UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
TERRE HAUTE DIVISION

JUAN RAUL GARZA,	)	
	)	
Petitioner,	)	
	)	
vs.	)	No. TH 01-095-C-M/F
	)	
HARLEY LAPPIN, Warden,	)	
	)	
Respondent,	)	

GOVERNMENT'S OPPOSITION TO STAY OF EXECUTION AND MOTION TO DISMISS PETITION FOR WRIT OF HABEAS CORPUS

Comes now the respondent, Harley Lappin, by counsel and moves that petitioner's petition for writ of habeas corpus be dismissed and that his motion for stay of execution be denied. In support thereof, the respondent would respectfully show the following:

PROCEDURAL HISTORY

Petitioner is currently incarcerated in the Special Confinement Unit at the United States Penitentiary in Terre Haute, Indiana. He was convicted in the United States District Court for the Southern District of Texas, Brownsville Division, of three counts of capital murder and sentenced to death. His convictions and sentence were affirmed by the United States Court of Appeals for the Fifth Circuit on September 1, 1995. *United States v. Flores and Garza*, 63 F.3d 1342 (5th Cir. 1995). He petitioned the Court of Appeals for rehearing on November 21, 1995, and rehearing was denied on December 15, 1995. *United States v. Garza,* 77 F.3d 481 (5th Cir. 1995) (table). He subsequently petitioned the United States Supreme Court for certiorari review on March 14, 1996, which marked the end of the 90-day period provided by statute. Relief was denied on October 7, 1996. *United States v Garza, 519* U.S. 825, 117 S.Ct. 87 (1996). Rehearing was denied on December 2, 1996. *United States v. Garza, 519* U.S. 1022, 117 S.Ct. 542 (1996).

After exhausting to the day the one-year statute of limitations period provided by statute, petitioner filed his motion to vacate sentence under 28 U.S.C. § 2255 on December 2, 1997 (CV-Dkt 1; attached as Appendix 1). The district court denied relief on April 9, 1998.

United States v. Garza, Civil Action No. B-97-273 (S.D.TX). Petitioner subsequently filed a motion for relief from judgment under FED. R. Civ. P. 60(b). He filed a separate motion to alter and amend judgment under Fed. R. Civ. P. 59(e). The district court denied this relief and denied a certificate of appealability (COA) on May 18, 1998. The Fifth Circuit Court of Appeals also denied COA on January 14, 1999. Petitioner's subsequent petition for writ of certiorari was denied on November 15, 1999.

On May 26, 2000, the United States District Court for the Southern District of Texas scheduled Garza's execution for 6 a.m. on August 5, 2000. On August 2, 2000, President Clinton granted Garza a reprieve from August 5 to December 12, 2000, to allow Garza to seek clemency under newly-promulgated regulations applicable to individuals sentenced to death. At the same time, the former President rescheduled the execution for December 12, 2000. On December 11, 2000, President Clinton granted petitioner an additional reprieve from December 12, 2000, to June 19, 2001, and set June 19, 2001, as the new date for the execution, with the time to be set by the Bureau of Prisons.

STATEMENT OF FACTS

At trial, Garza's challenge to the government's evidence as to his involvement in the extraneous, unadjudicated murders of four accomplices in Mexico was limited to his Fifth Amendment claim that he was denied his due process right to a fair opportunity to deny or explain that evidence. Specifically, he complained that he could not effectively defend himself against these accusations because he did not have compulsory process in Mexico, that he could not discover exculpatory evidence that the Mexican police possessed, and that he had no safeguards against police misconduct in that foreign country.

I. Notice of aggravating factors and discovery.

The United States gave notice of its intent to seek the death penalty on January 7, 1993, for the murders of Gilberto Matos, Thomas Rumbo and Erasmo De La Fuente. In this notice, the United States additionally listed as aggravating factors the 1991 murder of Oscar Cantu, the 1991 murder of Antonio Nieto, and 1992 murder of Bernabe Sosa. This notice was subsequently amended on February 12, 1993, over Garza's objection, to include the February

8, 1993, murder of Diana Flores Villareal (CR-Dkt. 1270-77). It was amended again on March 29, 1993, and April 20, 1993, to include the murders of Fernando Escobar Garcia and Bernabe Sosa (CR-DKT. 1014-25). On June 25, 1993, the government gave notice of its intent to introduce evidence of violent acts (CR-Dkt. 652-53).

At the March 3, 1993 pretrial conference, the United States advised the court that it had mailed to the defense copies of the first 264 exhibits and it tendered exhibits 265-322 at the hearing. The United States agreed, as a continuing obligation, to turn over the police reports of the murders (CR-Dkt. 190, p. 31). The United States specifically advised the court that it believed those pathology and lab reports had been received and turned over. On May 28, 1993, Garza complained that he needed additional time to decipher the Mexican autopsy reports for Fernando Escobar-Garcia. The United States disputed Garza's contention that it had failed to turn over the different Mexican autopsy and investigative reports. The only delay had been in obtaining the "corrected" transcriptions that were "certified translations from the official court interpreter." Those transcriptions were turned over at that time, more than six weeks before the United States began its presentation of evidence at the guilt phase of trial on July 12, 1993, and two months before Garza's sentencing hearing began on July 29, 1993 (CR-Dkt 399, pp. 103-04, 116-17).

