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

HUMAN RIGHTS ADVOCATES and fos*ters,
a Non-Governmental Organization,
On behalf of [redacted]
a United States Citizen
Petitioner/Victim

v.

THE UNITED STATES OF AMERICA
and THE STATE OF CALIFORNIA
Members of the Organization of American States,
Respondents

Petition No. P-120-07

PETITIONERS' RESPONSE TO THE REPLY OF THE U.S. GOVERNMENT

IN THE CASE OF
[redacted]
AS STATED IN THE PETITION ALLEGING VIOLATIONS OF HIS HUMAN RIGHTS BY THE UNITED STATES OF AMERICA AND THE STATE OF CALIFORNIA

This Response to the Reply of the United States of America Regarding Admissibility of the Petition is respectfully presented to this Honorable Commission. This Response is submitted on behalf of Human Rights Advocates, fos*ters, a non-governmental organization, and [redacted], a United States Citizen, by:

Constance de la Vega, Professor of Law
Frank C. Newman International Human Rights Law Clinic
University of San Francisco
School of Law
2130 Fulton Street
San Francisco, CA 94117
Tel. 415-422-2296
Fax 415-422-5440

PETITIONERS' RESPONSE TO THE REPLY OF THE U.S. GOVERNMENT

INTRODUCTION

Petitioners Human Rights Advocates and fos*ters file this response to the Reply of the Government of the United States of America regarding Admissibility of the Petition Alleging Violations of the Human Rights of [redacted]. (Mr. [redacted] was tried as [redacted].) This response will focus on two issues: 1) why petitioners have alleged sufficient facts to support the claims of the human rights violations, and 2) why exhaustion of domestic remedies is not required in this case under Article 31, Chapter II of the Rules of Procedure of the Inter-American Commission on Human Rights.

With respect to the first point, it is important to note that the focus of the petition is on the cruel, infamous or degrading treatment that Mr. [redacted] continues to suffer every day and will continue to suffer every day for years to come if no remedy is provided for the agonizingly slow process that his appeal is subject to under California law and procedure. The delays in this case and in the many others pending in California are not his or other defendants' fault. They are the result of systemic problems which have been recognized by federal courts as well as members of the California Supreme Court. The additional violations alleged in the petition are related to the underlying claim that the excessive delays in addressing his appeal amount to cruel, infamous, inhumane, and degrading punishment, as well as violations of other rights.

With respect to the second point, Mr. [redacted] does not have a remedy either under state or federal law that is not unacceptably prolonged to address the on-going violation to be free of the prohibited treatment and thus is not required to exhaust domestic remedies.

It is important to focus on the facts as documented by evidence submitted by petitioners: Mr. [redacted] has been on death row for **18 years** without having his first appeal heard by the California Supreme Court and it is likely to take at least five more years before it is heard; the delays in this case are the fault of the State of California, not Mr. [redacted]; Mr. [redacted]'s mental health has deteriorated over the course of his imprisonment and it is likely to continue to do so, both as a result of having the death penalty hanging over his head as well as from the conditions of his detainment.

I. Petitioners Have Alleged Actionable Violations

Petitioners' main claim in the petition is that the excessive delay in addressing Mr. [redacted]'s appeal of his death penalty conviction violates Article XXVI of the American Declaration of Rights and Duties of Man (hereinafter "Declaration"). Related to that claim are a number of sub-claims that violate other provisions. The United States raises two questions in relation to these claims. First, that reference to jurisprudence from other bodies is not relevant and second, that there are insufficient grounds for these claims. Petitioners will address those arguments in that order.

A. Relevance of jurisprudence from outside the Inter-American System

Petitioners have cited to jurisprudence from a number of jurisdictions that are relevant to the interpretation of the prohibition against cruel, infamous, and degrading treatment of Article XXVI as well as the prohibition against undue delay of Article XXIV. In particular, petitioners cite to decisions of the European Court of Human Rights, the Privy Council and national courts in Zimbabwe and India.[1] All those bodies have ruled that extended stays on death row violate the prohibition against cruel, inhuman or degrading treatment, and are thus clearly relevant to this case. As the Commission has ruled, in interpreting the Declaration, its articles "should be considered in the context of the broader international and inter-American human rights systems, in light of the developments in the field of international human rights law since [the IACHR] was first composed."[2] Thus, the references to those decisions are relevant to the Commission in determining whether the 18 years (not four as mentioned in the Government's reply) that Mr. [redacted] has spent on death row so far, has resulted in "the death row phenomena" as described in those cases and thus a violation of both Articles XXIV and XXVI.[3] It is now estimated that it will take an additional 4-5 years for his appeal to be heard, which will result in a minimum of 23 years on death row waiting for a decision of the California Supreme Court on the death sentence.[4] This period by far exceeds any cases addressing the issue of whether excessive time spent on death row constitutes a prohibition against cruel, inhumane, infamous, or degrading treatment.

