 253 F.3d 918, 925 (7th Cir. 2001); *accord, e.g.*, *Flores-Nova v. Attorney General of the United States*, 652 F.3d 488, 493-94 (3rd Cir. 2011); *In re Hicks*, 375 F.3d 1237, 1241 n.2 (11th Cir. 2004). As explained by the U.S. Court of Appeals for the Seventh Circuit in *Garza*, “[n]othing in the OAS Charter suggests an intention that member states will be bound by the Commission’s decisions before the American Convention goes into effect. To the contrary, the OAS Charter’s reference to the Convention shows that the signatories to the Charter intended to leave for another day any agreement to create an international human rights organization with the power to bind members. The language of the Commission’s statute similarly shows that the Commission does not have the power to bind member states.” *Accord* the language of the Commission’s Statute, art. 20 (setting forth recommendatory but not binding powers). For a further discussion of the U.S. position regarding the nonbinding nature of the American Declaration, *see* Request for an Advisory Opinion Submitted by the Government of Colombia to the Inter-American Court of Human Rights Concerning the Normative Status of the American Declaration of the Rights and Duties of Man, Observations of the United States of America, 1988.

¹⁴ Petitioner Merits Submission, at 35-36 (quoting *Dann v. United States*, Merits Report, ¶ 163).

¹⁵ *See, e.g.*, Resolution No. 23/81, Case 2141 (United States), ¶ 16 (Mar. 6, 1981) (stating “the provisions of other instruments and resolutions of the OAS . . . acquired binding force.”); Advisory Opinion No. OC-10/89, Interpretation of the American Declaration of the Rights and Duties of Man in the Context of Article 64 of the American Convention on Human Rights, Inter-American Court of Human Rights, ¶ 45 (July 14, 1989).

source of international law. As a sovereign State, the United States voluntarily undertakes international law obligations and takes those obligations seriously. However, the United States has never undertaken an obligation that would render the American Declaration binding and has persistently objected to any such notion in scores of written and oral submissions since at least 1979.¹⁶

In the U.S. Admissibility Submission, the United States submitted that Petitioner's allegation of infringement on Navajo sovereignty is beyond the Commission's competence (separately from Petitioner's failure to substantiate the allegation).¹⁷ In response, Petitioner claims that the United States "incorrectly assert[ed] that the Commission is not competent to review American Declaration rights that apply to collective groups as well as individuals."¹⁸ In so claiming, however, Petitioner conflates two distinct issues: that the Commission does not have competence with respect to the United States beyond the American Declaration, and that the American Declaration refers only to the rights of individuals. Tellingly, because the American Declaration does not purport to reflect collective rights, Petitioner invokes a broad array of instruments beyond the American Declaration—such as the U.N. Declaration on the Rights of Indigenous Peoples and the OAS Declaration on the Rights of Indigenous Peoples—in an attempt to resuscitate his collective rights-based claims.¹⁹

The United States recalls that, for a petition to be admissible before the Commission, it must satisfy the requirements of the Rules. 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 . . . and other applicable instruments" For the United States, the American Declaration is the only "applicable instrument."²⁰

The Commission is not a body of general jurisdiction over every international instrument: its competence is narrowly prescribed by the Rules. Petitioner's attempt to expand that competence with respect to the United States must be rejected. This is especially so where the Petitioner's request in this regard invites the Commission to stray well beyond its mandate: to "find that the United States violated the Navajo Nation's sovereign tribal rights in pursuing the

¹⁶ See, e.g., CUMULATIVE DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 1981-1988, Book I (Marian Nash (Leich) (Ed.)), at 782-83 (William S. Hein & Co., Inc., 1993); Request for an Advisory Opinion Submitted by the Government of Colombia to the Inter-American Court of Human Rights Concerning the Normative Status of the American Declaration of the Rights and Duties of Man, Observations of the United States of America, 1988; Tamayo Arias v. United States, Report on the Merits, Report No. 44/14, Case 12.873, OEA/Ser.L/V/II.151 Doc. 9, ¶ 200 (July 17, 2014).

¹⁷ U.S. Admissibility Submission, at 6-11.

¹⁸ Petitioner Merits Submission, at 4.

¹⁹ *Id.* at 5-8.