Two weeks before the guilt phase of the trial, on June 28, 1993, counsel for the defense made a second supplementary *Brady* motion requesting arrest records and police department files relating to any other individual who might have been arrested in connection with the murders both in the United States and Mexico, complaining that the defense did not have the power to get those records from the Mexican authorities (CR-Dkt. 400, p. 21-22). When asked to be more specific, defense counsel replied that he wanted arrest records and police files (both United States and Mexico) of other individuals who had been arrested in connection with the murders (CR-Dkt. 400, p. 23). The government responded that the only person arrested in connection with the murders was Juan Jose Stevens and the report was made available to the defense. Further, there were some individuals who, at various times, had been questioned during the investigation. By the time of the hearing, the United States had already turned over that information to the defense, along with all of the Jencks Act

material and all relevant officer's reports in its possession and knowledge, and that any information would be contained in those reports (CR-Dkt. 400, p. 23-27).

With respect to the murders in Mexico, the United States expressly averred that it "had turned over to them every single document that we received from Mexico, including the police reports." (CR-Dkt. 400, p. 26). Defense counsel at this point requested that the court order the United States to conduct defense discovery by making further inquiries as to the investigations that took place in Mexico by Mexican authorities (CR-Dkt. 400, p. 26). The court told the defense that it would have to identify the evidence and explain why the defense could not "go get it yourself." (CR-Dkt. 400, p. 26-27). The defense replied in response that it did not have subpoena power in Mexico (CR-Dkt. 400, p. 27). The court then ordered the United States to make available any record regarding any Mexican investigation that was known to the government, and the prosecutor replied that "we do not know of anything that has not already been turned over to the defense" (CR-Dkt. 400, p. 27). The court reminded the United States of its continuing duty to turn over any exculpatory evidence known to the government (CR-Dkt. 400, p. 27).

At the June 30, 1993 pretrial hearing, the defense again accused the United States of having failed to turn over "numerous documents that were being translated and certified." When pressed by the court to be specific, defense counsel clarified that he was referring to the Mexican autopsy reports, to which the government advised that they had "long since been corrected" and the "defense have been given copies of everything" (CR-Dkt. 400, p. 192-94). Apparently frustrated with the defense's continuing and unfounded accusation that the government had not complied with its promises of providing discovery, the government advised the court that it had kept a log of all information released to the defense (CR-Dkt. 400, p. 194). This detailed 48-page inventory of the evidence that had been given to the defense is a matter of record (Tr. 173-220).

II. Evidence presented at the sentencing hearing.

The United States proved the murders of Escobar, Nieto, Sosa, and Cantu, and Garza's participation in them through the testimony of accomplices Israel Flores, Jesus Flores, and Greg Srader, all of whom actually participated in one or more of the murders. How each victim was identified and the autopsy results were proved at trial through the in-court testimony of the United States Customs agents who investigated the crimes and by the

pathologist who actually conducted the autopsy. As stated above, Garza was given copies of Mexico's investigative reports and "certified" translations of the autopsy reports well in advance of trial. This evidence is detailed as follows:

A. Murder of Fernando Escobar Garcia.

Escobar's murder was proved primarily through the testimony of Garza's accomplice, Israel Flores. Flores testified that Antonio Nieto was one of Garza's associates who had participated in stalking Matos, and Fernando Escobar Garcia (who was one of Garza's Mexican contacts). On one of Flores's and Nieto's trips to Mexico to buy marihuana for Garza, Nieto was arrested for possessing a gun and marihuana "joints." At the time of his arrest, Nieto was driving Escobar's car. Flores loaned Nieto $10,000 of Garza's drug money to get out of jail; however, Nieto reneged on his promise to repay the loan. Meanwhile, complaining that they were taking too long to complete the deal (they were in Mexico from January to May 1991), Garza called Flores and told him to return to Brownsville. Having spent the money on Nieto's arrest and another $10,000 of Garza's money "partying", Flores was afraid to return. As a result Garza traveled to Vera Cruz. Flores lied to him about what had happened to the money and told him that they had used the money to purchase marihuana; however, when Flores left to pick up Escobar, Nieto told Garza the truth. Garza struck Flores and made him tell the truth (R. 3038-43, 3072).

Garza responded initially that he was going to kill all three of them: Nieto and Flores for their actions; Escobar because he was an instigator (R. 3044). His second response, made in the presence of all three, was that he would let them work off their debt. Garza took all of them to a restaurant (R. 3044-45). There, Garza told Flores and Nieto privately that he was going to kill Escobar because he had no use for him (R. 3046-47, 3061-62, 3065). Afterwards, Garza and another person identified only as "Gil" drove the trio to a secluded area. While the car was moving, Garza shot Escobar three times and dragged his body in the sand dunes (R. 3047-48, 3062-65). They later dumped the car and returned to Brownsville (R. 3049).

It was later determined by United States and Mexican authorities that Escobar had been killed around May 5-7, 1991 (R. 3296). Agent Robert Garcia, who was in charge of the

U.S. Customs, Merida, Yucutan, Mexico, assisted in the investigation of Escobar's murder (R. 3295). He contacted Escobar's brother, confirmed that the person identified in the newspaper article was Escobar, that the brother had viewed Escobar's body in the morgue, and that he had been shot several times (R. 3296-97). On cross-examination, Agent Garcia testified that he learned of no other suspects during the course of his investigation in Mexico (R. 3300).