The jurisprudence from the Human Rights Committee is also relevant since it oversees a treaty that the United States is party to - the International Covenant of Civil and Political Rights (hereinafter ICCPR). Article 7 of that treaty prohibits torture and cruel, inhuman and degrading treatment or punishment. In the case against Jamaica by the death row inmate that was also later addressed by the Privy Council, it was noted that the delays in that case could potentially violate article 7 of the ICCPR.[5] While the delays of **four** years in the preliminary stages of that case were held not to be sufficient to constitute a violation, the Human Rights Committee noted that delays in cases involving the death penalty can constitute violations of that article.[6]

Further, the Committee noted that:

> "[i]n capital punishment cases, States parties have an imperative duty to observe rigorously all the guarantees for a fair trial set out in article 14 of the Covenant.

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[1] See pages 13-15 of the Petition.

[2] *Michael Domingues v. The United States*, Case 12.285, Inter-Am. C.H.R., Report No. 62/02, ¶ 44 (Oct. 22, 2002)..

[3] The 18 years have been documented in the petition (pages 3-6) and in the Notice of Factual Change filed on 27 April 2009.

[4] Notice of Factual Change, see supra note 3.

[5] Pratt and Morgan v. Jamaica, U.N. Hum. Rts., Committee, No. 210/1986 & 225/1987, U.N. Doc. Supp. A/44/40 (1989). (The U.S. Government's reference to the Human Rights Committee's opinion as an "Advisory Opinion" is incorrect. It was an opinion in a specific case and is relevant to the parameters of the nature of the obligation under the ICCPR, a treaty the United States is party to.) Six years later the Privy Council did find that the **16 years** between Mr. Pratt's arrest and the time of his petition constituted inhuman punishment as "the death row phenomena". Pratt v. Attorney-General for Jamaica, P.C. Appeal No. 10 of 1993, 23.

[6] Pratt and Morgan v. Jamaica, U.N. Human Rts. Committee, supra note 5 at ¶ 13-6.

> Although in this case, article 6 is not directly at issue, in that capital punishment is not per se unlawful under the covenant, it should not be imposed in circumstances where there have been violations by the State party of any of its obligation under the Covenant. The committee is of the view that the victims of the violations of articles 14, paragraph 3 (c), and 7 are entitled to a remedy; the necessary prerequisite in the particular circumstances is the commutation of the sentence.[7]

Thus, the references cited by petitioners are clearly relevant to this Commission's determination of the parameters of Articles XXIV, XXV and XXVI of the Declaration. They are bolstered by the decisions of other international human rights bodies, the decisions of the courts of several countries, the works of scholars on the death row phenomena as well as the prior warden of San Quentin. They help to support the conclusion that the excessive delay in this case constitutes a violation of those provisions.

B. There are Sufficient Grounds to Support all of Petitioners' Claims

Petitioners will address the two main defenses raised by the Government: that the violations of the "undue delay" are not governed by Article XXV because it refers only to pre-trial delay and that delay was caused by Mr. [redacted]. Further, petitioners will summarize the evidence they already presented to support their other claims.

1. Article XXV Applies to Delays in the Appellate Process

With respect to the applicability of Article XXV to appeals, the article provides that "every individual who has been deprived of his liberty has the right to have the legality of his detention ascertained without delay by a court..." The legality of detention is ascertained not only by courts at the initial instance of an arrest, but by appellate courts as well. If the undue delay provision did not apply to appeals, there would be nothing to put a check on improper or illegal proceedings at the trial court level. What is the purpose of even providing appeals if not to assess whether the detention is valid? Further, under Article XXIV, "every person has the right to submit respectful petitions to any competent authority, ..., and the right to obtain a prompt decision thereon." Mr. [redacted] has filed an appeal and is entitled a prompt decision. That decision has not been able to be reached due to serious mistakes made by the State of California through its judicial system, which goes to the second defense raised by the Government.

