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REPORT No. 26/15
CASE 12,831
MERITS

KEVIN COOPER
UNITED STATES

Approved by the Commission at its session No. 2033 held on July 21, 2015
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¹ Commissioner James Cavallaro, a U.S. national, did not participate in discussing or deciding this case, in accordance with Article 17.2.a of the IACHR's Rules of Procedure.

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I. SUMMARY

1. On April 29, 2011, the Inter-American Commission on Human Rights (“the Inter-American Commission” or “the IACHR”) received a petition and request for precautionary measures filed by Norman C. Hile and Katie C. De Witt of *Orrick, Herrington & Sutcliffe LLP* (“the petitioners”) against the United States of America (“the State” or “the United States”). The petition was lodged on behalf of Kevin Cooper (“the alleged victim” or “Mr. Cooper”) who is deprived of his liberty on death row in the state of California since 1985.

2. The petitioners contend that Mr. Cooper’s rights to a fair trial and to due process of law recognized in Articles XVIII and XXVI of the American Declaration were violated. They assert, for example, that the processing of the crime scene was mishandled, that the District Attorney presented false evidence at trial, that the San Bernardino Sheriff’s Department (SBSD) failed to disclose exculpatory information to the defense and planted and manipulated evidence, and that the District Court failed to conduct meaningful post-conviction proceedings. Petitioners further allege that court-appointed trial counsel committed numerous mistakes that materially prejudiced Mr. Cooper and that the alleged victim faced racism from the SBSB, the District Attorney and the community, in violation of the fundamental right to equality before the law recognized in Article II of the American Declaration. Petitioners assert that Mr. Cooper’s execution by the United States would also constitute a violation of Article I of the American Declaration.

3. The State argues that all of Mr. Cooper’s claims have been extensively considered by the courts of the state of California and the United States and that his conviction and sentence have been repeatedly upheld. The State also affirms that the alleged victim was not deprived of effective assistance of counsel at trial, but rather had “an extraordinarily vigorous and able defense” that protected his right to due process of law. Finally, according to the United States, the state of California took precautions to protect Mr. Cooper from racial discrimination by granting the request to move the case out of San Bernardino County and the petitioners failed to allege any facts that support that Mr. Cooper’s race played any role in his conviction and sentencing.

4. On October 19, 2011, during its 143th regular sessions, the IACHR examined the contentions of the petitioner on the question of admissibility, and without prejudging the merits of the matter, decided to admit the claims in the present petition pertaining to Articles I (Right to life, liberty and personal security), II (Right to equality before the law), XVIII (Right to a fair trial) and XXVI (Right to due process of law) of the American Declaration; and to continue with the analysis of the merits of the case. It also resolved to publish Admissibility Report N° 131/11 and to include it in its Annual Report to the General Assembly of the Organization of American States. The petition was then registered as Case No. 12.831.

5. In the instant report, after analyzing the position of the petitioner and the State, and the available information, the Inter-American Commission concludes that the United States is responsible for violating Articles I, II, XVIII and XXVI of the American Declaration with respect to Kevin Cooper. Consequently, should the State carry out the execution of Mr. Cooper, it would also be committing a serious and irreparable violation of the basic right to life recognized in Article I of the American Declaration.

² Commissioner James Cavallaro, a U.S. national, did not participate in discussing or deciding this case, in accordance with Article 17.2.a of the IACHR’s Rules of Procedure.

II. PROCEEDINGS SUBSEQUENT TO REPORT No. 131/11

6. On November 15, 2011, the IACHR forwarded Admissibility Report No. 131/11 to the State and to the petitioner. In accordance with the Rules of Procedure in force at the time, the Inter-American Commission set a deadline of three months for the petitioners to submit additional observations on the merits and, at the same time, made itself available to the parties with a view to initiating a possible friendly settlement of the matter.

7. In a communication dated June 7, 2012, the petitioners indicated that they did not receive the admissibility report. On that same date the IACHR forwarded the report to the petitioners. On August 30, 2012, the petitioners submitted additional observations on the merits, the pertinent parts of which were duly forwarded to the State on September 19, 2012. On July 26 and September 27, 2013, the petitioners presented supplemental observations, which were forwarded to the State. On October 15, 2013, the IACHR received two *amici curiae* briefs presented by Death Penalty Focus and California Attorneys for Criminal Justice, which were forwarded to the parties.

8. On October 28, 2013, during its 149th regular sessions, the IACHR held a hearing on the merits in the case. On December 5, 2013, the IACHR received the observations on the merits from the State, the pertinent parts of which were forwarded to the petitioner on December 13, 2013. The IACHR received supplemental observations from the petitioners on January 17, 2014, August 12, 2014, February 9, 2015, and June 30, 2015, and from the State on June 20, 2014, all of which were duly forwarded to the other party.

Precautionary Measures

9. On August 3, 2011, the IACHR notified the State that precautionary measures had been granted on behalf of the alleged victim, and requested that a stay of execution be maintained until such time as it would be able to pronounce on the merits of the petition.

III. POSITIONS OF THE PARTIES

A. Position of the petitioners

10. The petitioners allege that Kevin Cooper, an African-American, was sentenced to death on March 1, 1985, for a crime he did not commit. According to the petitioners, on June 2, 1983 the alleged victim escaped from a minimum security prison in San Bernardino County, California, where he was serving a sentence for a non-violent felony. From the prison, he made his way through the country to a vacant home owned by Larry Lease ("the Lease home") in a rural residential area where he hid for two days. On June 4 at around 8:30pm, he reportedly left on foot. Mr. Cooper allegedly made his way through the fields and then hitchhiked south to San Ysidro, near the Mexican border. He reportedly checked into a Tijuana hotel at 6:00pm on June 5.

11. At some point between 9:00 p.m. on June 4 and the morning of June 5, in a house close to the Lease home, a white family composed of a couple and two children -a girl and a boy- ("the Ryens") and Christopher Hughes, a houseguest child, were all attacked. The child, the couple and their daughter were brutally murdered with a hatchet, a knife and an ice pick. The sole survivor was Josh Ryen, the couple's eight-year-old son. The victims were killed by numerous chopping and stabbing wounds, between twenty-five and forty-six separate wounds each. Petitioners assert that the contract pathologist who responded to the crime scene before the bodies were removed initially concluded, based on the number of victims and weapons, that there was more than one killer. This initial conclusion was also shared by a doctor of the American Board of Pathology who, in 2000, studied the autopsy reports and allegedly concluded: "More than one person had to have inflicted these wounds. It would be virtually impossible for one person to have accomplished this entire trauma."

12. The petitioners state that on June 9, 1983, Mr. Cooper started working on a boat in Ensenada, Mexico, in exchange for being allowed to sleep on the boat. Between June and the end of July the

boat sailed to southern California and made a number of stops at various ports. On July 30, 1983, while the boat was anchored near Santa Barbara, the Coast Guard arrested Mr. Cooper.

13. According to the available information, since the death penalty verdict was issued on March 1, 1985, Mr. Cooper has filed seven state habeas petitions, three federal habeas petitions with the United States District Court for the Southern District of California, eight writs of *certiorari* with the Supreme Court of the United States, two habeas petitions filed directly with the Supreme Court of the United States, and multiple discovery motions in California courts.

14. Petitioners allege that Mr. Cooper's rights to a fair trial and to due process of law recognized in Articles XVIII and XXVI of the American Declaration were violated, as well as his fundamental right to equality before the law recognized in Article II. Petitioners further assert that Mr. Cooper's execution by the United States would also constitute a violation of Article I of the American Declaration.

1. Fair trial and due process violations

a. Pretrial and trial proceedings

15. According to the petitioners, the "processing of the Ryen crime scene [by the SBSD] was disastrous."³ The homicide detectives allegedly made no effort to keep track of the people who were at the scene (reportedly more than 70); possible blood evidence was supposedly not collected; the on-call criminalists only had about 11 months of experience and the supervising criminalist allegedly did not remain at the scene to supervise the collection of the evidence; several bloodstain scrapings from a general area were allegedly mixed in one container, although they reportedly came from different types of stains; and allegedly no effort was made to vacuum the bedroom carpet for trace evidence on June 5, even though the SBSD reportedly had a special vacuum designed for collecting and separating trace evidence.

16. Petitioners state that, when the process of dismantling the bedroom began, the more experienced criminalists requested more time to study the patterns given the inadequate investigation conducted by the on-call criminalists. The request was reportedly denied. They claim that the mishandling and misprocessing of the crime scene deprived Mr. Cooper's defense team of the opportunity to conduct an independent analysis and reconstruction of the scene that may have been able to determine potentially exculpatory information. According to an expert presented by the defense at trial, if a full reconstruction had been done it would have been possible to have a much clearer idea of the number of assailants, the sequence of the wounds, and whether the assailants were left-handed or right-handed.

17. According to the petitioners, during the investigation of the crime scene a single drop of blood was discovered ("blood drop A-41"). A test conducted by a SBSD criminalist purportedly determined this drop had characteristics consistent with Mr. Cooper's genetic profile and inconsistent with any of the victims, becoming a central part of the prosecution's case against Mr. Cooper. Petitioners assert that the testing was performed under suspicious circumstances. They allege that the criminalist waited to conduct testing until he had Mr. Cooper's blood profile and, after learning that Mr. Cooper's blood group (EAP) was "rB" and not "B" as originally found, he allegedly altered his testing records so that A-41 would match Mr. Cooper's blood type. Petitioners also claim that there is uncontested evidence that, unbeknownst to the defense, in 1999 the criminalist took possession of A-41 in advance of DNA testing and lied about it under oath. Mr. Cooper believes that in 1991 the criminalist used this opportunity to plant his blood on A-41.

18. Further, DNA testing conducted in 2002 reportedly revealed that A-41 contained the DNA of two individuals, one of whom was supposedly Mr. Cooper. The identity of the second donor was allegedly unknown. In 2010, the alleged victim brought a motion to have the remaining portions of A-41 tested at his expense utilizing a new DNA test that is much more sensitive than the testing method utilized in prior testing in 2002. However, the State opposed the request, which was ultimately denied by the Court.

³ Brief from the petitioners, received on August 30, 2012, p. 24.

19. Petitioners further allege that the San Bernardino County District Attorney presented false evidence at trial. They state that the District Attorney manipulated the testimony of the surviving victim Josh Ryen, who immediately after the attacks allegedly identified three white males as his attackers, but whose testimony was reportedly manipulated by the State so that the jury heard Josh testify at trial to only having seen a singular shadow with a "puff" of hair. According to the petitioners, after seeing a photograph of Mr. Cooper on TV, Josh Ryen remarked at least two times in the weeks following the attacks that Mr. Cooper did not commit the murders. Further, a SBSB Detective allegedly perjured himself by testifying that Josh did not refer to multiple assailants during his formal June 14, 1983 interview. The psychologist who was assigned to attend the interview reportedly noted at least five instances where he referred to his attackers in the plural.

20. The SBSB, according to the petitioners, also planted, manipulated, and replaced cigarette evidence presented at trial and later tested in 2002 for Mr. Cooper's DNA. These cigarettes, which were used at trial to connect Mr. Cooper to the Ryens' station wagon, reportedly appeared in the car under suspicious circumstances, given that an initial, exhaustive search of the car did not discover them. A later search conducted by SBSB officers, which was inconsistent with an initial search that yielded an extensive list of items contained in the car, discovered two cigarette butts labeled V-12 and V-17. The defense was reportedly told that the initial forensic testing in 1984 consumed V-12. However, V-12 was, according to the petitioners "resurrected and introduced during trial." Later in 2002, when V-12 was sent off for DNA testing, it was reportedly significantly larger than the sample that was tested in 1984. Accordingly, petitioners conclude that the SBSB planted the cigarette butts in the Ryen car and used substitutes during later testing.

21. The petitioners further allege that the SBSB planted other evidence at the Lease home. This evidence purportedly included a hatchet sheath and a green bloodstained button that were allegedly not identified within this residence during the initial search on June 6, 1983, but which suspiciously appeared in plain view on a subsequent search of the property the following day.