B. Murder of Antonio Nieto

Israel Flores also testified as to Antonio Nieto's murder. Garza blamed Flores for losing the money and Escobar's death. About a week later, Garza ordered Flores to get rid of Nieto; if Flores refused, Garza threatened to kill both of them (R. 3050-51, 3060, 3073-75). Per Garza's instruction and plan, Flores and Raul Amaro told Nieto that they were going to stay at Amaro's grandmother's house in Matamoros instead of Juan's Villa Pancho ranch. They then drove Nieto to a secluded country road around Matamoros and Flores shot him four times, two of which were to the head (R. 3051-53, 3076-77). They reported the events to Garza (R. 3054-55, 3152). Jesus Flores testified that Garza told him that Israel had killed Nieto because "Nieto had wasted [Garza's] money over there in Mexico" (R. 3152-53).

United States Customs Special Agent Robert Pineda testified that he investigated the Nieto murder in Mexico in the fall of 1992 after receiving information that Garza may have been involved (R. 3304, 3306-07, 3324). At the time he arrived, Nieto's body had been found by the Mexican authorities but had been unidentified for 1 ½ years and had been treated as an unsolved murder (R. 3306-07). Agent Pineda obtained the Mexican police reports (R. 3328), and matched the case to Nieto based on the shots (R. 3307). He also met with Nieto's parents, who told him that Nieto had been missing for about 1½ years. Nieto's father identified his son by photographs taken when the body was discovered. In particular, he identified the tattoos on Nieto's skin (R. 3308, 3329; G.Exh. 192 [autopsy report]; G.Exh. 193 [translation]). The photographs of the crime scene, the body, and a key ring found on the body that Nieto's father used to identify his son were introduced into evidence as G.Exh. 195, 198, and 603 (R. 3310-12, 3327-28).

Nieto's body was exhumed from its Mexican grave and transported to the United States (R. 3309). Agent Pineda personally viewed the body (R. 3325). The funeral director,

Dr. Ramirez, specifically remembered burying that particular body in Mexico as an unidentified body (R. 3309).

Dr. Marguerite DeWitt, the pathologist who performed the autopsy on Nieto's body in the United States, testified at trial and was cross-examined by counsel for Garza (R. 3079). Her report, G.Exh. 372, was not introduced into evidence based on Garza's objection that the witness "can testify to the material on here." (R. 3082).

DeWitt testified on questioning by the court that she had been informed by Detective Rolando Vasquez of the Brownsville Police Department (R. 3083, 3091) that Nieto had probably died in Brownsville and was then buried in across the border in Matamoros, Mexico (R. 3084). An x-ray of the body revealed two gunshot wounds to the head. Bullet fragments were removed from the head and from the left side of the torso (R. 3086-89, 3093). Because the body soft tissue was in an advance stated of decomposition, the pathologists was unable to determine whether there were additional shots to the soft tissue (R. 3090, 3096).

Garza elicited on cross-examination the name of the detective to whom the pathologist spoke in the Brownsville Police Department (R. 3091). On further questioning, DeWitt testified that she had not seen any Mexican autopsy report and did not know whether Mexican authorities even performed an autopsy (R. 3092). She testified that there were no exit wounds, indicating that the bullets stayed in the head (R. 3094). To counsel's questioning whether there was "not enough force" for the bullet to exit, DeWitt explained that it was common for the bone and brain matter to absorb the force of the firing (R. 3094).

C. Murder of Bernabe Sosa.

According to Israel Flores, Garza did not like his son-in-law Bernabe Sosa because he had once brought a gun to Garza's house (R. 3055-56). According to Jesus Flores, Garza also blamed Sosa for a January 1992 seizure in Houston (R. 3159-60). Sosa was apparently taken into custody with the seizure but was released when two others apprehended were detained (R. 3159-60).

Garza told Jesus Flores that something was fishy and accused Sosa of trying to set him up R.

3160). A couple of weeks later, Garza told Jesus Flores that he wanted Sosa killed (R. 3161). In the presence of co-conspirators Jesus Flores, Emilio ("Biggie") Gonzalez, and Raul Amaro, Garza stated his plan was to take Sosa to Matamoros under the pretext of looking at a landing strip and to kill him there (R. 3162).

Garza instructed Jesus Flores to wait for him at Gonzalez's house (R. 3163). In accordance with Garza's plan, Garza contacted Sosa and had Amaro drive across the border, Garza instructed Jesus Flores to cross the Gateway International Bridge on foot and Emilio Gonzales to drive across. Once on the Mexican side, Flores and Gonzales drove to the old bridge. There, per Garza's instruction and plan, Sosa and the other three got out of the car and started walking toward the supposed landing strip. On Flores' prearranged cue, Gonzalez shot Sosa first with a gun supplied by Garza. (Jesus Flores testified that he saw Garza give Gonzalez the gun). Gonzalez's gun then jammed and Amaro shot Sosa two more times (R. 3164-68). Flores testified that he believed Sosa was shot in the head (R. 3168). Still following Garza's instruction, Gonzalez then handcuffed Sosa to give the appearance that the Mexican Federales had murdered Sosa (R. 3161-69). The assailants then met Garza at a place called the "Toucan Lounge" and told him what had happened (R. 3169). Jesus Flores testified that he participated in this murder to pay Garza back for $14,000 that he owed him and to keep from being one of Garza's victims (R. 3169-70).