2. The Delays Have Been Caused by the State of California

In relation to the argument that Mr. [redacted]'s attorneys have caused the delay, the Government fails to address all the evidence provided by petitioners that the delays have resulted from the actions of the State of California through the mistakes made by the Superior Court of San Diego where the trial was held and the record was to be prepared. The first delay resulted from the four and a half years it took to appoint him counsel on

[7] Id. at ¶ 15.

appeal.[8] The second and major part of the delay has resulted from the fact that the trial court lost major portions of the transcript of the trial.[9] The inadequacy of the record was well documented in the petition and the exhibits that are attached thereto.[10] It is incomprehensible how the Government could blame the requests for continuances by Mr. [redacted]'s counsel on him since they resulted from such serious mistakes made by the Superior Court in San Diego where the trial was held.

The third reason for the delay has been caused by the illness suffered by Mr. [redacted]'s counsel that made it impossible for him to work on the case for a year,[11] and the recent death of another counsel.[12] It is difficult to fathom how the Government can blame the delays caused by these factors on either Mr. [redacted] or his counsel.

Perhaps more importantly with respect to the delays specific to this case is the fact that the entire California capital appeals system is producing unconscionable delays in the disposition of appeals and habeas corpus proceedings.[13] Indeed, Chief Justice Ronald M. George recently noted that"[t]he existing system for handling appeals in California is dysfunctional and needs reform."[14]

Thus, there is no merit to the Governments contention were either caused by or the fault of either Mr. [redacted] or his counsel.

3. Petitioners have Alleged Sufficient Facts to Support Violations of Articles XXIV, XXV, XXVI

There is also little merit to the Government's contention that petitioners have failed to state actionable claims. First, in relation to the Article XXVI claim, petitioners have established that Mr. [redacted] has been on death row for 18 years and that his mental

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[8] Petition page 4 and Exhibit 8. *See also*, Supreme Court of California Docket in the case of People v. [redacted] (a.k.a. [redacted]), Docket, Case Number [redacted], *available at* [redacted]

[9] Petition pages 4-7, and Exhibits 16, 17, 18, 20.

[10] Id. Attached is the Declaration of Brahmani Houston who has reviewed the record and prepared a more detailed summary of the various requests for extensions along with two orders from the Superior Court regarding the preparation of the record on appeal.

[11] Petition page 6 and Exhibit 18.

[12] Notice of Factual Change page 3, and Declaration of Wilbur Haines, ¶ 5, attached thereto.

[13] This is well documented in the Notice of Factual Change pages 4-5 and the article cited there written by Senior Judge of the United States Court of Appeals, Arthur L. Alarcon, *Remedies for California's Death Row Deadlock*, 80 Southern California Law Review 697, 722-23 (2007).

[14] Chief Justice of the Supreme Court of California Ronald M. George, *Reform Death Penalty Appeals*, Editorial Jan. 7, 2008, The L.A. Times, *available at* http://articles.latimes.com/2008/jan/07/opinion/oe-george7 (last visited July 24, 2009). See also Supplemental Report to Petition (filed 27 May 2008) which summarizes not only the overall problem of the delays on death row in California (pages 11-13) but those in a number of the federal system and a number of other states, including Texas, Florida, Pennsylvania, Oklahoma, and South Carolina. The Supplement also addresses other problems related to the death penalty in the United States, including inadequacy of counsel, wrongful convictions, and its disproportionate impact on minorities and indigent persons (pages 1-10).

health which had already been questioned during trial[15] has gotten worse during that time period[16] constitutes cruel, infamous or unusual punishment. It is relevant that other bodies have found the prolonged incarceration on death row to be a violation of similar provisions. For example, the European Convention for the Protection of Human Rights and Fundamental Freedoms, article 3 prohibition of torture or inhuman or degrading treatment or punishment was interpreted by the European Court of Human Rights to prohibit the extradition of the applicant to the United States because of the potential that he could be subjected to the death penalty which could result in the death row phenomena and thus a violation of article 3.[17]