22. The SBSB also allegedly failed to disclose exculpatory information to Mr. Cooper's defense. The petitioners indicate that a former San Bernardino County Detective learned shortly after the murders that three white men with blood on their clothing had been spotted not far from the crime scene at the Canyon Corral Bar on the night of the murders. The Ryens' home could be seen from the parking lot of the bar. According to the petitioners, this information was reported to the head of the SBSB investigation but was not disclosed to Mr. Cooper until 2004. They claim that, had Mr. Cooper been aware of such reports, he would have found three new witnesses who would have at trial described the white men as having blood on their clothing and persons, and one as wearing a tan T-shirt and coveralls. According to the petitioners, once Mr. Cooper was a suspect, SBSB made no attempt to find out who else was in the bar the night of the murders or further investigate the three white men.

23. Petitioners also state that the SBSB approved the destruction of bloody coveralls provided by Diana Roper as being connected with the murders on or about June 9, 1983. Ms. Roper allegedly told the SBSB that on the night of the murders her then-boyfriend, Lee Furrow, a convicted killer, arrived home in a car matching the description of the Ryen vehicle and was wearing the bloody coveralls. The SBSB allegedly did not subject the bloody coveralls to serological testing. Fixated on Mr. Cooper, the SBSB reportedly ignored Roper's information. In response to the State's assertion that the bloody coveralls were of little evidentiary or exculpatory value, petitioners allege that in an interview with the defense investigator shortly after the defense learned of the existence of the coveralls, Deputy Eckley's statements clearly showed that the coveralls were indeed covered in blood. Regarding the Government's suggestion that Ms. Roper was an unreliable witness, petitioners claim that she had been a proven informant for Deputy Eckley in the past and that it was her father, not Roper, who stated that Roper had had a "vision."

24. Petitioners also indicate that the SBSB falsely asserted that the type of shoes that left shoe prints at the crime scene were special prison-issued shoes. According to the petitioners, before trial the prison warden informed the SBSB that those shoes were widely available to the public. They state that the prosecution made multiple references to Mr. Cooper's "prison tennis shoes" in both opening and closing arguments.

25. Petitioners further allege that the existence of two bloody shirts discarded near the crime scene points to multiple killers and to Mr. Cooper's innocence. They state that unknown individuals from the SBSB planted Mr. Cooper's blood on a tan T-shirt recovered near the Canyon Corral Bar two days after the discovery of the murders. This T-shirt allegedly had Douglas Ryen's blood on it. Prior to trial, law enforcement reportedly tested two separate portions of the T-shirt for blood, but released only one test result. That test allegedly found only blood that was consistent with Douglas Ryen's blood type and inconsistent with Mr. Cooper's serological profile. However, when the tan T-shirt was tested in 2002 pursuant to Mr. Cooper's request, the DNA test report indicated there was "strong evidence" that Mr. Cooper was the donor of the DNA extracted from the tan T-shirt.

26. At Mr. Cooper's request, subsequent testing was conducted to determine whether the blood samples contained heightened levels of the blood preservative EDTA, which would indicate that Mr. Cooper's blood was planted. Petitioners indicate that heightened levels of EDTA were detected. However, upon learning of this result, the State's expert purportedly withdrew the test results, claiming they were inconclusive due to an unspecified EDTA contamination in his laboratory. Mr. Cooper's counsel were allegedly never provided with the complete results of the EDTA testing by the State's expert, and a request for discovery into how this EDTA contamination occurred was denied.

27. Further, the existence of a blue shirt with possible blood on it found near the murder scene the day after the murders was allegedly never disclosed to the defense before or after trial. Petitioners assert that it was only because the SBSB produced its daily log during an evidentiary hearing in 2004 (21 years after the crime) that Mr. Cooper learned for the first time about its existence. They further assert that there is no evidence that SBSB ever performed tests on the blue shirt and its whereabouts are currently unknown. With regard to the State's allegation that the blue t-shirt never existed and was in fact the tan t-shirt, petitioners assert that it would have been impossible that the tan t-shirt would appear on a call log the day before it was discovered and that the manner in which the tan t-shirt was recovered would also preclude it being reported in a "call log."

28. In addition, petitioners claim that the use of information produced at trial but not on the record required a mistrial to guard against juror misconduct in violation of due process. Petitioners allege in this regard that Mr. Cooper's jury had a duty to consider only the evidence that was presented to them in Court. However, information not on the record to the effect that Mr. Cooper suffered from mental problems reportedly came before the jury during their deliberations. Once this information came to light, defense counsel moved for a mistrial, which the judge denied. According to the petitioners, this information provided the missing motive, which undermined the instruction the jury received that "[a]bsence of motive may tend to establish innocence." It further allegedly provided the missing link allowing the jury to find that the killings were willful, deliberate and premeditated.

b. Post-conviction proceedings

29. Petitioners claim that the right to due process of law was also violated given the failure of the U.S. District Court for the Southern District to conduct meaningful post-conviction proceedings, as recognized by five federal judges of the U.S. Court of Appeals for the Ninth Circuit Court.

30. Petitioners assert that the Federal District Judge improperly handicapped Mr. Cooper's first habeas petition. In December of 1992, the federal court appointed habeas corpus counsel for Mr. Cooper. Habeas counsel allegedly deduced that a full-scale reinvestigation of the case was necessary and, after reportedly spending over 100 hours on this case, he made his first request for reimbursement. The Federal Judge, however, allegedly awarded only a third of the requested money, severely handicapping habeas corpus counsel's ability to conduct the reinvestigation.

31. According to the petitioners, shortly thereafter, habeas counsel suffered a severe change in circumstance for family reasons and was no longer able to effectively represent Mr. Cooper. Therefore, he first asked to be relieved from the case in July of 1994. Petitioners claim that the Federal Judge, however,

repeatedly denied habeas counsel's request, despite the fact that he was no longer conducting legal work for the alleged victim. As a result, habeas counsel reportedly remained counsel of record as Mr. Cooper's first execution date of November 26, 1994 closed in. On June 2, 1995, nearly a year later, the Federal Judge finally approved the replacement of habeas counsel. However, according to the petitioners, she failed to grant more than a short continuance to allow for the preparation of Mr. Cooper's habeas claims and ultimately denied those handicapped claims on August 25, 1997.

32. In 2004, new habeas counsel filed a request for a stay of execution and leave to file a successive habeas corpus petition that would include, according to the petitioners, newly discovered exonerating evidence. On February 9, 2004, less than eight hours before Mr. Cooper was to be executed, the Ninth Circuit Court of Appeals issued a stay of execution and ordered the testing. Petitioners allege that Mr. Cooper has suffered subsequently from post-traumatic stress disorder caused by his treatment leading up to the time of execution combined with the stress caused by being a few hours away from its implementation.

33. Petitioners indicate that the same Federal Judge was again assigned to the case, "despite her prior denials of relief and clear bias against Mr. Cooper." Hearings on this successive petition were held in 2004 and 2005 and relief was ultimately denied. According to the petitioners, the Federal Judge failed to abide by the Ninth Circuit directive. Petitioners indicate that some specific instances of the Federal Judge's misconduct as noted by Judge William Fletcher of the Ninth Circuit Court of Appeals were: alleged abuse of discretion in denying Mr. Cooper's discovery requests prior to the actual filing of those discovery requests; denial of necessary testing via the utilization of a testing protocol; predetermination of the result of mitochondrial DNA testing by only allowing the testing of hairs already examined in prior proceedings; restriction of the investigation and the presentation of evidence regarding the missing blue shirt with blood on it that was reportedly recovered the day after the murders.

34. According to the petitioners, Mr. Cooper's latest attempt to obtain additional DNA testing on select pieces of evidence at no expense to the Government has been denied. In 2011, Mr. Cooper's counsel learned of a new DNA testing technique that may be utilized to determine DNA information from small and/or degraded DNA samples. Defense counsel brought a motion seeking supplemental DNA testing of the tan T-shirt, A-41, and Mr. Cooper's blood vial in the hopes of identifying the secondary DNA donors previously established, but not identified in the 2002 DNA testing. Nonetheless, despite the fact that this testing could have been completed at no expense to the State, the petitioners report that the State fought it and continues in its refusal to put the doubts surrounding Mr. Cooper's case to rest.

35. Finally, petitioners allege that the rights to due process and fair trial were also violated given the draconian procedural restrictions imposed by the Antiterrorism and Effective Death Penalty Act (AEDPA) of 1996 that prohibits the filing and determination of otherwise meritorious constitutional claims unless the applicant can show, among other things, that "no reasonable factfinder would have found the applicant guilty of the underlying offense." This, according to the petitioners, impermissibly raises the constitutional minimum established by *Brady*.⁴ They also claim that petitioners who make a claim in state court based on newly discovered evidence, face a particularly significant barrier if they are in California. Accordingly, while other states like Arizona or Florida grant relief when a prisoner provides new evidence that "probably" would have changed the verdict or sentences, California requires petitioners to provide new evidence that "points unerringly to innocence." This standard, according to the petitioners, is so severe that even innocent petitioners may be unable to meet it as reportedly demonstrated by the California Commission on the Fair Administration of Justice's description of the California Death Penalty System as "dysfunctional" and "broken." They allege that Mr. Cooper's lack of success reflects a state and federal habeas system designed to deny relief.

36. With regard to the assertion made by the U.S. Government that Mr. Cooper has not presented any new evidence, the petitioners state that the United States has failed to acknowledge the six new expert

⁴ In *Brady v. Maryland*, 373 U.S. 83 (1963), the United States Supreme Court held that withholding exculpatory evidence violates due process "where the evidence is material either to guilt or to punishment."

submissions filed prior to the October 28, 2013 hearing at the IACHR. This evidence has reportedly never been reviewed by any court, nor have these experts offered testimony in any of Mr. Cooper's prior hearings.

37. According to these expert submissions, based on the early accounts of Josh Ryen, the attackers were more likely 3-4 white or Hispanic men, not a single black man (Declaration of Dr. Pezdek); the investigators reportedly suffered from endemic tunnel vision that focused all attention on gathering evidence to convict Mr. Cooper and disregarding and/or eliminating any evidence that showed the opposite (Declaration of Thomas R. Parker, retired Special Agent of the FBI); Mr. Cooper's trial counsel allegedly conducted the defense well below the ineffective assistance of counsel standard (Declaration of Michael Adelson, Esq.); critical items of evidence had supposedly been tampered with (Declaration of Janine S. Arvizu, Certified Quality Auditor); new techniques of DNA testing could reportedly substantiate or refute the statements done by the alleged victim (Declaration of Mrs. Eikelenboom-Shieveld, MD, Independent Forensic Services); and multiple offenders allegedly conducted the murders (Declaration of Mr. McCrary, Behavioral Criminology International).

38. Petitioners conclude that Mr. Cooper's right to a fair trial was violated through the authorities and in particular the SBSD's and the prosecution's use of false evidence, destruction of potentially exculpatory evidence, and the prosecution's failure to disclose potentially exculpatory information. They refer, in this regard, to the unprecedented dissent of Judge William Fletcher, joined by five other judges of the Ninth Circuit, which opens: "[t]he State of California may be about to execute an innocent man."

2. Ineffective assistance of court-appointed counsel

39. According to the petitioners, numerous mistakes committed by Mr. Cooper's trial counsel at the pretrial, guilt, and penalty stage crippled the alleged victim's defense. They claim that Mr. Cooper's defense counsel, an employee of the San Bernardino Public Defenders Office, refused to accept co-counsel or paralegal help, or hire more than one investigator to process and utilize the vast amounts of information associated with this complex, capital case, resulting in severe prejudice to the alleged victim. This failure allegedly led to defense counsel's inability to review discovery from the prosecution in a timely manner, which reportedly caused him, for instance, to fail to learn about the bloody coveralls prior to their destruction. Petitioners further allege that trial counsel suffered numerous health problems and delays that inhibited his ability to adequately challenge the massive number of errors purportedly committed by the SBSD in processing the crime scene and testing the evidence derived therefrom.

40. Petitioners also report the existence of problems in the defense during the guilt phase and the penalty phase of the trial. Defense counsel reportedly ignored evidence of other killers and failed to present that evidence to the jury to provide a plausible alternative to the case presented by the District Attorney. He allegedly failed to make a timely investigation of Kenneth Koon's confession to the Ryen murders that he received on the day that Mr. Cooper was to begin his testimony (Koon allegedly confessed to a cellmate that he and two other individuals committed the murders). Rather, according to the petitioners, he inexplicably declined any additional time to investigate this lead. Further, defense counsel allegedly did not follow up on Roper's information and never called her to the stand. He reportedly only asserted that the jury would never know if Mr. Cooper committed the crime because of the poor investigation conducted by the SBSD.