Dr. Eduardo Lopez-Vasquez, a forensic pathologist in the city of Rio Bravo, Tamulipas, testified for the government that he performed an autopsy on Sosa's body in January 1992 (R. 3245; G.Exh. 234 (autopsy report); G.Exh. 235 (translation)). Sosa's body had three gunshot wounds to the head and neck and powder burns (R. 3246-49). The caliber of the gun used was not identified (R. 3250). The handcuffs were on Sosa when the body was subsequently recovered (R. 3250, 3313-16). Agent Pineda obtained photographs of the body and the recovery site from Mexico's files and they were introduced into evidence as G.Exh. 238, 240 (R. 3314-16, 3327).

D. Murder of Oscar Cantu.

Accomplice witnesses Israel Flores and Greg Srader testified as to Oscar Cantu's murder. Oscar Cantu was one of Garza's pilots who, at Garza's instruction, purchased

marihuana and returned it to Matamoros (R. 3056, 3101, 3213). To make these purchases, Greg Srader would receive cash from Garza, take it to a bank in Mexico, and wire the funds to Cantu in Vera Cruz (R. 3102-03, 3109). On one such venture in 1991, Cantu reported to Garza that he had been pulled over by the Mexican police, tortured, and the $40,000 - $60,000 seized. Garza did not believe Cantu's story. He believed instead that Cantu had "ripped it off" and stated that he was going to kill him (R. 3056-58, 3066, 3104-05). Thereafter, Garza and Jesus Flores[1] took Cantu on a trip to Mexico. Cantu never returned (R. 3105, 3112). Srader testified that Garza admitted to him that they had killed Cantu (R. 3058, 3106, 3114-15).

Srader was cross-examined by the defense, who elicited testimony that Cantu was also a paid pilot for a drug trafficker named Medina (R. 3107). When pressed as to whether Cantu was working for Medina at the time of his murder, Srader remained firm that he was working for Garza but could not state with certainty that he wasn't also dealing with Medina (R. 3113-14). Srader confirmed that he had sent money to Cantu on several occasions at Garza's direction to wire transfer (R. 3107-09). Srader overheard and was part of the conversations between Garza and Cantu regarding the lost money. He confirmed that the money Cantu lost ("[p]robably around $40,000 or $60,000") belonged to Garza (R. 3109-11). Cantu had claimed that the Mexican Federales had tortured him by shocking him on his testicles. Srader testified on cross-examination that Cantu had showed him the scars (R. 3111, 3114-16). He remained unequivocal in his testimony that Garza had told him that he killed Cantu (R. 3114-16).

Dr. Lopez-Vasquez also performed an autopsy on Cantu's body in April 1991 (R. 3237). His report was identified at trial as G. Exh. 184, and admitted only as a trial aid (R. 3238-39). The translation was identified as G. Exh. 185 (R. 3239). Cantu had been shot once in the head at a range close enough to leave powder burns (R. 3240-43). The pathologist was not able to determine the caliber of the weapon that killed Cantu (R. 3243). Garza elicited on cross-examination that Dr. Lopez did not have personal knowledge as to the identity of the

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[1] On examination by the court, Jesus Flores denied any knowledge as to what had happened to Cantu (28 R. 3213).

body; that he had been informed by the Mexican district attorney's office that relatives had identified it (R. 3253-54, 3259).

United States Customs Special Agent Robert Pineda also testified that he retrieved the Mexico records on the Cantu murder in Rio Bravo, Tamaulipas. He met with the Ministerio Publico, a woman named Loera. He determined that Mexican officials had an open file on the Cantu murder as an unsolved murder and photographs of the body at the site of its recovery from an irrigation canal (R. 3301-02, 3322). The Mexican District Attorney identified the body as Cantu (R. 3304). According to the information he received, Cantu had been shot and was found in an irrigation canal. Agent Pineda obtained the crime scene photographs, which were identified as G.Exh. 187-188.[2] He also visited the crime scene himself after the body was removed (R. 3302, 3323). At the time he was sent to Mexico, United States officials suspected that Garza had ordered the killings. Agent Pineda had been sent to Mexico to see if the bodies had been discovered (R. 3304).

Based on this evidence, at the punishment phase the jury found beyond a reasonable doubt the following non-statutory aggravating factors:

> 1. JUAN RAUL GARZA intentionally engaged in conduct intending that OSCAR CANTU be killed and/or that lethal force be employed against OSCAR CANTU, which resulted in his death.
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> 3. JUAN RAUL GARZA committed the killing of OSCAR CANTU after substantial planning and premeditation.
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> 4. JUAN RAUL GARZA intentionally engaged in conduct intending that ANTONIO NIETO be killed and/or that lethal force be employed against ANTONIO NIETO, which resulted in his death.
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> 5. JUAN RAUL GARZA committed the killing of ANTONIO NIETO after
> substantial planning and premeditation
>
> 6. JUAN RAUL GARZA intentionally engaged in conduct intending that BERNABE SOSA be killed and/or that lethal force be employed against BERNABE SOSA, which resulted in his death.
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> 7. JUAN RAUL GARZA procured the killing of BERNABE SOSA by payment and/or promise of payment of something of pecuniary value.