²⁰ 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. Although Article 23 of the Rules lists several additional instruments, the United States is not a party to any of those other instruments.

death penalty for Mitchell.”²¹ Not only is the premise of Petitioner’s request false, as explained in the U.S. Admissibility Response,²² but the request itself reaches far beyond the Commission’s authority “to make recommendations . . . to bring about more effective observance of human rights.”²³

III. No International Legal Obligation Prohibits the Death Penalty in the United States

Petitioner dedicates a considerable portion of his Merits Submission attempting to establish that capital punishment violates the American Declaration as well as undefined “other international human rights standards.”²⁴ The Commission itself, however, has recently acknowledged the “fact that the United States international obligations do not prohibit the death penalty.”²⁵

Nevertheless, Petitioner now claims that the application of the death penalty is a violation of his right to life.²⁶ However, the American Declaration is intentionally silent on the death penalty.²⁷ 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, recognizes 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*.²⁸ Therefore, the imposition of the death penalty that complies with the U.S.’s international obligations cannot be construed as a violation of the commitments of the United States under Article I of the American Declaration.

The United States has not signed or ratified any international convention obligating it to abolish 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

²¹ Petitioner Merits Submission, at 10.

²² U.S. Admissibility Response, at 6, 9-11.

²³ Statute of the Inter-American Commission on Human Rights, art. 20(b).

²⁴ Petitioner Merits Submission, at 10-21.

²⁵ *Bucklew v. United States*, Report on the Merits, Report No. 30/18, Case 12.958, OEA/Ser.L/V/II Doc. 36, ¶ 77 (Apr. 11, 2018).

²⁶ Petitioner Merits Submission, at 10.

²⁷ In fact, language prohibiting capital punishment except in exceptional circumstances was deleted during the drafting process. *See* Project of Declaration of the International Rights and Duties of Man, formulated by the Inter-American Juridical Committee, for consideration by the Ninth International Conference of American States, Pan American Union, Washington, 1948, art. I.

²⁸ *See, e.g., Domingues v. United States*, Case 12.285, Report No. 62/02, Annual Report of the IACHR, para. 52 (2002). 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.*

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. The foregoing merely underscores what the Commission itself has already recognized: international legal obligations of the United States do not prohibit the death penalty.²⁹

IV. The Fourth Instance Doctrine Bars Consideration of Petitioner's Claims

Petitioner continues to press alleged due process and fair trial violations in the context of his criminal proceedings, all of which were raised during the course of various stages of review of his case and rejected. Petitioner, dissatisfied with the outcome of those domestic proceedings, now seeks relief from the Commission by claiming that the fourth instance doctrine is “inapplicable” in this case.³⁰ However, Petitioner’s attempt to relitigate these issues is barred by the Commission’s Fourth Instance doctrine. As the Commission recently observed, “the interpretation of the law, the relevant proceeding, and the weighing of evidence, is among others, a function to be exercised by the domestic jurisdiction, which cannot be replaced by the IACHR.”³¹

Whether or not Petitioner’s due process and fair trial rights—rights affirmed at the regional level in the American Declaration—have been respected is squarely a question of whether these protections have been afforded under domestic law. Consequently, the legal authorities relevant to the merits of the Petition under review are domestic authorities.³² The U.S. Admissibility Response correctly framed the issues as such, and conclusively demonstrated that domestic law did in fact afford the protections affirmed in the Declaration. The Commission is complementary to domestic systems and operates with the aspiration that States will, over time, draw upon the guidance and example provided by it in developing their domestic protections and processes. To this end, as noted above, the Commission can make recommendations in order to bring about more effective observance of human rights.³³

²⁹ Petitioner also claims that imposition of the death penalty in his case was inconsistent with U.S. law. Specifically, he asserts without substantiation that the death penalty was applied arbitrarily in his case based on the “arbitrary whim” of the Attorney General serving at the time of Petitioner’s prosecution. Petitioner attempts to support this assertion by invoking the 1972 *Furman v. Georgia* decision, which concerned the absence (in 1972) of standards to guide the discretion of “juries and judges” in imposing capital sentences. *Furman* did not speak to whether a prosecutor could seek the death penalty in a given case, but rather, the discretion of judges or juries to impose such sentence. In Petitioner’s case, the Federal death penalty was imposed by the court, based on the recommendation of a jury of Petitioner’s peers, in accordance with standards consistent with the Supreme Court’s decision in *Furman*. Petitioner’s assertions to the contrary are baseless and must be rejected under Article 34 of the Rules.

³⁰ Petitioner Merits Submission, at 34.

³¹ *Heron v. United States*, Petition 961-07, Report No. 86/19, OEA/Ser.L/V/II.Doc. 95, ¶ 14 (May 31 2019).