41. Petitioners also assert that defense counsel mistakenly recommended that Mr. Cooper waive his right to second degree murder instructions on the belief that multiple convictions for second degree murder would allow for the potential imposition of the death penalty. On the basis of this faulty legal advice, Mr. Cooper reportedly waived this right, and the jury was instructed only on first degree murder.

42. In addition, defense counsel allegedly requested the jury to proceed immediately to the penalty phase, despite the propriety of allowing a cooling off period in order to provide the jury some time to become more open to the idea of sentencing Mr. Cooper to life in prison, rather than death. Defense counsel also reportedly failed to move for a substitution of counsel and, as noted above, did not have any supporting

counsel to conduct the penalty phase. According to the petitioners, such substitution is recognized as necessary in death penalty cases.

43. Further, defense counsel allegedly failed to reasonably represent Mr. Cooper during the penalty stage where he could have presented mitigating evidence that would, according to the petitioners, have saved Mr. Cooper's life. He allegedly presented only about an hour of testimony, only presented five witnesses, and the testimony of Mr. Cooper's immediate adopted family and his godparents allegedly consumed only 11 pages of transcript.

44. Petitioners state that the most egregious error was defense counsel's failure to stay in San Diego during the jury's deliberations, despite the specific and repeated requests by the San Diego courthouse in this regard. Because he returned to San Bernardino, he was several hours from the San Diego court house and unable to immediately respond to court requests regarding the jury. The first time the jury deadlocked during penalty deliberations, defense counsel allegedly refused to return to San Diego and the jury was reportedly instructed to continue deliberating. The second time it allegedly took defense counsel two and half hours to return to Court. This delay proved to be fatal, as the jury continued to deliberate during the delay and, according to the petitioners, reached a verdict of death before the parties assembled for the judge to declare a mistrial. Therefore, according to the petitioners, the self-imposed absence and corresponding delay resulted in Mr. Cooper being subjected to a death penalty verdict.

45. Finally, petitioners claim that, in light of the voluminous number of exhibits admitted into evidence (nearly 700 exhibits), defense counsel's exhausted inadvertence resulted in the admission of a document into the deliberations that had not been admitted into evidence. As noted above, this extra-record information allegedly provided the missing motive in the case, materially prejudicing Mr. Cooper.

3. Racial discrimination

46. According to the petitioners, the Superior Court of San Diego County and the SBSB failed to protect against the racially charged atmosphere that surrounded and polluted Mr. Cooper's incarceration and trial. This atmosphere allegedly arose after Mr. Cooper, a black man, was arrested for the vicious murder of a white family and their young house guest in an affluent Arabian horse ranching community, which generated enormous media attention. Media coverage regarding Mr. Cooper's past history was, according to the petitioners, particularly prejudicial.

47. Racially charged hatred for Mr. Cooper was, according to the petitioners, openly expressed. Pretrial events in San Bernardino County reportedly included a demonstration by a group of individuals in uniforms with Nazi emblems, carrying a pole with a monkey hanging from it with a sign stating "Hang the Nigger." Petitioners also state that, even in jail, the alleged victim was the subject of racial animus.

48. Petitioners assert that, although Mr. Cooper's change of venue motion was granted, it was only changed to San Diego County. They allege that this change was hardly an improvement given the extensive media coverage, proximity to the crime scene, and homogeneity of the population. According to the petitioners, the evidence was indisputable that publicity surrounding the murders had been much greater in San Diego County than in Sacramento or Alameda County. They further state that at the time of trial San Diego was a predominantly white, highly conservative county that was among the top 10 death sentencing counties in the United States. Mr. Cooper's renewed motion for a transfer outside of San Diego was denied.

49. According to petitioners, the SBSB and District Attorney violated Mr. Cooper's right to equality before the law as guaranteed under the American Declaration by targeting him, a black man, for prosecution while ignoring the multitude of evidence pointing to three white men as the ones who attacked and killed the Ryen family and Christopher Hughes.

50. Petitioners further note that a black person convicted of a capital crime is significantly more likely to receive the death penalty than a white person convicted of the same kind of offense. When the victim is white and the alleged perpetrator is black, the alleged perpetrator is reportedly 4.3 times more likely to

receive the death penalty than similarly situated defendants whose victims are black. Petitioners also cite studies conducted on a California-specific basis that further demonstrate the bias inflicted based upon the race and ethnicity of the victim, as well as the diversity of the community where the crime occurred. According to the petitioners, it is a well-settled fact that blacks in California receive a disproportionately high percentage of the death sentences. Since the reinstatement of capital punishment, black defendants reportedly make up 33% of the death sentences issued despite the fact that they make up only 6.7% of the population. They also state that California's ratio for blacks in prison is higher than the ratios in most other states with large death row populations.

51. Petitioners conclude that Mr. Cooper's fundamental right to equality before the law recognized in Article II of the American Declaration was violated by the Court's refusal to remove the venue from San Diego County due to a poisoning of the jury pool by extensive and hostile media coverage. They state that Mr. Cooper's chances of receiving a fair trial without regard to his race were even further diminished after his case was transferred, given that San Diego County disproportionality sentences black defendants to death. Petitioners note that while blacks make up only about 5% of the population, they account for 34% of the death penalty convictions. They conclude in this regard that, given the combined facts that Mr. Cooper was an African-American living in California and was tried in San Diego County, he was more likely to be convicted and sentenced to death than a white person in a similar situation due to his race.

52. Finally, petitioners assert that there is ample evidence in Mr. Cooper's case that he faced racism both from the SBSD who ignored evidence clearly implicating three white males, from the District Attorney who refused to allow the case to be transferred to a racially diverse forum, and from the community from which the jury that convicted and sentenced him was selected.

B. Position of the State

53. According to the United States, all of Mr. Cooper's claims have been extensively considered by the courts of the state of California and the United States, his conviction and sentence have been repeatedly upheld, and the petitioners have presented no information to the IACHR that would suggest they should be reconsidered. The State claims that in his various post-conviction petitions, Mr. Cooper pursued his rights in state and federal courts to raise the same issues that he raises before the IACHR, including alleged violations of his rights to a fair trial, equal protection, and due process of law. According to the State, at the alleged victim's request, post-conviction DNA tests were conducted, and they only served to further inculcate Mr. Cooper in the murders.

54. The State further argues that the fact that Mr. Cooper was sentenced to death is not an independent basis for review by the Commission in criminal cases where the underlying claims have been repeatedly raised and extensively litigated over the course of decades. It indicates in this regard that many of the issues raised by the petitioners are factual contentions that were presented and decided upon by a jury after hearing forty-eight days of trial arguments and testimony. According to the State, petitioners do not establish that the courts of California and the United States were incapable of thoroughly considering Mr. Cooper's various petitions or deciding them in a fair and just fashion.

55. The Government therefore requests the IACHR to reject this case as it is not the role of the IACHR to intervene and substitute its judgment for the consistent and collective judgments of the jury and a myriad of state and federal judges since the original trial in 1984.

1. Fair trial and due process violations

56. The United States argues that Mr. Cooper's right to a fair trial recognized in Article XVIII of the American Declaration was not violated because the prosecution did not manufacture false evidence prejudicial to the alleged victim, did not hide potentially exculpatory evidence, there was no juror misconduct, and San Diego was a proper venue.

57. Regarding Mr. Cooper's guilt, the U.S. Government argues that there were a number of details and items offered as evidence of Mr. Cooper's connection with the murders. First the alleged victim admitted to staying in the Lease home next door to the Ryen's residence on the nights of June 2 and June 3, 1983. He slept in the closet of the bedroom that Ms. Bilbia, an employee of Larry Lease, had rented and recently vacated ("the Bilbia bedroom").

58. Second, the State notes that one of the murder weapons, a hatchet covered with dried blood and human hair, came from the Lease home and was discovered on June 5, 1983, on the side of the only paved road leading to the Ryen home. Buck knives, an eleven-inch hunting knife, and an ice pick were also missing from the Lease home. A coiled, blood-stained rope was allegedly found in the Bilbia bedroom closet. The State indicates that bloodstains on the rope were tested and found to be consistent with a mixture of blood from Jessica and Douglas Ryen, or Peggy and Douglas Ryen. In addition, post-conviction DNA testing reportedly confirmed Mr. Cooper to be the source of the A-41 drop of blood found on the opposite wall of the Ryen master bedroom.

59. The United States also indicates that police investigators found three significant shoe-print impressions, two on the Ryen premises, and one in the Lease home. All of the shoe-prints were reportedly consistent with Mr. Cooper's shoe size and the pattern of the Pro-Keds Dude tennis shoes issued to inmates at the prison from which Mr. Cooper escaped. Further, Mr. Cooper admitted to drinking beer in the Lease home. A six-pack of Olympia Gold beer with one can missing was found in the refrigerator of the Ryen home; one of the cans in the six-pack was blood-stained. According to the Government, a nearly empty can of Olympia Gold was found in a plowed horse-training area about midway between the Ryen home and the Lease home.

60. Further, some loose "Role-Rite" tobacco, provided free to California inmates and not available for retail was allegedly recovered in the Ryen station wagon that was found after the murders in Long Beach, California. This same type of tobacco had also reportedly been found in the Bilbia bedroom of the Lease home. The State points out that a manufactured cigarette butt was also found in the station wagon and post-conviction DNA tests confirmed that the cigarettes were Mr. Cooper's.

61. The United States asserts that the testimony of Josh Ryen was not manipulated and that the jury heard about Josh's description of "three Mexicans." It argues that the assertion that Josh Ryen described the assailants as three white males is not supported by any evidence, as he testified he could not recall seeing any assailants. The State indicates that, during the interview conducted on June 14, 1983, Detective O'Campo asked Josh who he "thought had done it," and he speculated that the three Mexicans who had stopped by his home earlier that evening might have done it. This speculation is, according to the State, hardly the same as a description that he saw three men carry out the murders, whether white or Hispanic. The State also claims that Josh's grandmother, who arrived at the hospital the night after the murders and was with him while he made his recovery, clearly and unequivocally testified at trial that Josh had never stated he could remember seeing more than one attacker the night of the murders. Further, it states that the allegation that Josh Ryen described the presence of multiple assailants and that police investigators manipulated his testimony was heard by the jury at trial and rejected.

62. Petitioners' allegations of police misconduct, including Mr. Cooper's claim that evidence regarding three white male perpetrators was ignored by police officers, are not, according to the State, supported by credible evidence. The State notes that the police interviewed several persons known to have been present at the Canyon Corral Bar on the night of the murders, one of whom testified at trial, and none of them claimed to have seen three white men with bloody shirts. This finding was affirmed by the U.S. District Court for the Southern District of California and the U.S. Court of Appeals for the Ninth Circuit in federal habeas proceedings.

63. According to the U.S. Government, the state of California did not destroy potentially exculpatory information affecting Mr. Cooper as alleged by the petitioners. The processing of the crime scene was the subject of a number of pre-trial hearings between May and August of 1984 that involved the testimony of a number of investigators and witnesses.

64. The assertion that the destruction by the prosecution of a pair of “bloody coveralls” severely compromised his defense is, according to the State, equally groundless. It argues in this regard that Diana Roper was abusing methamphetamine at the time and had a motive for disparaging Mr. Furrow, who had begun a sexual relationship with one of her childhood friends. The Government notes that during pretrial evidentiary hearings, Deputy Eckley testified that shortly after the discovery of the murders he was dispatched to the home of Diana Roper. Ms. Roper allegedly claimed she had found “bloody coveralls” hanging in a closet in her home that belonged to her former boyfriend Furrow, which she believed were linked to the murders based on a “vision” she obtained after she and some “witches” went into a trance. Deputy Eckley testified he found the coveralls had some stains below the knee that were dry and reddish in color, which was distinct from the brownish color of dried bloodstains he had seen in the past. He also testified that he only disposed of the coveralls months later when neither the homicide department nor the defense expressed any interest in them. Therefore, according to the State, the defense team was informed about the coveralls and did not choose to investigate them further.