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[2] G.Exh. 187, which identified the wounds on the body was not introduced into evidence (29 R.3305). The court, however, did permit G.Exh. 188, which showed body at the recovery site (29 R. 3306).

8. JUAN RAUL GARZA committed the killing of BERNABE SOSA after substantial planning and premeditation.

9. JUAN RAUL GARZA intentionally killed DIANA FLORES VILLARREAL, in furtherance of a continuing criminal enterprise.

10. JUAN RAUL GARZA intentionally engaged in conduct intending that DIANA FLORES VILLARREAL be killed and/or that lethal force be employed against DIANA FLORES VILLARREAL, which resulted in her death.

11. JUAN RAUL GARZA intentionally killed FERNANDO ESCOBAR-GARCIA in furtherance of a continuing criminal enterprise.

12. JUAN RAUL GARZA committed the killing of FERNANDO ESCOBAR-GARCIA after substantial planning and premeditation.

The jury failed to find the non-statutory aggravating factor that Juan Raul Garza procured the killing of Oscar Cantu by payment *and/or* promise of payment of something of pecuniary value.

III. Appeals

Although Garza raised his due-process challenge on direct appeal, the Fifth Circuit Court of Appeals did not address his challenge in denying his appeal. In his motion to vacate his sentence under 28 U.S.C. 2255, he claimed that by failing to address his claim, the Court of Appeals violated his Eighth Amendment right to meaningful appellate review. The Court rejected this claim as well as his claim that he was denied due process by the introduction of evidence relating to the unadjudicated murders committed on Mexican soil. The Court of Appeals reasoned:

> Under *Brady v. Maryland*, 373 U.S. 83, 83 SCt. 1194 (1963), the Government is required to turn over to a defendant any exculpatory or impeachment evidence in the Government's possession. Here, the Government turned over to Garza every document that it received from Mexico, including the police reports, investigative reports, and certified translations of the autopsy reports. Garza was given express notice that the Government intended to rely on the extraneous murders at sentencing, was provided full pretrial discovery of all evidence in the Government's possession, and was given the opportunity to cross-examine all witnesses presented by the Government at sentencing. There is no question, indeed Garza does not even contest, that the Government satisfied its duty under Brady.

> The Government is under no obligation to conduct a defendant's investigation or to make a defendant's case for him. *United States v. Aubin*, 87 F.3d 141, 148 (5th Cir. 1996). Vague allegations of unidentified favorable witnesses and unspecified exculpatory evidence simply will not suffice to show a violation of due process. Garza has therefore failed to make a substantial showing that his right to due process of law was denied.

United States v. Garza, 165 F3d at 315.

IV. Inter-American Commission

On December 20, 1999, petitioner filed a petition with the Inter-American Commission on Human Rights (Inter-American Commission) alleging that his rights under the American Declaration of the Rights and Duties of Man (American Declaration), the Organization of American States Charter, and international law were violated by the introduction at the capital punishment phase of evidence of four unadjudicated murders committed by Garza or at his behest on Mexican soil. Although couched in terms of the Declaration and international law, the complaint and underlying analysis presented to the Commission paralleled the complaint presented on direct appeal and raised again in his motion to vacate sentence under section 2255. On April 4, 2001, the Commission released a report in which it concluded that the United States was responsible for violations of Articles I, XVIII, and XXVI of the American Declaration and "recommended" that the United States "provide Mr. Garza with an effective remedy, which includes commutation of sentence." Report at 36.

The provisions of American Declaration at issue are:

> Right to life, liberty, and person security.
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> Article I. Every human being has the right to life, liberty, and the security of person.

Right to a fair trial.

> Article XVIII. 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 of his fundamental rights.

Right to due process of law.

> Article XXVI. Every person is presumed to be innocent until proven 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 and unusual punishment.

Inter-American Commission Report, April 4, 2001, at pp 25, 28.

MOTION TO DISMISS

Garza asks this court to enforce the Inter-American Commission's conclusion that the United States violated Articles I, XVIII, and XXVI of the American Declaration by allowing Garza's death sentence to be based in part on theretofore unadjudicated murders committed on Mexican soil. That Garza is not entitled to the relief requested is manifest. (1) First, Garza's claims do not fall within the scope of review available under 28 U.S. C. § 2241, which is normally limited to claims concerning the execution of sentence not the validity of the sentence. Further, Garza's claims also fall outside the scope of the exception encompassed by § 2255's savings clause, which allows claims for relief to proceed under the auspices of § 2241 if appears that the remedy by § 2255 motion is inadequate or ineffective to test the legality of his detention. (2) The limitations of § 2255 review that would be applicable to Garza's claim in that context should likewise foreclose relief under § 2241 including (a) that a violation of international law or treaty is not cognizable under § 2255, (b) that Garza did not object at trial on the basis of the American Declaration and did not identify that as the basis of his claims on direct appeal or § 2 255 review, (c) that, if the purported violation were cognizable under § 2255, Garza's claim would nonetheless be foreclosed by the limitations on successive motions of paragraph 8, and (d) that he relies on a new rule that cannot be announced or applied in § 2255 review. (3) All procedural hurdles aside, the identified recommendations of the Inter-American Commission are not enforceable against the United States.