³² *See, e.g.*, American Declaration, para. 4 (“The *affirmation* of essential human rights by the American States together with the *guarantees given by the internal regimes of the states* establish the initial system of protection considered by the American States as being suited to the present social and juridical conditions” (emphasis added)).

³³ Statute Art. 20(b).

However, the Commission is not empowered to supplant the domestic law of the United States to achieve this end.

As a result, Petitioner's claims should be dismissed because the Commission lacks competence to sit as a court of fourth instance. The Commission has repeatedly stated that it may not "serve as an appellate court to examine alleged errors of internal law or fact that may have been committed by the domestic courts acting within their jurisdiction"—a doctrine the Commission calls the "fourth instance formula."³⁴ The fourth instance doctrine recognizes the proper role of the Commission as subsidiary to States' domestic judiciaries,³⁵ and indeed, nothing in the American Declaration, the OAS Charter, the Commission's Statute, or the Rules gives the Commission the authority to act as an appellate body. The Commission has elaborated on the limitations that underpin the fourth instance doctrine in the following terms: "The Commission ... lacks jurisdiction to substitute its judgment for that of the national courts on matters that involve the interpretation and explanation of domestic law or the evaluation of the facts."³⁶ It is not the Commission's place to sit in judgment as another layer of appeal, second-guessing the considered decisions of a State's domestic courts in weighing evidence and applying domestic law, nor does the Commission have the resources or requisite expertise to perform such a task. Under the fourth instance doctrine, the Commission's review of Petitioner's claims is precluded. Petitioner raised before domestic courts the very allegations he makes in the Petition. Domestic courts have carefully deliberated on these matters.

The Commission must consequently decline this invitation to sit as a court of fourth instance. Acting to the contrary would have the Commission second-guessing the legal and factual determinations of both state and federal courts at multiple levels, conducted in full conformity with due process protections under the U.S. Constitution and fully consistently with U.S. commitments under the American Declaration. The Commission has long recognized that "if [a petition] contains nothing but the allegation that the decision [by a domestic court] was wrong or unjust in itself, the petition must be dismissed under [the fourth instance doctrine]."³⁷ The Commission has also reiterated that "the fact that the outcome [of a domestic proceeding]

³⁴ *Marzioni v. Argentina*, Case No. 11.673, Report No. 39/96, Inadmissibility, Oct. 15, 1996, ¶ 51 ("Marzioni Inadmissibility Report").

³⁵ *See Castro Tortorino v. Argentina*, Case No. 11.597, Report No. 7/98, Admissibility, Mar. 2, 1998, ¶ 17.

³⁶ *Macedo García de Uribe v. Mexico*, Petition No. 859-03, Report No. 24/12, Inadmissibility, Mar. 20, 2012, ¶ 40. The Commission has interpreted and applied the fourth instance formula in the same way for OAS Member States that are parties to the legally binding American Convention and for those, including the United States, for which review is instead undertaken pursuant to the nonbinding American Declaration, where there must be even more deference. *See, e.g., id.* at ¶ 40 (emphasis added) ("The judicial protection afforded by the [American] Convention [on Human Rights] includes the right to fair, impartial, and prompt proceedings which give rise to the possibility, *but never the guarantee*, of a favorable outcome. Thus, the interpretation of the law, the relevant proceeding, and the weighing of the evidence is, among others, a function to be exercised by the domestic jurisdiction, which cannot be replaced by the IACHR.").

³⁷ *Marzioni Inadmissibility Report*, *supra* note 34, ¶ 51.

was unfavorable ... does not constitute a violation.”³⁸ The claims raised in the Petition are precisely those precluded by application of the fourth instance doctrine. The fourth instance doctrine therefore bars the review sought by Petitioner.

V. Conclusion

The Commission should declare the Petition to be inadmissible because Petitioner continues to pursue and exhaust domestic remedies and has not stated facts that tend to establish a violation of any rights in the American Declaration. Moreover, the Commission should decline the invitation to operate as a court of fourth instance to review Petitioner’s claims which have been carefully adjudicated by the courts of the United States. Should the Commission nevertheless declare the Petition admissible and examine its merits, the United States urges it to find the Petition without merit and deny Mr. Mitchell’s request for relief.