65. The United States maintains that the criminologist who conducted serological testing of blood sample A-41 did not manipulate evidence or give false testimony. It notes that the photographs of the original testing of the drop of blood were inconclusive on the issue of whether it was EAP type B or rB because the photograph did not extend high enough on the bands to show the subtle distinction. It further states that all of the serological testing of A-41 performed by the defendant’s own expert showed that Mr. Cooper was possibly the source of it based on his African-American ancestry, while the tests excluded A-41 as having come from a Caucasian or Hispanic individual. The State further asserts that petitioner’s allegation that the criminalist manipulated and tampered with evidence was extensively reviewed and rejected by U.S. courts, which found that the allegation was unsupported and contradicted by the serological and DNA test results of evidence that was either not handled by the criminalist or was also verified by Mr. Cooper’s expert witness. Therefore, according to the State, Mr. Cooper has already raised this and similar claims at least twice, in the California Supreme Court on automatic appeal, and in U.S. federal court during habeas corpus proceedings and in both instances was found to be without merit.

66. According to the United States, California did not use falsified cigarette evidence against Mr. Cooper. It notes that the petitioners allege that the fact that the size of one of the cigarettes changed by 3 millimeters after having been unrolled for testing demonstrates tampering. However, the Court of Appeals noted the first measurement was of a “butt,” whereas the second measurement made after testing was of unrolled paper, and ruled that the fact that “the dimensions would be different is self-evident.”

67. The State alleges that there is no evidence indicating that San Bernardino Police planted the hatchet sheath and green button. It claims that, at trial, Detective Moran testified that he had entered the Lease home on June 6 at the request of Mr. Lease only in order to “determine if there was anybody hiding in the residence.” The State notes in this regard that the hatchet sheath, as admitted at trial, had been found along the side of a road the day in which the murders were discovered and before police could have had knowledge that Mr. Cooper had taken refuge in the Lease home or that the hatchet was taken from that house.

68. It also maintains that the SBSB did not plant Mr. Cooper’s blood on the tan t-shirt as alleged by the petitioners and that, even if petitioners could show this had happened, the tan t-shirt was not used against Mr. Cooper at trial, as petitioners themselves admit. Petitioners’ theory, according to the State, is that blood that had been drawn from Mr. Cooper after his arrest and stored in a “purple-topped tube” containing the preservative EDTA had been planted on the t-shirt by the SBSB. The State indicates that on September 7, 2004, following the district court’s recommendation, Mr. Cooper’s expert and a Government’s expert conducted a double-blind EDTA testing. According to the State, the test results submitted by the petitioners’ own expert are inconsistent with petitioners’ theory of tampering.

69. Further, the United States asserts that the prosecution did not fail to disclose the existence of a bloody blue shirt to Mr. Cooper. It notes in this regard that the district court found that the defense counsel was on notice because the dispatch log with the entry report of a “blue shirt” was disclosed to the defense before trial. However, the district court found there was evidence the “blue shirt” had never existed and was in fact the “tan shirt” admitted at trial. Therefore, according to the State, the “blue shirt” did not exist and it

was likely the “tan shirt” that was recovered by law enforcement and introduced by Mr. Cooper himself at trial.

70. The State alleges that the prosecution did not commit misconduct in considering a document that was admitted into evidence concerning Mr. Cooper’s mental health. It indicates that the California Supreme Court noted in this regard that, when a jury considers evidence that was given by mistake, this is not misconduct by the jury, but constitutes a trial error. The Court found that the effect of the exhibit’s admission into evidence was relatively minor, since the jury simply learned Mr. Cooper had once complained of headaches and said he had hallucinations. The minor effect, according to the Court, was further reduced when the judge withdrew the exhibit and admonished the jury to disregard it or any statements made pertaining to it.

71. Finally, regarding the alleged procedural bars, according to the Government few convicted prisoners have had the number of opportunities to challenge their conviction that Mr. Cooper has had. The State indicates in this regard that two different Superior Court judges have reviewed and rejected his post-conviction challenges and requests, in addition to numerous appeals to the 7-member California Supreme Court, and the numerous federal judges who have reviewed his claims. It further points out that the alleged victim has filed three successive federal habeas petitions and each denial was affirmed by the U.S. Court of Appeals for the Ninth Circuit. Regarding specifically the allegation that Mr. Cooper suffered from an improper procedural bar to relief, the States asserts that the alleged victim was granted a third successive federal habeas petition by the Ninth Circuit sitting *en banc* in 2004, meaning that he was permitted to proceed with his entire application in the district court irrespective of the provisions regarding successive applications found in the AEDPA.

72. The United States also notes that the alleged victim has sought certiorari in the U.S. Supreme Court at least six times and filed at least two petitions for the writ of habeas corpus in the Supreme Court; filed seven petitions for habeas corpus in the California Supreme Court; and sought clemency from the Governor of California twice. The State concludes, in this regard, that Mr. Cooper’s inability to overturn his conviction has not been the result of a failure of state and federal courts to conduct meaningful review over the past three decades, but rather because the evidence of Mr. Cooper’s guilt is overwhelming. Regarding the dissenting opinion cited by the petitioners, the State alleges that it does not equate to a denial of due process no matter how forcefully those dissenting views were expressed.

2. Ineffective assistance of court-appointed counsel

73. The United States notes that Mr. Cooper has litigated on multiple previous occasions various claims regarding the alleged failure of his trial counsel to provide him with effective assistance, and that California and U.S. federal courts have rejected each claim as being without merit. The Government indicates that several of the instances of alleged ineffective assistance of counsel revolve around trial counsel’s “failures” regarding the “fantastical story of Diana Roper, the destruction of the alleged “bloody” coveralls, and included an alleged “confession” made by Kenneth Koon, a friend of Ms. Roper, which was a matter of second-hand hearsay related by [a] mental patient.” The U.S. District Court for the Southern District of California determined that none of these factors were grounds for a new trial.

74. The State also claims that the allegations about trial counsel’s advice regarding whether to seek a second-degree murder verdict were also found to be without merit by the California Supreme Court. It indicates in this regard that trial counsel made a deliberate, tactical choice not to seek a second-degree murder instruction, and in any case there was no prejudicial error to Mr. Cooper.

75. Therefore, according to the United States, the alleged victim was not deprived of effective assistance of counsel at his trial, but rather had “an extraordinarily vigorous and able defense” that protected his right to due process of law.

3. Racial discrimination

76. The United States alleges that Mr. Cooper's right to equality before the law recognized in Article II of the American Declaration was not violated because California took measures to protect Mr. Cooper from racial hostility and nothing in the record suggests Mr. Cooper was found guilty or sentenced to death because of his race. According to the State, in order to protect the alleged victim against potential biases and prejudices, the judge granted the request to move the case out of San Bernardino County, where the coverage of the murders and the pre-trial proceedings was significant. In his ruling, the judge allegedly found the trial required significant logistical considerations even without a change of venue, and these problems would be unreasonably exacerbated by moving the trial into the north of the state. In addition to agreeing to a change of venue, Mr. Cooper and his defense, according to the State, actively participated in the selection of an impartial jury to protect him against possible prejudices, including those based on race, and a jury acceptable to the defense and prosecution was chosen with ease.

77. The United States also claims that the statistics cited by the petitioners do not show that race was a consideration in Mr. Cooper's prosecution, conviction and sentencing for three reasons. First, Mr. Cooper has reportedly presented no evidence that any direct or indirect act of racial discrimination occurred at any time in his case. The Government asserts that petitioners do not point to any facts supporting their contention that police investigators acted out of racial prejudice in investigating and arresting Mr. Cooper. The State indicates that while petitioners emphasize the difference between Mr. Cooper's race and that of his victims, they downplay the fact that he was granted a change of venue to protect against racial bias in the nearby community, and completely ignore his counsel's role in choosing an impartial jury.

78. Second, the State claims that relying on statistical evidence alone is not sufficient to call into question the criminal conviction and sentencing that has been the subject of extensive trial and post-trial proceedings. Rather than presenting specific evidence that Mr. Cooper's conviction and sentencing was the result of racial discrimination, the petitioners rely on statistical studies to support an allegation that he was statistically more likely to be sentenced to death because of his race.

79. Third, the State alleges that, even if it could stand on its own, the statistical evidence cited by the petitioners has inherent flaws, is susceptible to different interpretations, and the conclusions they draw from it are the subject of significant contention. The Government notes that several of the figures cited by the petitioners are rooted in the study done by David Baldus ("Baldus Study"). However, according to the United States, the causes of these discrepancies as well as their actual meaning have been disputed, including by a 2001 report issued by the U.S. Department of Justice.

80. Therefore, the State concludes that the petitioners cannot show, based on their statistical arguments alone, that Mr. Cooper's right to equality before the law under Article II of the American Declaration was violated. First, according to the United States, the state of California took precautions to protect the alleged victim from racial discrimination by granting him a change of venue for his trial and a role in choosing an impartial jury. Second, petitioners reportedly failed to allege any facts that support their contention that Mr. Cooper's race played any role in his conviction and sentencing. Third, the statistical evidence cited by the petitioners is not, according to the State, sufficient by itself to cast doubt on Mr. Cooper's conviction and sentencing, and the meaning of the statistic themselves are a matter of contentious debate.

IV. ESTABLISHED FACTS

81. In application of Article 43(1) of its Rules of Procedure, the IACHR will examine the arguments and evidence provided by the petitioners and the State.

82. The trial against Kevin Cooper for four counts of first degree murder and one count of attempted first degree murder started on August 1, 1983, in the County of San Bernardino, California.⁵ Following a request for change of venue filed by the defense, the trial was moved to San Diego County in March 1984.⁶ On March 1, 1985, the alleged victim was sentenced to the death penalty. The California Supreme Court affirmed the judgment on May 6, 1991, and denied a rehearing on June 26, 1991.⁷ On March 26, 1992, the U.S. District Court for the Southern District of California issued the first stay of execution in order to consider Mr. Cooper's additional legal challenges to his conviction and sentence.

83. In 1997 the first federal habeas petition was denied by the district court. The U.S. Court of Appeals for the Ninth Circuit affirmed the denial and subsequently denied rehearing and rehearing *en banc*. On April 30, 1998, the alleged victim filed a second federal habeas petition in the district court, which was dismissed for lack of jurisdiction and as an impermissible successive petition for repeating the same claims. On December 21, 2001, the Ninth Circuit denied Mr. Cooper's appeal. Rehearing and rehearing *en banc* were also denied by the Ninth Circuit on October 18, 2002, and the United States Supreme Court denied certiorari.⁸

84. During the second federal habeas petition Mr. Cooper filed a motion in the California Superior Court to seek DNA testing of blood found at the crime scene. Before the Superior Court made a ruling, the state of California entered into an agreement with Mr. Cooper on May 10, 2001, to conduct joint nuclear DNA forensic testing. The State and Mr. Cooper agreed to nuclear DNA testing of the hand rolled and manufactured cigarette butts recovered from the Ryan station wagon, the drop of blood (A-41), a hatchet, the hairs recovered from the murder victims' hands, a T-shirt, a bloody button, and the reference samples of Mr. Cooper and his alleged victims. The result from the agreed-upon post-conviction nuclear DNA testing confirmed the serology analysis from trial.⁹

85. Prior to the completion of the agreed-upon DNA analysis, Mr. Cooper filed a motion for evidentiary hearing in the California Superior Court claiming that in 1999 a criminalist of the San Bernardino County Sheriff's Crime Laboratory checked out evidence in his case and did not return that evidence until the following day. Based on this, Mr. Cooper claimed that prior to the agreed-upon DNA testing, law enforcement personnel either tampered with or contaminated the evidence that was the subject of the agreed-upon nuclear DNA testing.

86. On October 22, 2002, Mr. Cooper filed a supplemental motion for additional mitochondrial DNA testing of hairs recovered from the hands of the victims and requested an evidentiary hearing based on a claim that the evidence from the 2002 nuclear DNA test had been tampered with. On June 16, 2003, Mr. Cooper also filed a post-conviction discovery request in order to gain access to the tan blood-stained T-shirt. On July 2, 2003, after conducting an evidentiary hearing, the Court concluded that Mr. Cooper had not made any showing that law enforcement personnel tampered with or contaminated any evidence in his case and denied the request for further testing.¹⁰

⁵ Annex 4, trial transcript. Brief from the petitioners, received on April 29, 2011.

⁶ Annexes 9, 11 and 12, trial transcripts. Brief from the petitioners, received on April 29, 2011.

⁷ *People v. Cooper*, 809 P.2d 865, 904 (Cal. 1991).

⁸ Annex D, Opposition to Motion for Postconviction DNA Testing, *People v. Cooper*, No. CR-72787 at 9 (Cal. Super. Ct. Oct. 6, 2010) pp. 9-10, Brief from the State, received on December 5, 2013.