1. Section 2241 review is normally limited to motions seeking relief on grounds concerning the execution of sentence, such as a claim to be entitled to a less restrictive form of custody, and does not extend to claims such as Garza's that challenge the validity of his sentence. *See Valona v. United States*, 138 F.3d 693, 694 (7th Cir. 1998). The solitary exception to this rule exists for claims that satisfy the savings clause of § 2255 ¶5, which allows an application for habeas relief to proceed under § 2241 if "the remedy by motion is inadequate or ineffective to test the legality of his confinement." 28 U.S.C. 2255 ¶ 5. The savings clause encompasses a very narrow exception, however, and does not come into play merely because a petitioner's claim is foreclosed under the rules applicable to § 2255 review.

Garza incorrectly relies on a series of cases from various Circuit Courts of Appeals in which, pursuant to the savings clause, relief has been afforded under § 2241 to claims based on *Bailey v. United States*, 516 U.S. 137 (1995), that would otherwise be foreclosed by the limitations on successive motions of § 2255 ¶ 5. Under Seventh Circuit precedent, however, to come within the savings clause exception applicable to *Bailey* claims, a federal prisoner is permitted to seek habeas relief only if (1) "he had no reasonable opportunity to obtain earlier judicial correction of a fundamental defect in his conviction or sentence because the law changed after his first § 2255 motion," (2) "the change of law has been made retroactive by the Supreme Court, as the Court has now done for *Bailey* errors by its *Bousley* [*v. United States*, 523 U.S. 614 (1998)] decision," (3) "the change [] eludes the permission in section 2255 for successive motions," and (4) the "change in law" is not the "difference between the law in the circuit in which the prisoner was sentenced and the law in the circuit in which he is incarcerated." *In re Davenport*, 147 F.3d 605, 611-12 (7th Cir. 1998).

The savings clause exception delineated in *Davenport* is inapplicable here. First, it is clear that Garza relies on a new rule that has not been made retroactively applicable by the Supreme Court. He does not suggest that the Court has held that the American Declaration confers rights enforceable by suppression of evidence in a federal capital sentencing proceeding. Moreover, as delineated *infra*, a failure by the trial court or any subsequent court to act in accordance with or give effect to the recommendation of the Inter-American

Commission would not constitute a fundamental defect in the conviction or sentence resulting in a miscarriage of justice.

Garza's reliance on *Reyes-Requena v. United States*, 243 F.3d 893 (5th Cir. 2001) is unavailing. First, it is the law of the § 2241 court in the district of incarceration that is controlling regarding whether he can avail himself of the § 2255 savings clause exception, not the law of the circuit court of appeals for the district of conviction. *Gray Bey v. United States*, 209 F.3d 986 (7th Cir. 2000). In any event, the savings clause exception articulated by the Fifth Circuit in *Reyes-Requena* requires that the claim be based on a retroactively applicable Supreme Court decision which establishes that the petitioner may have been convicted of a nonexistent offense. *Id.* at 904. Such clearly is not the case here, and thus there is no basis upon which Garza can validly argue that he comes within the savings clause exception.

2. Further, even if Garza could properly avail himself of § 2241 habeas review, the limitations of § 2255 review applicable to Garza's claim in that context would likewise foreclose relief under § 2241. "[A]s *Felker* [*v. Turpin*, 518 U.S. 651 (1996)] observes a court in which a petition under 2241 is filed must treat the new successive-petition rules as guideposts." *United States v. Gray-Bey*, 209 F.3d at 990.

First, constitutional violations aside, § 2255 review is limited to violations of federal law which constitute "a fundamental defect which inherently results in a complete miscarriage of justice [or] an omission inconsistent with the rudimentary demands of fair procedure." *See Reed v. Farley*, 512 U.S. 339, 348 (1994); *Hill v. United States*, 368 U.S. 424 (1962). The Fifth Circuit Court of Appeals found that due process under the United States Constitution was not violated by the government's reliance on the adjudicated murders. Accordingly, the ad hoc extension of due process articulated by the Inter-American Commission cannot be deemed a fundamental defect.

Second, unlike § 2241, § 2255 does not by its express terms extend to violations of treaties. 28 U.S.C. § 2255 ("A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States . . . may move the court