The United States recalls its position on the precautionary measures requested in this matter as stated in the U.S. Admissibility Submission. On August 15, 2019, the Commission issued a press release suggesting “the breach of precautionary measures seriously violates the international obligations of the United States given that it is detrimental to the effectiveness of the Commission’s procedures.” The United States respectfully reaffirms its longstanding position that the Commission lacks the authority to require that States adopt precautionary measures. We refer the Commission to past submissions, which state the reasons for the U.S. position on precautionary measures in detail.³⁹ Because the United States is not a State Party to the American Convention, the Commission has only the authority “to make recommendations ... to bring about more effective observance of fundamental human rights.”⁴⁰ The United States is not subject to international obligations under the American Declaration,⁴¹ nor could the United States have breached such obligations by “violating” a non-binding request for precautionary measures.

The United States has taken no action that would “render ineffective the processing of [Petitioner’s] case before the inter-American system” within the meaning of the Commission’s precautionary measures request of July 2, 2017.⁴² Moreover, Petitioner has been granted a stay of execution pending the disposition of his ongoing litigation in the United States. The United States submits the instant observations in advance of the deadline provided by Article 37(1) of

³⁸ Maldonado Manzanilla v. Mexico, Petition No. 733-04, Report No. 87/07, Inadmissibility, Oct. 17, 2007, ¶ 58 (quoting and citing Rodríguez v. Argentina, Case No. 10.382, Report No. 6/98, Inadmissibility, Feb. 21, 1998, ¶ 71).

³⁹ See, e.g., Kadamovas et. al. v. United States, Petition No. P-1285-11, Response of the United States, Sept. 2, 2015, § D; U.S. Hearing Presentation, Ameziane v. United States, Case No. 12.865, 164th Period of Sessions, Mexico City, Sept. 7, 2017, available at <https://www.youtube.com/watch?v=sbN4tBcBbtQ>.

⁴⁰ Commission Statute, art. 20(b).

⁴¹ See *supra*, notes 12-16.

⁴² Mitchell v. United States, Res. 21/2017, PM-250-17, ¶ 21 (July 2, 2017).

the Rules and respectfully requests the Commission's prompt resolution of this matter to assure that the processing of Petitioner's case is not rendered ineffective.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED

OCT 4 2019

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

LEZMOND C. MITCHELL, AKA Lezmond
Charles Mitchell,

Petitioner-Appellant,

v.

UNITED STATES OF AMERICA,

Respondent-Appellee.

No. 18-17031

D.C. Nos. 3:09-cv-08089-DGC
3:01-cr-01062-DGC-1

District of Arizona,
Prescott

ORDER

Before: IKUTA, CHRISTEN, and HURWITZ, Circuit Judges.

Before an execution date had been set in this capital case, this Court granted a Certificate of Appealability, entitling Mitchell to appeal the district court's denial of his Rule 60(b) motion. Mitchell has moved to stay the execution pending the disposition of the appeal. Briefing is not yet complete on the appeal, and the Court believes that oral argument would be appropriate.

The Court therefore hereby stays the execution pending resolution of the appeal. Oral argument will be heard on December 13, 2019 at 2:00 p.m. in Phoenix, Arizona, at the Sandra Day O'Connor Courthouse, and shall be limited to 20 minutes per side.

Mitchell v. United States, No. 18-17031
Ikuta, Circuit Judge, dissenting

We may not grant a stay of execution pending appeal without first determining whether the defendant has a “significant possibility of success on the merits” of the appeal. *Hill v. McDonough*, 547 U.S. 573, 584 (2006). The majority here grants Lezmond Mitchell’s motion to stay the government’s execution date without making this determination, even though we have adequate time to decide the merits of Mitchell’s claim prior to the execution date. Therefore, I dissent.

I

Mitchell’s sentence of death has been pending for sixteen years. In 2003, Lezmond Mitchell was convicted and sentenced to death under the Federal Death Penalty Act, 18 U.S.C. §§ 3591–3598, for the murder of a 63-year-old grandmother and her nine-year-old granddaughter. Mitchell raised multiple challenges to his conviction and sentence, both on direct appeal and in a § 2255 motion,¹ but they all failed. *See United States v. Mitchell*, 502 F.3d 931, 942 (9th Cir. 2007), *cert. denied*, 553 U.S. 1094 (2008); *Mitchell v. United States*, 790 F.3d 881, 885 (9th Cir. 2015), *cert. denied*, 137 S. Ct. 38 (2016).

¹A prisoner serving a federal sentence may bring a motion under 28 U.S.C. § 2255 claiming that the sentence was imposed in violation of the Constitution or federal laws.