⁹ Annex D, Opposition to Motion for Postconviction DNA Testing, *People v. Cooper*, No. CR-72787 at 9 (Cal. Super. Ct. Oct. 6, 2010) pp. 10-11, Brief from the State, received on December 5, 2013.

¹⁰ *Cooper v. Brown*, 565 F.3d, pp. 636-638; *Cooper v. Brown*, 510 F.3d, pp. 891, 916, 917.

87. Mr. Cooper filed a second habeas petition before the Ninth Circuit involving the use of DNA testing and allegations of evidence tampering. The request was denied on the basis that Mr. Cooper alleged no new facts establishing his innocence or supporting his claim of DNA testing deficiencies or evidence tampering.¹¹ The U.S. Supreme Court denied certiorari in 2003.

88. On February 11 and May 15, 2003, Mr. Cooper filed two petitions for writ of habeas corpus in the U.S. Supreme Court, which were denied.

89. On December 17, 2003, the California Superior Court set an execution date of February 10, 2004. On January 20, 2004, Mr. Cooper filed a petition for writ of certiorari in the U.S. Supreme Court. The petition and application for stay were denied on February 9, 2004.¹² On February 2 and 5, 2004, Mr. Cooper filed two petitions for habeas corpus in the California Supreme Court, which were denied on February 5 and 9, 2004, respectively. The California Supreme Court concluded that “[a]s with the previous five petitions for writ of habeas corpus that petitioner has filed in this court challenging the judgment, this petition casts no doubt on petitioner’s guilt or the validity of the judgment.”¹³ On February 7, 2004, Mr. Cooper filed his seventh petition for writ of certiorari in the U.S. Supreme Court and requested a stay of execution. The petition and application for stay were denied on February 9, 2004.

90. On February 9, 2004, on the eve of his scheduled execution, the alleged victim sought permission from the three-judge Ninth Circuit panel to file a second or successive application for federal habeas corpus. Among other things, Mr. Cooper claimed that he had new and previously unavailable evidence that the State had violated the rule set forth in *Brady v. Maryland*, 373 U.S. 83 (1963), which requires the State to turn over exculpatory information to a criminal defendant. The three-judge panel denied permission. However, hours before Mr. Cooper’s scheduled execution, a majority of the Ninth Circuit sitting *en banc* issued a stay of execution and granted Mr. Cooper’s request for leave to file a new federal habeas petition.

91. The Court held that the alleged victim made out a *prima facie* case that entitled him to file a second or successive application; authorized him to file it; and remanded for the district court to order that two tests be performed so that “the question of Mr. Cooper’s innocence can be answered once and for all.” Those tests were the Mitochondrial DNA testing of blond hairs found in Jessica Ryen’s hands and the testing of the presence of the preservative EDTA on the t-shirt that was not part of the prosecution’s case at trial.¹⁴

92. On remand, the district court conducted the tests. Having conducted the EDTA tests, however, it decided the results were not admissible. With regard to the EDTA testing, the district court concluded that it did not satisfy the standards for reliability established by the *Daubert* case and the Federal Rules of Evidence. The ruling was based on findings that: in the only other instance in which EDTA test results by Mr. Cooper’s EDTA expert were offered into evidence, the court soundly rejected both the credibility of the expert and the reliability of EDTA testing in ruling the evidence inadmissible; the application of EDTA testing in a forensic context had not been scientifically accepted and had not been subjected to either peer review or publication; and there were no standard EDTA levels against which test results could be compared, permitting significant manipulation of the results and preventing definite conclusions.¹⁵ With regard to the Mitochondrial DNA testing ordered by the Court, it confirmed that the hairs most likely came from one or more of the victims, and failed to identify another assailant.

93. After conducting evidentiary hearings at which 42 witnesses testified, the district court rejected Mr. Cooper’s nine habeas claims and denied the request for a Certificate of Appealability (COA) on

¹¹ Cooper v. Brown, 565 F.3d, pp. 636-641; Cooper v. Brown, 510 F.3d, p. 890.

¹² Cooper v. California (2004) 540 U.S. 1172.

¹³ Annex D, Opposition to Motion for Postconviction DNA Testing, People v. Cooper, No. CR-72787 at 9 (Cal. Super. Ct. Oct. 6, 2010) p. 14, Brief from the State, received on December 5, 2013.

¹⁴ Cooper v. Woodford 358 F.3d 1117 (9th Cir. 2004).

¹⁵ Cooper v. Brown, 510 F.3d 870 (9th Cir. 2007), pp. 941-48.

May 31, 2005. The Court dismissed the claim of ineffective assistance of counsel based on procedural grounds. It found in this regard that "factual grounds in support of a legal claim that has already been presented are not sufficient to evade the mandatory dismissal requirement of 28 U.S.C. § 2244(b)" and that "[t]he gravamen of the claim of ineffective assistance of trial counsel is the same, regardless of whether Petitioner presents new and different legal arguments or different factual allegations."¹⁶

94. Circuit Judge McKeown issued a concurring opinion expressing:¹⁷

"I concur in the opinion but am troubled that we cannot, in Kevin Cooper's words, resolve the question of his guilt "once and for all." I do not fault the careful and extensive review by the district court or the multiple levels of appeal carried out under statutory and Supreme Court standards. Rather, the state bears considerable responsibility in making such resolution unavailable. I separately concur to underscore the critical link between confidence in our justice system and integrity of the evidence. Significant evidence bearing on Cooper's culpability has been lost, destroyed or left unpursued, including, for example, blood-covered coveralls belonging to a potential suspect who was a convicted murderer, and a bloody t-shirt, discovered alongside the road near the crime scene. The managing criminologist in charge of the evidence used to establish Cooper's guilt at trial was, as it turns out, a heroin addict, and was fired for stealing drugs seized by the police. Countless other alleged problems with the handling and disclosure of evidence and the integrity of the forensic testing and investigation undermine confidence in the evidence.

[...]

Despite the presence of serious questions as to the integrity of the investigation and evidence supporting the conviction, we are constrained by the requirements of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), 28 U.S.C. § 2244(b)(2)(b). The only exception potentially applicable in Cooper's case requires Cooper to present facts that "could not have been discovered previously through the exercise of due diligence," and that, if proven, and "viewed in light of the evidence as a whole, would be sufficient to establish by *clear and convincing evidence* that, but for constitutional error, *no reasonable factfinder* would have found [Cooper] guilty of the underlying offense." 28 U.S.C. § 2244(b)(2)(B) (emphases added).

In light of this demanding statutory barrier, I agree that Cooper has failed to qualify for relief. Nonetheless, I write separately to draw attention to the illustrative troubling circumstances involving the alleged state mishandling of evidence. The forensic evidence in this case is critical and yet was compromised. These facts are all the more troubling because Cooper's life is at stake.

95. A request for a certification of appeal was later granted by the Ninth Circuit Court. The Court left Mr. Cooper "to assert that even though the district court allowed the testing [ordered by the Ninth Circuit], it abused its discretion in how the tests were conducted and in the scope of the evidentiary hearings that it held; and to appeal denial of [eight of the nine claims] of his third petition."¹⁸

¹⁶ Cooper v. Brown, 510 F.3d 870 (9th Cir. 2007), Appendix A (Order Denying Successive Petition for Writ of Habeas Corpus), pp. 984-985.

¹⁷ Cooper v. Brown, 510 F.3d 870 (9th Cir. 2007), Appendix A (Order Denying Successive Petition for Writ of Habeas Corpus), pp. 1004-1005.

¹⁸ Cooper v. Brown, 510 F.3d 870 (9th Cir. 2007), p. 876.

96. On December 4, 2007, a three-judge panel of the Ninth Circuit of the U.S. Court of Appeals affirmed the district court's denial of Mr. Cooper's federal habeas petition.¹⁹ The panel affirmed the district court finding that EDTA test results on the bloodstained T-shirt did not meet the standards for admissibility and that, even if state contaminated or tampered evidence, Mr. Cooper was not entitled to habeas relief since the T-shirt was not used as evidence in his murder trial. It determined in this regard that the district court had discretion to conclude that testing for preservative agent EDTA lacked sufficient indicia of reliability to be admissible and therefore test results could not be used to decide the ultimate issue at hand. The Court also held that the alleged victim failed to establish a claim of actual innocence; failed to establish a *Brady* violation; and failed to establish an ineffective assistance of counsel claim.

97. On May 11, 2009, a panel of the Ninth Circuit denied a petition for rehearing and a petition for rehearing *en banc*.²⁰ According to this decision, "[i]n short, there is no reliable evidence of tampering." With regard to the dissenting vote mentioned below, the panel stated:²¹

"The dissent improperly marshals the facts in the light most favorable to Kevin Cooper, yet the evidence was resolved against Cooper at trial – after he took the stand and testified – and at each step of post-conviction proceedings. The dissent also approaches the issues as if they were new yet the same issues have been on the table since day one (except for DNA testing which didn't exist at the time and which has turned out to be inculpatory).

[...]

The dissent ignores the rules that Congress established for federal habeas review of state criminal judgment in the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). Cooper's petition is a successive federal habeas corpus application that was preceded by appeals through the California courts, post-conviction petitions in state and federal court, and evidentiary hearings in both state and federal court."

98. Regarding the EDTA testing, the decision indicates that:²²

"The district court did the job it was required to do under *Daubert* [...] – determine whether EDTA testing is scientifically valid. The district court concluded that the analysis by Cooper's expert did not pass muster. There is no evidence that the methodology Cooper's expert espoused has been, or can be, tested. No other scientists regularly perform this kind of testing. There are no industry standards regarding proper testing protocol, and we have no idea how the history of each specimen's exposure to environmental EDTA will affect the sample and, in turn, the testing."

99. Circuit Judge W. Fletcher, joined by other five Circuit Judges issued a 114 page dissenting opinion from denial of rehearing *en banc*. The opinion, which begins with the assertion "[t]he State of California may be about to execute an innocent man," affirms:²³

"There is no way to say this politely. The district court failed to provide Cooper a fair hearing and flouted our direction to perform the two tests [referring to the testing of the bloody tan t-shirt and the mitochondrial DNA testing of the hairs in the hand of Jessica Ryen].

[...]

¹⁹ Cooper v. Brown, 510 F.3d 870 (9th Cir. 2007).

²⁰ Cooper v. Brown, 565 F.3d 581 (9th Cir. 2009).

²¹ Cooper v. Brown, 565 F.3d 581 (9th Cir. 2009), p. 2.

²² Cooper v. Brown, 565 F.3d 581 (9th Cir. 2009), p. 13.

²³ Cooper v. Brown, 565 F.3d 581 (9th Cir. 2009), pp. 22-24.

The most egregious, but by no means the only, example is the testing of Cooper's blood on the t-shirt for the presence of EDTA. As will be described in greater detail below, the district court so interfered with the design of the testing protocol that one of Cooper's scientific experts refused to participate in the testing. The district court allowed the state-designated representative to help choose the samples to be tested from the t-shirt. The court refused to allow Cooper's scientific experts to participate in the choice of samples. Indeed, the court refused to allow Cooper's experts even to *see* the t-shirt. The state-designated lab obtained a test result showing an extremely high level of EDTA in the sample that was supposed to contain Cooper's blood. If that test result was valid, it showed that Cooper's blood had been planted on the t-shirt, just as Cooper has maintained."

100. The dissenting opinion further discusses the "[six fundamental] errors committed by the district court in conducting the EDTA tests and in refusing to continue that testing" and "then discuss[es] the information revealed by the testing so far conducted, and show[s] that even the truncated EDTA testing strongly suggests that Cooper's blood was planted on the t-shirt."²⁴

101. On November 30, 2009, a petition for writ of certiorari to the United States Supreme Court was denied.²⁵

102. On January 14, 2011, a San Diego County Superior Court Judge rejected a request from the alleged victim to conduct, at no expense to the Government, further DNA testing on select pieces using a new technique called a "MiniFiler" that is allegedly more sensitive than traditional DNA.

103. California Governor Arnold Schwarzenegger denied Mr. Cooper's first clemency request in 2004. On December 17, 2010, Governor Schwarzenegger received a second clemency application but did not act before he left office on January 3, 2011, stating that there was insufficient time to fully review the extensive materials filed and reach a decision.²⁶

V. LEGAL ANALYSIS

A. Preliminary matters

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

105. That gives rise to the particular importance of the IACHR's obligation to ensure that any deprivation of life that may arise from the enforcement of the death penalty strictly abides by the requirements set forth in the applicable instruments of the inter-American human rights system, including the American Declaration.²⁷ That heightened scrutiny is consistent with the restrictive approach adopted by other international human rights bodies in cases involving the imposition of the death penalty,²⁸ and it has been set out and applied by the Inter-American Commission in previous capital cases brought before it.²⁹

²⁴ Cooper v. Brown, 565 F.3d 581 (9th Cir. 2009), pp. 57-60.