which imposed the sentence to vacate, set aside or correct the sentence"). Even if it did, the American Declaration is not a treaty. Moreover, it cannot be credibly claimed that the narrow savings clause exception serves to open to Federal prisoners via § 2241 a vast arena of otherwise unavailable claims purportedly based on international law. Further, despite the express references in sections 2241 and 2254, those sections have not been used to enforce treaties. *Workman v. Sundquist*, ___ F.3d ___, 2001 WL 332053 (M.D. Tenn. March 29, 2001); *Roach v. Aiken*, 781 F.2d 379, 380-81 (4th Cir. 1986) (pending ruling by the IACHR that execution of man who committed a criminal offense while under the age of 18 was prohibited by international law was an insufficient reason to stay the petitioner's execution); *Jamison v. Collins*, 100 F.Supp.2d 647, 765-66 (S.D. Ohio 2000) (the OAS Charter "makes no mention of capital punishment in its articles" and "lacks the power to prohibit the death penalty in the United States"); *Faulder v. Johnson*, 99 F.Supp.2d 774, 777 (S.D. Tex.), *aff'd*, 178 F.3d 741 (5th Cir. 1999) (Insigning Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment and International Covenant on Civil and Political Rights, United States made reservation stating that it understood language to mean cruel and unusual punishment as defined by the Eighth Amendment, which does not prohibit the death penalty). Third, Garza did not object at trial to the introduction of evidence concerning the four unadjudicated murders committed in Mexico on the ground that the jury's consideration of such evidence violated Articles I, XVIII and XXVI of the American Declaration and did not identify that as the basis of claims on direct appeal or 2255 review. A defendant's failure to raise his specific claim in a contemporary objection at trial constitutes a procedural default that operates to bar collateral review of the claim under the procedural default doctrine. *See Bousley v. United States*, 523 U.S. 614, 620-21, 118 S. Ct. 1604, 1610 (1998); *United States v. Frady*, 456 U.S. 152, 167, 102 S. Ct. 1584, 1594 (1982); *United States v. Griffin*, 765 F.2d 677, 680-81 (7th Cir. 1985).

Fourth, Garza's claim is also foreclosed by non-retroactivity rule of *Teague v. Lane*, 489 U.S. 299 (1989), and its progeny, which prohibits the announcement or the application of a new rule of Constitutional criminal procedure in habeas review. The *Teague* non-retroactivity doctrine applies not only in federal habeas proceedings under 28 U.S.C. § 2254,

but also in federal post conviction proceedings. *See Van Daalwyk v. United States*, 21 F.3d 179, 181-83 (7th Cir. 1994).

In addition, because Garza's claim falls outside the scope of § 2255's savings clause exception, review under § 2241 would be controlled by successive writ provisions of § 2255 ¶ 8, which limit review to claims that to "contain--(1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense; or (2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable." 28 U.S.C. 2255 ¶ 8. *United States v. Gray-Bey*, 209 F.3d at 990; *Felker v. Turpin*, 518 U.S. at 651, 116 S.Ct. at 2333. Garza's claims satisfy neither condition that would render them cognizable in a successive § 2255 petition.

3. The United States has no obligation to take precautionary measures to prevent Garza's execution. Because the Commission has not been given authority to request precautionary measures in proceedings before the Commission, there is no legal basis for the Commission's request for the United States to take precautionary measures to prevent Garza's execution. The commissions limited authority is to make a "recommendation" and, contrary to the assertions of Garza, the United States has maintained both in Garza's proceeding and others before the Commission that the Commission's authority is limited to making recommendations.

Garza also mischaracterizes the nature of the American Declaration. It is not binding. It is not an international agreement (the American Convention, on the other hand, is a potentially binding instrument - but United States has only signed, not ratified it; therefore the United States has not accepted any obligations thereunder). It is an aspirational document that establishes no legally binding obligations. While it is true that "scholars" and the Commission have taken the position that the United States is "bound" by the Declaration, this position is not supported in the history of the Declaration's negotiation or of the OAS generally. The United States has consistently taken the position that the Declaration gives rise to no legally binding obligations.

Further, the Commission is authorized only to interpret the American Declaration. It is an international body, established to decide questions of international law. It is not "a court of fourth instance." In the report on Garza's case, the Commission does not cite any principles of international law on which to base its decision. Indeed, the Commission relies almost entirely on principles of domestic law -- citing to Supreme Court cases, the Federal Rules of Evidence and federal statutes. It is not appropriate for the Commission to be reviewing the decisions of the United States Supreme Court and the Fifth Circuit Court of Appeals on a domestic legal basis. As such, the Commission has no basis in international law.

a. There is no authority in the American Convention or the Commission statute for the request. Chapter VII of the American Convention establishes the organization, functions and procedures of the Commission. *See American Convention on Human Rights*, Nov. 22, 1969, 9 I.L.M. 673, arts. 34-51 [hereinafter *American Convention*]. Article 39 authorizes the Commission to prepare its Statute, which it submitted to the OAS General Assembly for its approval in

Resolution No. 447. *See Statute of the Inter-American Commission on Human Rights, approved by* O.A.S. Gen. Assembly Res. 447 (October, 1979), *reprinted in Organization of American States, Basic Documents Pertaining to Human Rights in the Inter-American System* [hereinafter *Basic Documents*] 21 (1996) [hereinafter *Commission Statute*]. The Statute provides further details about the operation of the Commission, and most important, it identifies its functions and powers. *See id.*, arts. 18-20.

While the OAS has given the Commission varied powers relating to the advancement of human rights throughout the Americas, its authority to adjudicate individual-state complaints is quite limited. In reviewing communications filed against OAS member states that are not parties to the American Convention, [3] the Statute outlines the Commission's limited powers as follows:

> *to examine communications* submitted to it and any other available information, to address the government of any member state not a Party to the Convention for information deemed pertinent by this Commission, and *to make recommendations* to it, when it finds this appropriate, in order to bring about more effective observance of fundamental human rights . . .

Id., art. 20(b)(emphasis added). This provision echoes article 18(a) of the Statute and article 41(b) of the American Convention, which both identify the Commission's function as: *to make recommendations* to the governments of the member states for the adoption of progressive measures in favor of human rights. *Id.*, art. 18(a); *American Convention* , art. 41(b). The authority to make recommendations does not include the authority to request precautionary measures.