Mitchell brought this new appeal in 2018, after the Supreme Court decided *Peña-Rodriguez v. Colorado*, 137 S. Ct. 855 (2017). *Peña-Rodriguez* held that “where a juror makes a clear statement that indicates he or she relied on racial stereotypes or animus to convict a criminal defendant,” then the Sixth Amendment allows the trial court to “consider the evidence of the juror’s statement.” *Id.* at 869. Based on this holding, Mitchell brought a motion in district court under Rule 60(b)(6) of the Federal Rules of Civil Procedure.² Mitchell sought to reopen his prior § 2255 motion to investigate whether jurors were influenced by bias against him because he is a member of the Navajo Nation, even though the jurors had signed a certification attesting that race played no role in their decision, and there was no evidence that any of the jurors in his case were biased against him. The district court denied this motion in a well-reasoned opinion, holding that *Peña-Rodriguez* did not grant Mitchell a procedural right to investigate potential juror bias and that Mitchell’s motion did not comply with Local Rule of Civil Procedure 39.2(b), which requires meeting certain procedural requirements and showing good cause for a request to interview jurors. *Mitchell v. United States*, 2018 WL 4467897, at *3–4 (D. Ariz. Sept. 18, 2018). In April 2019, we granted a

²Rule 60(b)(6) provides that a court may relieve a party from a judgment or order for “any other reason that justifies relief.” Fed. R. Civ. P. 60(b)(6).

certificate of appealability (COA) on the question whether the district court properly denied appellant's Rule 60(b)(6) motion to reopen his § 2255 motion.

On July 25, 2019, sixteen years after the death sentence was imposed, the government informed Mitchell that his execution date was set for December 11, 2019. On September 9, 2019, Mitchell filed a motion for stay of execution with our court.

II

The Supreme Court has emphasized that “a stay of execution is an equitable remedy” that “is not available as a matter of right, and equity must be sensitive to the State’s strong interest in enforcing its criminal judgments without undue interference from the federal courts.” *Hill*, 547 U.S. at 583–84 (2006). Therefore, we may grant a stay of execution only “where the inmate seeking the stay can show a significant possibility of success on the merits.” *Moormann v. Schriro*, 672 F.3d 644, 646–47 (9th Cir. 2012); *see also Hill*, 547 U.S. at 583–84 (holding that inmates seeking a stay of execution “must satisfy all of the requirements for a stay, including a showing of a significant possibility of success on the merits.”). If the petitioner fails to show “a strong likelihood of relief on the merits” we must deny the motion for stay. *Moorman*, 672 F.3d at 649; *see also Cook v. Ryan*, 688 F.3d 598, 612–13 (9th Cir. 2012) (same).

The majority does not comply with this requirement. Instead of explaining why Mitchell has a likelihood of success on the merits of his Rule 60(b)(6) motion, the majority grants a stay of execution based on our prior grant of a COA on Mitchell's Rule 60(b)(6) motion. But a COA grant does not mean that the petitioner has shown a significant possibility of success on the merits of the claim at issue. To the contrary, at the COA stage a "court of appeals should limit its examination . . . to a threshold inquiry into the underlying merit of [the] claims," and ask "only if the District Court's decision was debatable." *Buck v. Davis*, 137 S. Ct. 759, 774 (2017) (quoting *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003)); see *id.* (holding that a prisoner may successfully make "a preliminary showing that his claim was debatable" even though the prisoner "failed to make the ultimate showing that his claim is meritorious"). While Mitchell's *Peña-Rodriguez* claim may be debatable for COA purposes, it is far from obvious that it is likely to succeed on the merits. The district court has issued a persuasive opinion to the contrary. At a minimum, it is necessary for the majority to address this issue before interfering with the government's scheduled execution.

Because granting a stay requires evaluating the likelihood of success of Mitchell's appeal on the merits, it would be more efficient to decide the merits of the appeal and motion to stay simultaneously. Briefing on the Rule 60(b)(6)

motion and the stay motion will be complete on October 11, 2019, two months before the scheduled execution date. Therefore, we have sufficient time to evaluate and decide Mitchell's appeal on the merits. *Cf.* 28 U.S.C. § 2266(a) ("The adjudication of any . . . motion under section 2255 by a person under sentence of death, shall be given priority by . . . the court of appeals over all noncapital matters."). We frequently decide claims in capital cases in a matter of days. *See, e.g., Bible v. Schriro*, 651 F.3d 1060 (9th Cir. 2011); *Rhoades v. Reinke*, 671 F.3d 856 (9th Cir. 2011). We should do so here. If we conclude that the district court abused its discretion in denying Mitchell's Rule 60(b)(6) motion, we can grant the motion to stay at that time.

Accordingly, I dissent.