²⁵ Cooper v. Ayers (2009).

²⁶ Annex E, Andrea Lynn Hoch, Kevin Cooper Clemency Petition Deferral, California Office of the Governor Memo (Jan. 2, 2011), Brief from the State, received on December 5, 2013.

²⁷ See, in this respect, IACHR, The death penalty in the Inter-American System of Human Rights: From restrictions to abolition, OEA/Ser.L/V/II.Doc. 68, December 31, 2011.

²⁸ See, for example: I/A Court H. R., Advisory Opinion OC-16/99 (October 1, 1999), *The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law*, para. 136 (finding that "because execution of the death penalty is [continues ...]

106. As the Inter-American Commission has explained, this standard of review is the necessary consequence of the specific penalty at issue and the right to a fair trial and all attendant due process guarantees:³⁰

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

107. The Inter-American Commission will therefore review the petitioner’s allegations in the present case with a heightened level of scrutiny, to ensure in particular that the rights to life, due process, and to a fair trial as prescribed under the American Declaration have been respected by the State. With regard to the legal status of the American Declaration, the IACHR reiterates that:

“[t]he American Declaration is, for the Member States not parties to the American Convention, the source of international obligations related to the OAS Charter. The Charter of the Organization gave the IACHR the principal function of promoting the observance and protection of human rights in the Member States. Article 106 of the OAS Charter does not, however, list or define those rights. The General Assembly of the OAS at its Ninth Regular Period of Sessions, held in La Paz, Bolivia, in October, 1979, agreed that those rights are those enunciated and defined in the American Declaration. Therefore, the American Declaration crystallizes the fundamental principles recognized by the American States. The OAS General Assembly has also repeatedly recognized that the American Declaration is a source of international obligations for the member states of the OAS.”³²

B. Right to a fair trial and right to due process of law (Articles XVIII and XXVI of the American Declaration)

108. The American Declaration guarantees the right of all persons to a fair trial and to due process of law, respectively, in the following terms:

[... continuation]

irreversible, the strictest and most rigorous enforcement of judicial guarantees is required of the State so that those guarantees are not violated and a human life is not arbitrarily taken as a result’); United Nations Human Rights Committee, *Baboheram-Adhin et al. v. Suriname*, Communications Nos. 148-154/1983, adopted on April 4, 1985, para. 14.3 (observing that “the law must strictly control and limit the circumstances in which a person may be deprived of his life by the authorities of a State”); *Report of the United Nations Special Rapporteur on Extrajudicial Executions*, Bacre Waly Ndiaye, submitted pursuant to Commission on Human Rights Resolution 1994/82, Question of the Violation of Human Rights and Fundamental Freedoms in any part of the World, with particular reference to Colonial and Other Dependent Countries and Territories, UN Doc.E/CN.4/1995/61 (December 14, 1994) (“the Ndiaye Report”), para. 378 (emphasizing that in capital cases, it is the application of the standards of fair trial to each and every case that needs to be ensured and, in case of indications to the contrary, verified, in accordance with the obligation under international law to conduct exhaustive and impartial investigations into all allegations of violation of the right to life).

²⁹ IACHR, Report No. 11/15, Case 12.833, Merits (Publication), Felix Rocha Diaz, United States, March 23, 2015, para. 54; Report No. 44/14, Case 12.873, Merits (Publication), Edgar Tamayo Arias, United States, July 17, 2014, para. 127; Report No. 57/96, Andrews, United States, IACHR Annual Report 1997, para. 170-171.

³⁰ IACHR, The death penalty in the Inter-American System of Human Rights: From restrictions to abolition, OEA/Ser.L/V/II.Doc. 68, December 31, 2011, para. 41.

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

³² IACHR, Report No. 44/14, Case 12.873, Report on Merits (Publication), Edgar Tamayo Arias, United States, July 17, 2014, para. 214.

Article XVIII – Right to a fair trial

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

Article XXVI – Right to due process of law

Every accused person is presumed to be innocent until proved guilty.

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

1. Fair trial and due process violations

109. The petitioners allege that the mishandling and misprocessing of the crime scene by the San Bernardino Sheriff's Department deprived Mr. Cooper's defense team of the opportunity to conduct an independent analysis and reconstruction of the scene. They further state that the SBSD planted, manipulated and replaced evidence, and also failed to disclose exculpatory information to the defense. Petitioners further assert that the U.S. District Court for the Southern District failed to conduct meaningful post-conviction proceedings. Finally, petitioners allege that the rights to due process and fair trial were also violated given the draconian procedural restrictions imposed by the Antiterrorism and Effective Death Penalty Act (AEDPA) of 1996 that prohibits the filing and determination of otherwise meritorious constitutional claims unless the applicant can show, among other things, that "no reasonable factfinder would have found the applicant guilty of the underlying offense."

110. The United States argues that all of Mr. Cooper's claims have been extensively considered by the courts of the state of California and the United States and that his conviction and sentence have been repeatedly upheld. The State claims that in his various post-conviction petitions, Mr. Cooper pursued his rights in state and federal courts to raise the same issues that he raises before the IACHR. According to the State, at the alleged victim's request, post-conviction DNA tests were conducted, and they only served to further inculcate Mr. Cooper in the murders. Therefore, the State asserts that petitioners fail to establish that the courts of California and the United States were incapable of thoroughly considering Mr. Cooper's various petitions or deciding them in a fair and just fashion. Regarding the alleged procedural bars, according to the Government, few convicted prisoners have had the number of opportunities to challenge their conviction that Mr. Cooper has had. The State concludes that Mr. Cooper's inability to obtain the overturning of his conviction has not been the result of a failure of state and federal courts to conduct meaningful review over the past three decades, but rather because the evidence of Mr. Cooper's guilt is overwhelming.

111. The Inter-American Commission would first like to note that it has no competence to replace domestic courts in the appraisal of evidence or to declare that an individual convicted of a criminal offense is or not guilty. According to the "fourth instance formula," the Commission in principle will not review the judgments issued by the domestic courts acting within their competence and with due judicial guarantees. The fourth instance formula does not, however, preclude the Commission from considering a case where the petitioner's allegations entail a possible violation of any of the rights set forth in the American Declaration.³³ In this regard, the IACHR has affirmed in death penalty cases that the application of the heightened scrutiny test to due process questions is not, in any way, precluded by the fourth instance formula.³⁴ The analysis that follows thus concerns the right to a fair trial and due process under the American Declaration.

³³ IACHR, Report No. 75/02, Case 11.140, Mary and Carrie Dann, Merits, United States, December 27, 2002, para. 166.

³⁴ IACHR, Report No. 44/14, Case 12.873, Merits (Publication), Edgar Tamayo Arias, United States, July 17, 2014, para. 129.

112. The IACHR notes that Mr. Cooper has had ample opportunities to challenge his conviction before state and federal courts. The alleged victim has filed three federal habeas petitions, sought certiorari in the U.S. Supreme Court at least six times, and filed at least two petitions for the writ of habeas corpus in the Supreme Court. However, after more than 20 years of post-conviction proceedings, the alleged victim and the petitioners continue to affirm that Mr. Cooper is innocent and that the process against him has violated his right to due process. Given that the case involves the pending application of the death penalty, the Commission necessarily analyzes the due process issues involved in that framework, with the strict level of scrutiny required, and taking into account the totality of the circumstances of the trial, sentencing and post-conviction appeals. In this regard, the Commission must give due attention to the claims that have arisen over this long period, and the way that the different courts have responded to them. The due process questions that have been subjected to special attention during the proceedings at the domestic level, and which the Commission identifies as requiring review concern, first, whether evidence against Mr. Cooper was planted or manipulated by the authorities, and, second, whether evidence was withheld from him and his lawyer.

113. According to the record, DNA testing in 2001 of blood on the tan t-shirt found at the crime scene would have been probative of Mr. Cooper's guilt. Mr. Cooper's defense, however, claimed that his blood had been planted on the shirt. On the eve of Mr. Cooper's scheduled execution in 2004, the Ninth Circuit ordered that the shirt be tested for the presence of the blood preservative EDTA. Heightened levels of EDTA were in fact detected. This would have suggested that Mr. Cooper's blood was planted from the sample the SBSO took from him two days after his arrest and placed in a vial containing EDTA. After this result was reported, the state-appointed lab withdrew it on the basis that the sample had been contaminated by EDTA in the lab, and the district court accepted the withdrawal. The district court declared the other evidence gathered during the testing process inadmissible as not meeting the standards of scientific certainty set forth in the Federal Rules of Evidence. The record indicates that the design of the testing process was controlled by the state authorities; Mr. Cooper's expert was not permitted to participate in the process for selecting the samples, or even to see the t-shirt; Mr. Cooper was never provided with the complete results of the EDTA testing by the state-appointed lab; and a request for discovery into how the unspecified contamination cited by the lab would have occurred was denied.

114. The Commission takes note of the considerations expressed in the dissenting opinion issued by Circuit Judge Fletcher and four other judges on May 11, 2009:³⁵

"The most egregious, but by no means the only, example is the testing of Cooper's blood on the t-shirt for the presence of EDTA. [...] [t]he district court so interfered with the design of the testing protocol that one of Cooper's scientific experts refused to participate in the testing. The district court allowed the state-designated representative to help choose the samples to be tested from the t-shirt. The court refused to allow Cooper's scientific experts to participate in the choice of samples. Indeed, the court refused to allow Cooper's experts even to see the t-shirt. The state-designated lab obtained a test result showing an extremely high level of EDTA in the sample that was supposed to contain Cooper's blood."

115. Analyzing this issue in its context, the Commission observes that the objective of ordering the EDTA test was precisely to provide clarification as to whether evidence against Mr. Cooper had been planted or manipulated. The way the process was managed by the courts did not provide that clarification. Serious issues remain with respect to the conditions under which the testing was done and the withdrawal of the results that would have been favorable to Mr. Cooper by the state-appointed lab with no possibility for the defense to probe or challenge the reasons or validity of the withdrawal. The district court and 9th Circuit accepted the failure to clarify this evidence without allowing or requiring steps that would have been available—including but not limited to retesting the shirt or authorizing the defense to have access to lab data, notes, reports and other materials relative to the claims of contamination by the state-appointed lab-- to ensure a complete review as to whether there may have been evidence tampering by state officials.

³⁵ Cooper v. Brown, 565 F.3d 581 (9th Cir. 2009), pp. 22-24.

116. Another issue that remains unclarified to date is the reason why the DNA of two different persons was found in that same vial that was supposed to contain only the blood sample taken from Mr. Cooper two days after his arrest.³⁶ The record reflects that the presence in the vial of DNA from more than one person only became known through a mix-up in other testing. When the existence of more than one DNA donor in the sample was brought to light in 2004, Mr. Cooper's defense requested an evidentiary hearing to investigate how the DNA of more than one person would have ended up in that vial, but the request was denied. In 2011 Mr. Cooper's counsel learned of a new DNA testing technique that could allegedly identify the secondary DNA donor previously established but not identified in the 2002 DNA testing and brought a motion seeking supplemental DNA testing. Although the request was made proposing no expense to the Government, the motion was denied. Again, measures were available to attempt to clarify a potential situation of manipulation of evidence, but those measures were not pursued.

117. The Inter-American Commission has underscored that "in cases involving the death penalty, the State has an enhanced obligation to guarantee that no evidence favorable to the accused is withheld, as this could change the outcome of the trial and give rise to an arbitrary deprivation of life."³⁷ The State has the duty to disclose all exculpatory evidence in its possession as well as information favorable to the accused.

118. The Commission identifies a separate but related concern with respect to information that was not made available to the defense, and takes into account two particular examples that could have had significance in the criminal proceedings. As for the first, as recounted above, evidence was submitted at Mr. Cooper's trial to the effect that the tennis shoe marks found at the scene were from a type of shoe only issued within the prison system. The warden of the CIM at the time of Mr. Cooper's detention there had seen this testimony reported in the news and asked the staff whether this was the case. Upon finding out that this type of shoe was not manufactured in or exclusively for the prison, she tried more than once to report this to the SBSB. While she spoke to someone at the SBSB for this purpose, this information was not placed in the record or reported to the defense. The defense was not informed and only became aware of it years later.