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[3] The United States has signed, but not ratified the American Convention. Thus, it is not a party to the Convention, and the Commission's authority to review communications filed against the United States is governed by article 20 of the Statute. *See Commission Statute* , art. 20.

Indeed, where the OAS thought it appropriate for one of its bodies to request provisional or precautionary measures, it expressly created such authority. For instance, article 63 of the American Convention explicitly gives the Inter-American Court of Human Rights the power to "adopt such provisional measures as it deems pertinent" in cases of "extreme gravity and urgency, and when deemed necessary to avoid irreparable damage to persons." *American Convention*, art. 63(2). Moreover, the American Convention gives the Commission the authority to request that the Court take such measures. *See id.* ("With respect to a case not yet submitted to the Court, it may act at the request of the Commission.") But, notably, the American Convention does not vest the same authority in the Commission to request that *states* take precautionary measures. So, while the OAS was willing to give the Commission the authority to request that the Court take provisional measures, it was not willing to give the Commission the same authority vis-à-vis states.

Where other international judicial bodies have the authority to request precautionary or provisional measures, that authority is explicitly created in the bodies' organic document. For instance, article 41 of the Statute of the International Court of Justice expressly gives the Court the power to indicate provisional measures from a party. *See Statute of the International Court of Justice*, art. 41. Conversely, where a similar quasi-judicial tribunal's organic document did not expressly provide for such authority, it was found not to have the competence to request precautionary measures. *See, e.g., Cruz Varas v. Sweden*, 201 Eur. Ct. H.R. (ser A.) at 34-35 (1991) (finding by European Court of Human Rights that the European Commission on Human Rights was not given express or implied power to order interim measures under the European Convention on Human Rights).

In sum, the Commission has not been given the express authority to request precautionary measures in either of its constituting documents – the American Convention or the Commission Statute. Thus, the Commission lacks the authority to request such measures in this case.

b. Even if the Commission's request for the United States to take precautionary measures were within the Commission's authority, which it is not, the request would in no way be binding. In order to be consistent with the powers conferred on the Commission by the

American Convention and the Commission Statute, the request can be only that – a request. This flows from the plain meaning of the language of each relevant instrument and is consistent with the law of the international human rights mechanism most relevant here: the European Commission on Human Rights ("European Commission").4

First, with respect to the functions and powers of the Commission, neither the American Convention nor the Commission Statute uses language that could be construed as permitting the Commission to make requests that are binding on states. As noted above, each empowers the Commission to "make recommendations" to states. *See American Convention*, art. 41(b); *Commission Statute*, art. 18(b), art. 20 (b). It cannot credibly be disputed that a "recommendation" has no binding effect. The Oxford English Dictionary defines "to recommend" as "to suggest (a thing) to a person as being advisable to do." *New Shorter Oxford English Dictionary* 2504 (4th ed., 1993)[hereinafter *OED*]. A recommendation – like a suggestion – can be accepted or rejected without consequence, *i.e.*, it has no binding effect. To interpret "recommendation" otherwise would be to ignore the word's plain meaning.

Similarly, the Commission Regulations purport to permit the Commission to "request" that provisional measures be taken. *Commission Regulations*, art. 29(2). The language of this Regulation reflects the non-binding nature of Commission *requests* for precautionary measures. The Oxford English Dictionary defines "to request" as "to express a wish or desire that." *OED* 2556. Again, a request can be honored or rejected without consequence; it has no binding effect. On the basis of this language, therefore, the United States has no obligation to take precautionary measures in this case.

Second, the European Court of Human Rights ("European Court") has held under similar circumstances that, absent a specific provision in the European Convention on Human Rights ("European Convention"), the European Commission did not have the power to order legally binding interim measures. *See Cruz Varas v. Sweden*, 201 Eur. Ct. H.R. (ser A.) at 34-35 (1991). In *Cruz Varas*, the European Court addressed the binding nature of a European

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4 After a recent reorganization of the European human rights system, the European Commission no longer exists. Nevertheless, it is instructive to review some of the system's case law on the issues raised by the petition here given the many similarities between the old European system and the Inter-American system.

Commission Rule of Procedure that purported to authorize the Commission to request that states indicate provisional measures. Much like here, there was no statutory authority in the European system to provide for the adoption of provisional measures; the only authority lay in the Commission's self-created Rules of Procedure.

The Court concluded that the European Commission's request for Sweden to take interim measures not to expel a claimant was not legally binding. *Id.* at 38. In the absence of a specific provision in the European Convention, the Court held, the European Commission had no power to order interim measures. *Id.* Similarly, here, there is no statutory authority – in either the American Convention or the Commission Statute – for the Commission's request for provisional measures. As with the European Commission, the sole basis for the Commission's request is the

Commission Regulations. This is not sufficient authority for the request to have binding effect. At the very most, the Commission's request is discretionary in nature.

CONCLUSION

For all the foregoing reasons, the Respondent respectfully urges the Court to dismiss Garza's petition and deny a stay of execution.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that I have served a copy of the foregoing GOVERNMENT'S OPPOSITION TO STAY OF EXECUTION AND MOTION TO DISMISS PETITION FOR WRIT OF HABEAS CORPUS, by mailing a copy thereof to the following on this _____ day of May, 2001.

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