119. The second example concerns the coveralls that were turned in to the SBSB by Ms Roper, who reported suspicions that her then boyfriend, a convicted murderer, may have been involved in the Ryen killings. Those coveralls were described by multiple declarants as blood stained. The defense was aware that they had been turned in; however the defense was not informed when the coveralls were disposed of absent any further investigation or testing just months later. When this was discovered, the officer who disposed of them declared that he had done so on his own, but it was later confirmed that a superior had signed off on the disposal.

120. The right to a fair trial with due process requires that the police and prosecution take into account facts and evidence in favor of and against the defendant. As the European Court of Human Rights encountered in the case of *Natunen v. Finland* (2009), "a procedure whereby the investigating authority itself, even when cooperating with the prosecution, attempts to assess what may or may not be relevant to the case, cannot comply with the requirements" of the right to due process.³⁸ As in the present case, in *Natunen* a decision had been made to destroy undisclosed evidence at the pre-trial investigation stage "without providing the defense with the opportunity to participate in the decision making process."³⁹ The process that led to the disposal of the coveralls, absent any procedural safeguards, was inconsistent with due process guarantees, and the result was to impose an unjustified limitation on Mr. Cooper's defense.

³⁶ Judge W. Fletcher of the Ninth Circuit, in his dissenting opinion, noted that one "obvious explanation" is that someone removed blood from the vial for the purpose of planting it on evidence, and added some from another source to conceal the action (*Cooper v. Brown*, 565 F.3d 581 (9th Cir. 2009), p. 5458).

³⁷ IACHR, Report No. 53/13, Case 12.864, Merits (Publication), Ivan Teleguz, United States, July 15, 2013, para. 98.

³⁸ ECtHR, *Case of Natunen v. Finland*, Application No. 21022/04, Judgment of 31 March 2009, para. 47.

³⁹ ECtHR, *Case of Natunen v. Finland*, Application No. 21022/04, Judgment of 31 March 2009, para. 48.

121. Additionally, the record demonstrates the existence of a call log recording that a local resident had reported finding a blue blood-stained t-shirt near the scene of the crime, and that the SBSB went to the location and retrieved the shirt the caller had reported. That shirt never appeared in the evidence of the case. The explanation later given was that there was confusion between the tan t-shirt and a supposed blue t-shirt that never existed. The Commission notes, however, that the record reflects the finding and retrieval of a blue t-shirt the day before the recorded discovery of the tan t-shirt that did show up in evidence, and on which the defense maintains that Mr. Cooper's blood was planted.

122. Further, according to the facts established in this report, the district court dismissed the claim of ineffective assistance of counsel based on procedural grounds. The court found that "factual grounds in support of a legal claim that has already been presented are not sufficient to evade the mandatory dismissal requirement of 28 U.S.C. § 2244(b)."⁴⁰ According to the court, even if the petitioner presents new and different legal arguments or different factual allegations, the claim is barred. In his concurring opinion, Circuit Judge McKeown expressed in this regard: "[d]espite the presence of serious questions as to the integrity of the investigation and evidence supporting the conviction, we are constrained by the requirements of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA)."

123. Therefore, 30 years after Mr. Cooper's conviction and sentence, the question of his innocence has not been answered "once and for all," as requested by the Ninth Circuit.

124. According to the standards developed by the inter-American human rights system, a remedy must be effective, i.e., it must provide results or responses to the end that it was intended to serve, that is, to prevent the consolidation of an unjust situation. It must also be accessible, without requiring the kind of complex formalities that would render this right illusory. The right to appeal a judgment is a basic guarantee of due process to prevent the consolidation of a situation of injustice. In this respect, the IACHR has stated that "[t]he due process guarantees should also be interpreted to include a right of effective review or appeal from a determination that the death penalty is an appropriate sentence in a given case."⁴¹

125. Although the regulation of some minimum requirements for presenting a legal challenge is not *per se* incompatible with the American Declaration, the Inter-American Commission concludes that in the instant death penalty case, the rejection of a claim based on the failure to comply with formal requirements established by statute constitutes a violation of the right to a fair trial. More specifically, the Commission observes that the terms of the AEDPA restricting review of claims already raised, regardless of new arguments or even new facts, precluded the admissibility and further review of the ineffective assistance of counsel claim. The Commission takes into account that in the context of a death penalty case this type of claim may be of crucial importance. The IACHR has an enhanced obligation to ensure that any deprivation of life which may occur through the application of the death penalty is in strict compliance with the right to a timely, effective and accessible legal remedy.

126. Based on the above considerations, the Inter-American Commission concludes that the United States violated Mr. Cooper's right to due process and to a fair trial under Articles XVIII and XXVI of the American Declaration.

2. Ineffective assistance of court-appointed counsel

127. The petitioners contend that numerous mistakes committed by Mr. Cooper's trial counsel at the pretrial, guilt, and penalty stage, "crippled the alleged victim's defense." Trial counsel allegedly refused to accept co-counsel or paralegal help, or hire more than one investigator, in what was a complex, capital case. These failures allegedly lead to defense counsel's inability to review discovery from the prosecution in a

⁴⁰ *Cooper v. Brown*, 510 F.3d 870 (9th Cir. 2007), Appendix A (Order Denying Successive Petition for Writ of Habeas Corpus), pp. 984-985.

⁴¹ IACHR, Report No. 53/13, Case 12.864, Merits (Publication), Ivan Teleguz, United States, July 15, 2013, paras. 101, 102 and 106.

timely manner. Further, defense counsel reportedly failed to stay in San Diego during the jury's deliberations, despite the specific and repeated requests by the San Diego courthouse in this regard, resulting in those deliberations continuing notwithstanding questions from the jury that had they been dealt with in a timely and complete manner with the presence of his lawyer may have had some impact on that phase of the process.

128. The State argues that Mr. Cooper has litigated on multiple previous occasions various claims regarding the alleged failure of his trial counsel to provide him with effective assistance, and that California and U.S. federal courts have rejected each claim as being without merit. According to the United States, the alleged victim was not deprived of effective assistance of counsel at his trial, but rather had "an extraordinarily vigorous and able defense" that protected his right to due process of law.

129. The Inter-American Commission has indicated that:

"[t]he right to due process and to a fair trial includes the right to adequate means for the preparation of a defense, assisted by adequate legal counsel. Adequate legal representation is a fundamental component of the right to a fair trial.

[...]

The State cannot be held responsible for all deficiencies in the conduct of State-funded defense counsel. National authorities are, however, required [...] to intervene if a failure by legal aid counsel to provide effective representation is manifest or sufficiently brought to their attention. Rigorous compliance with the defendant's right to competent counsel is compelled by the possibility of the application of the death penalty."⁴²

130. The appointment of an attorney by the state does not, in and of itself, ensure effective assistance of counsel. At the same time, while the state is responsible for ensuring that such assistance is effective, it is not responsible for what may be understood as decisions of strategy or for every possible shortcoming. Rather, the Commission must evaluate whether the assistance of counsel was effective in the overall context of the process and taking into account the specific interests at stake. In the present case, the interests at stake included the potential application of the death penalty, and the assistance of counsel must be evaluated in that context.

131. It may be noted that the fundamental nature of this guarantee has been reflected in practice guidelines for lawyers. The American Bar Association has prepared and adopted guidelines and related commentaries that emphasize the importance of investigating and presenting mitigating evidence in death penalty cases.⁴³ According to these guidelines, the duty of counsel in the United States to investigate and present mitigating evidence is now "well-established" and:

"[b]ecause the sentencer in a capital case must consider in mitigation, "anything in the life of the defendant which might militate against the appropriateness of the death penalty for the defendant," "penalty phase preparation requires extensive and generally unparalleled investigation into personal and family history."⁴⁴

⁴² IACHR, The death penalty in the Inter-American System of Human Rights: From restrictions to abolition, OEA/Ser.L/V/II.Doc. 68, December 31, 2011, p. 123.

⁴³ American Bar Association, *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases* (Revised editions) (February 2003), Guideline 10.7 – Investigation. Available at: <http://www.abanet.org/legalservices/downloads/sclaid/deathpenaltyguidelines.pdf>.

⁴⁴ American Bar Association, *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases* (Revised editions) (February 2003), Guideline 10.7 – Investigation, at 82.

132. The Guidelines also emphasize that the “mitigation investigation should begin as quickly as possible, because it may affect the investigation of first phase defenses (e.g., by suggesting additional areas for questioning police officers or other witnesses), decisions about the need for expert evaluations (including competency, mental retardation, or insanity), motion practice, and plea negotiations.”⁴⁵

133. According to the information submitted by the petitioners, which has not been disputed by the State, despite the complex nature of the case, trial counsel allegedly refused to accept co-counsel or paralegal help. Further, defense counsel refused to stay in San Diego during the jury’s deliberations notwithstanding the requests made by the courthouse. The first time the jury deadlocked during penalty deliberations, defense counsel allegedly refused to return to San Diego, waiving the right to be present, and the jury was reportedly instructed to continue deliberating. The second time the jury continued to deliberate during the two and half hours that it took Mr. Cooper’s lawyer to return to Court, and allegedly reached a verdict of death before the parties assembled for the judge to declare a mistrial. The record also reflects that his attorney advised Mr. Cooper to request that no jury instructions be given on second degree murder (which would not have carried the death penalty), based on the lawyer’s mistaken interpretation of the applicable law.

134. As a consequence of these failures on the part of the state appointed counsel in a crucial phase of the process, the Inter-American Commission concludes that the United States violated Mr. Cooper’s right to due process and to a fair trial under Articles XVIII and XXVI of the American Declaration.

C. Right to equality before the law (Article II of the American Declaration)

135. The American Declaration guarantees the right to equality before the law, in the following terms:

Article II – Right to equality before the law

All persons are equal before the law and have the rights and duties established in this Declaration, without distinction as to race, sex, language, creed or any other factor.

136. The petitioners contend that Mr. Cooper faced racism from the San Bernardino Sheriff’s Department who ignored evidence implicating three white males, from the District Attorney who refused to allow the case to be transferred to a racially diverse forum, and from the community from which the jury that convicted and sentenced him was selected. They state that media coverage regarding Mr. Cooper’s past history was particularly prejudicial and racially charged and that the change of venue to San Diego County was hardly an improvement given the extensive media coverage, proximity to the crime scene, and homogeneity of the population. Based on statistics, the petitioners note that a black person convicted of a capital crime is significantly more likely to receive the death penalty than a white person convicted of the same kind of offense.

137. The United States argue that the state of California took precautions to protect Mr. Cooper from racial discrimination by granting the request to move the case out of San Bernardino County, where the coverage of the murders and the pre-trial proceedings was significant. According to the State, the judge found that moving the trial into the north of the state would unreasonably exacerbate significant logistical considerations. It further states that the defense actively participated in the selection of an impartial jury to protect Mr. Cooper against discrimination, and a jury acceptable to the defense and prosecution was chosen with ease. The State also asserts that the petitioners failed to allege any facts that support that Mr. Cooper’s race played any role in his conviction and sentencing. Finally, according to the United States, statistical evidence is not sufficient by itself to cast doubt on Mr. Cooper’s conviction and sentencing.

⁴⁵ American Bar Association, *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases* (Revised editions) (February 2003), Guideline 10.7 – Investigation, at 83.

138. As a result of its growing concern over the treatment of African-Americans by the United States criminal justice system and, particularly, by law enforcement officers, on October 27, 2014, the IACHR convened, on its own initiative, a public hearing on Reports on Racism in the United States Justice System. The IACHR received troubling information regarding the problem of racial profiling by law enforcement officials at the local, state, and federal levels.

139. In its report on The Situation of People of African Descent in the Americas, the IACHR, based on the General Recommendation No. XXXI issued by the Committee on the Elimination of Racial Discrimination,⁴⁶ indicated that “offences involving members of stigmatized or marginalized groups are more severely punished and that whatever the legal and procedural system in force in a given country, the structural inequalities, stereotypes and prejudices are mirrored in the criminal justice system.”⁴⁷ The Commission also observed “the impact of racism in the criminal justice systems in the region” and reiterated that “the use of race and skin color as grounds to set and adjust a criminal sentence are banned by the inter-American system of human rights protection.”⁴⁸

140. The Commission also notes the special seriousness of the fact that the Governments own studies demonstrate that the race of defendants and the race of victims of crimes has an undeniable influence on conviction and sentencing patterns. This is not a recent finding. Rather, a review of studies looking back to the period of the trial and first years of appeals demonstrates that this had been analyzed and reported. A 1981 study looked at the proportion of blacks on death row in states/regions across the United States as compared to the percent of blacks in that region, and found that “[t]he percentage of blacks on death row was 3-1/2 times greater than the percentage of blacks in the general population [...]. This disproportionality was present in every region.”⁴⁹

141. A 1990 study carried out by the Government Accounting Office to report to the Senate and House Committees on the Judiciary titled “Death Penalty Sentencing: Research Indicates Patterns of Racial Disparities,” found “evidence indicating racial disparities in the charging, sentencing, and imposition of the death penalty” as from the 1970’s.⁵⁰ The study found that both the race of the defendant and the race of the victim demonstrated a disproportionate effect in terms of outcome.

In 82% of the studies, race of victim was found to influence the likelihood of being charged with capital murder or receiving the death penalty, i.e., those who murdered whites were found to be more likely to be sentenced to death than those who murdered blacks. This finding was remarkably consistent across data sets, states, data collection methods, and analytic techniques.”⁵¹

142. In alleging racial discrimination, petitioners rely on the decision issued by the IACHR in the case of William Andrews in which the Commission found that the existence of “a reasonable appearance of “racial bias” by some members of the jury” that tainted the trial and resulted in the death sentence, constituted a violation of the right to an impartial trial and to equality before the law.⁵² In this case, the

⁴⁶ CERD, General Recommendation No. XXXI, U.N. Doc. CERD/C/GC/31/Rev.4 (2005).

⁴⁷ IACHR, The Situation of People of African Descent in the Americas, OEA/Ser.L/V/II. Doc. 62, December 5, 2011, para. 184.

⁴⁸ IACHR, The Situation of People of African Descent in the Americas, OEA/Ser.L/V/II. Doc. 62, December 5, 2011, para. 189.

⁴⁹ U.S. Department of Justice, Bureau of Justice Statistics, Capital Punishment 1981, A National Prisoner Statistics Report, p. 7. Available at: <http://www.bjs.gov/content/pub/pdf/cp81.pdf>

⁵⁰ United States General Accounting Office, Report to Senate and House Committees on the Judiciary, Death Penalty Sentencing, Research Indicates Pattern of Racial Disparities, February 1990, GAO/GGD-90-57, p. 5. Available at: <http://www.gao.gov/assets/220/212180.pdf>

⁵¹ United States General Accounting Office, Report to Senate and House Committees on the Judiciary, Death Penalty Sentencing, Research Indicates Pattern of Racial Disparities, February 1990, GAO/GGD-90-57, p. 5.

⁵² IACHR, Report No. 57/97, Case No. 11.139, William Andrews, Merits, United States, December 6, 1996, para. 165.

record before the Commission reflected ample evidence of “racial bias.”⁵³ A napkin had been found among the jurors during a recess of the trial, which stated “Hang the Nigger’s” and a request filed by defense counsel for a mistrial and a right to question jurors concerning the note was denied by the trial judge.⁵⁴

143. According to the decision of the IACHR, “the international standard on the issue of “judge and juror impartiality” employs an objective test based on “reasonableness, and the appearance of impartiality.” The United Nations Committee to Eliminate Racial Discrimination (CERD) has held that a reasonable suspicion of bias is sufficient for juror disqualification.⁵⁵

144. In the instant case, however, the petitioners do not question the composition of the jury, its conduct, or the manner in which the members of the jury were chosen. They do not dispute the State’s allegation that a jury acceptable to the defense and prosecution was chosen with ease. In order to protect Mr. Cooper from the racially charged atmosphere in San Bernardino County, and at the request of the defense, the State changed the venue of the trial to San Diego County. The denial of the renewed motion for a transfer to the north of the state was explained in a motivated decision, and the Commission does not have more specific allegations, information or proof on the record before it to identify concrete deficiencies in that procedure or its outcome.

145. What the Commission does find established in the record is a series of issues in the investigation, prosecution, sentencing and appeals in this case that were left unclarified. The central question that has been left unclarified concerns the allegations, information and proof adduced at different points in the process that pointed toward an alternative hypothesis for the homicides that would have implicated three white men. The unresolved issues have to do with whether proof that was admitted against Mr. Cooper was planted or manipulated, and whether proof that might have been favorable to him was intentionally disposed of or omitted from the record. These contentions remain unresolved notwithstanding the many appeals. The Commission considers that the number of instances or appeals is not dispositive for a determination of compliance with due process; the analysis must look toward the fairness of the process and the standards and content of the review. In the particular case, the process and review have not been sufficient to meet the strict scrutiny required in a death penalty case.

146. Given the accepted existence of statistical disparities based on race at all stages of the criminal justice process, based on both the race of the defendant and the race of the victims, and given that the Cooper case presents both of the variables cited in such disparities, that is, an African American defendant, and white victims, the Commission considers that the courts were on notice of this context and had the obligation to complete a full and fair inquiry into the possibility of evidence tampering and failure to fully investigate other hypotheses that pointed to the perpetrators having been white. While the Commission does not have before it the elements necessary to establish that racial discrimination in fact produced a tainted investigation, it does have before it elements sufficient to determine that this possibility was not fully investigated. The Commission must make clear that the questions of due process and possible racial discrimination cannot be considered in isolation; it is precisely the deficiencies in due process that have left the possibility of racial discrimination unresolved. It is on that basis that the United States is responsible for failing to fully respond to the allegations, information and proof concerning possible racial discrimination raised throughout this process pursuant to its obligations under Article II of the American Declaration.

⁵³ IACHR, Report No. 57/97, Case No. 11.139, William Andrews, Merits, United States, December 6, 1996, para. 165.

⁵⁴ IACHR, Report No. 57/97, Case No. 11.139, William Andrews, Merits, United States, December 6, 1996, para. 4.

⁵⁵ IACHR, Report No. 57/97, Case No. 11.139, William Andrews, Merits, United States, December 6, 1996, para. 159.

D. Right to life (Article I of the American Declaration)

147. Article I of the American Declaration provides that:

Article I - Right to life, liberty and personal security

Every human being has the right to life, liberty and the security of his person.

148. As mentioned above, according to the “fourth instance formula,” in principle, the Inter-American Commission will not review the judgments issued by the domestic courts acting within their competence and with due judicial guarantees. This is because, in principle, the IACHR does not have the authority to superimpose its own interpretations on evaluations of facts by domestic organs. However, the fourth instance formula does not preclude the Inter-American Commission from considering a case where the petitioner’s allegations entail a possible violation of any of the rights set forth in the American Declaration.⁵⁶ This authority is enhanced in cases involving the imposition of the death penalty given its irreversible nature.

149. As also noted above, the Inter-American Commission considers that it is the competence of domestic courts, and not of the Commission, to interpret and apply domestic law, and, in the instant case, to determine whether the alleged victim is innocent or guilty. However, the IACHR must ensure that any deprivation of life that may arise from the enforcement of the death penalty would be strictly consistent with the requirements set forth in the American Declaration.⁵⁷

150. In evaluating the information on the record, the Inter-American Commission concludes that the manner in which certain evidence pertinent to the basis for Mr. Cooper’s capital conviction was treated in the course of his criminal proceedings and the ineffective defense provided by a court-appointed counsel, failed to meet the rigorous standard of due process applicable in capital cases and amounted to a denial of justice contrary to the fair trial and due process standards.

151. When a convicted prisoner’s right to a fair trial has been violated in proceedings through which the death penalty was imposed, the IACHR has maintained that executing the person under such a sentence would be an extremely grave and deliberate violation of the right to life set forth in Article I of the American Declaration.⁵⁸ Therefore, the IACHR concludes that the imposition of the death penalty in such circumstances would constitute a grave violation of Mr. Cooper’s right to life recognized under Article I of the American Declaration.

VI. CONCLUSIONS AND RECOMMENDATIONS

152. In accordance with the legal and factual considerations set out in this report, the Inter-American Commission concludes that the United States is responsible for the violation of the right to equality before the law (Article II), the right to a fair trial (Article XVIII), and the right to due process of law (Article XXVI) guaranteed in the American Declaration, with respect to Kevin Cooper. Consequently, should the State carry out the execution of Mr. Cooper, it would be committing a serious and irreparable violation of the basic right to life recognized in Article I of the American Declaration.

153. Kevin Cooper is the beneficiary of precautionary measures adopted by the Inter-American Commission under Article 25 of its Rules of Procedure. The Inter-American Commission must remind the State that carrying out a death sentence in such circumstances would not only cause irreparable harm to the person but would also deny his right to petition the inter-American human rights system and to obtain an

⁵⁶ See, *mutatis mutandi*, IACHR, Report No. 57/96, Case 11.139, William Andrews, United States, December 6, 1996.

⁵⁷ IACHR, Report No. 53/13, Case 12.864, Merits (Publication), Ivan Teleguz, United States, July 15, 2013, para. 129.

⁵⁸ IACHR, Report No. 11/15, Case 12.833, Merits (Publication), Felix Rocha Diaz, United States, March 23, 2015, para. 106.

effective result, and that such a measure is contrary to the fundamental human rights obligations of an OAS member state pursuant to the Charter of the Organization and the instruments deriving from it.⁵⁹

Accordingly,

THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS RECOMMENDS THAT THE UNITED STATES:

1. Grant Kevin Cooper effective relief, including the review of his trial and sentence in accordance with the guarantees of due process and a fair trial enshrined in Articles I, II, XVIII and XXVI of the American Declaration;
2. Review its laws, procedures, and practices to ensure that people accused of capital crimes are tried and, if convicted, sentenced in accordance with the rights established in the American Declaration, including Articles I, II, XVIII, and XXVI thereof;
3. Ensure that the legal counsel provided by the State in death penalty cases is effective, trained to serve in death penalty cases, and able to thoroughly and diligently investigate all mitigating evidence; and
4. Given the violations of the American Declaration that the IACHR has established in the present case and in others involving application of the death penalty, the Inter-American Commission also recommends to the United States that it adopt a moratorium on executions of persons sentenced to death.⁶⁰

VII. NOTIFICATION

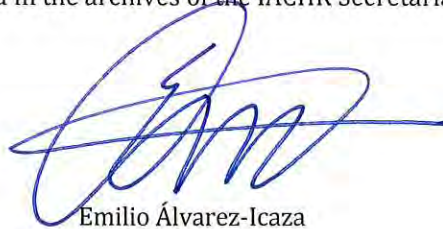
154. As set forth in Article 44.2 of its Rules of Procedure, the Inter-American Commission on Human Rights agrees to transmit this report to the United States, which shall have one month to report on the measures adopted to comply with the recommendations made herein. That time period shall begin as of the date of transmittal of this report to the State, which shall not be authorized to publish it. Likewise, the IACHR agrees to notify the petitioners of the approval of a report under Article 44.3 of the Rules of Procedure of the Commission.

⁵⁹ See: IACHR, Report No. 81/11, Case 12.776, Merits, Jeffrey Timothy Landrigan, United States, July 21, 2011, para. 66; Report No. 52/01, Case No. 12.243, Juan Raúl Garza, United States, Annual Report of the IACHR 2000, para. 117; IACHR, *Fifth Report on the Situation of Human Rights in Guatemala*, Doc.OEA/Ser.L/V/II.11doc.21rev. (April 6, 2001) paras. 71 and 72. See also: International Court of Justice, *Case re. the Vienna Convention on Consular Relations (Germany v. United States of America)*, Request for the Indication of Provisional Measures, Order of March 3, 1999, General List, No. 104, paras. 22-28; United Nations Human Rights Committee, *Dante Piandiong et al. v. Philippines*, Communication No. 869/1999, UN Doc. CCPR/C/70/D/869.

⁶⁰ See in this regard, IACHR, *The death penalty in the Inter-American Human Rights System: From restrictions to abolition*, OEA/Ser.L/V/II.Doc 68, December 31, 2011.

Done and signed in the city of Washington, D.C., on the 21st day of the month of July, 2015. (Signed): Rose-Marie Belle Antoine, President; José de Jesús Orozco Henríquez, Second Vice President; Felipe González, Rosa María Ortiz, Tracy Robinson, and Paulo Vannuchi, Commissioners.

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



Emilio Álvarez-Icaza
Executive Secretary