In relation to the undue delay provision, the Human Rights Committee has found that the 45 month delay by the Jamaican Court of Appeal in issuing a decision was found to be a violation of a similar provision of the ICCPR, article 14(3)(c) which has similar language to that in Article XXV. [18] Further, the Committee noted that delays could also be a violation of the prohibition in article 7, especially in a death penalty case though the specific circumstances should be assessed.[19] Clearly, the case of Mr. [redacted] involves the circumstances that would meet the test. Further, the Committee has noted that violations of articles 7 and 14, are entitled to a remedy and indicated that the appropriate remedy would be commutation of a death sentence.[20]

The lack of adequate medical care that has also been documented in the petition constitutes a violation of both articles XXV and XXIV. The lack of care has been documented both in relation to Mr. [redacted]'s specific case[21] as well as the entire prison population in California as is evidenced by a number of lawsuits that have been on-going since 1995 regarding the lack of care provided by the system.[22] These cases are on-going and it appears unlikely that they will be resolved in the near future. Earlier this year, a three judge federal panel ordered the "release of tens of thousands of inmates over the next two to three years to relieve the over-crowding that has ravaged prison medical and mental health care.."[23] The state is now appealing that decision, so it is likely to take years before the overcrowding is addressed.

Regarding the allegations of denial of medical care, petitioners have provided information regarding about specific medical conditions that Mr. [redacted] suffers, but

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[15] Petition pages 3-4, and Exhibits 9, 10, 11, 12, and 14 attached thereto.
[16] Petition pages 8-9, and Exhibits 1 and 23 attached thereto.
[17] *Soering v. United Kingdom*, no. 14038/88, § 106, ECHR 1989-I. *See also*, cases cited on pages 13-14 of Petition.
[18] See, Pratt and Morgan v. Jamaica, supra note 5 at ¶ 13.5; see also, *Pratt v. Attorney-General for* Jamaica, P.C. Appeal No. 10 of 1993. This argument is covered in greater detail in pages 18-19 of the petition.
[19] Pratt and Morgan v. Jamaica, supra note 5 at ¶ 13.6.
[20] Pratt and Morgan v. Jamaica, supra note 5 at ¶ 15.
[21] Petition page 23 and Exhibit 1.
[22] Petition pages 20-22.
[23] Bob Egelko & Wyatt Buchanan, "Judges tell state to free thousands in crowded prisons," San Francisco Chronicle, February 10, 2009, page A1. The two cases involved in the litigation are: *Plata v. Schwarzenegger*, 3:01-cv-01351-TEH (N.D. Cal.) (medical care), *Coleman v. Schwarzenegger*, 2:90-cv-00520-LKK-JFM (E.D. Cal.) (mental health care). (A summary of these cases is available at http://clearinghouse.wustl.edu/.)

most importantly is the information they have provided regarding Mr. [redacted]'s mental health which has deteriorated while he has been on death row. The petitioners provided documentation that Mr. [redacted] already suffered from psychological problems before and during the trial.[24] Claudio Marinucci, the founder of fos*ters, one of the petitioners in this case, has provided information that Mr. [redacted] has told him that he has been denied access to medical care.[25] Further, Mr. Marinucci has noted specific behavior that indicates that there are problems with Mr. [redacted]'s mental health,[26] as well as evidence that his mental condition has deteriorated.[27] Yvonne Pols-Adriaensen, who was in contact with from 2004-2007, noted deterioration in his mental condition over that time period which included increased agitation, becoming demanding, hostile and alienated.[28]

Petitioners do not otherwise have access to Mr. [redacted]'s medical records. However, it is their contention that their observations are bolstered by the fact that the medical care system in California has been taken over by the Federal Courts because of its inadequate provision of medical care. The condition of the medical system has been documented in the petition and is not denied by the Government. Litigation over the medical and mental health conditions in the California prison system has on-going for years with little progress made in remedying the situation. Remarkably, the case involving mental health care has been on-going since 1990,[29] and the case involving health care has been on-going since 2001.[30]

More recently, the Governor of the State of California has indicated that the State was not going to build the hospitals in the prisons as it had been ordered to do due to the budget crisis.[31] Thus, it is clear that there is still inadequate provision of medical care and that this likely affects Mr. [redacted]'s physical as well as mental conditions negatively. It also exacerbates the claims of cruel, infamous or unusual punishment.

4. Petitioners have Alleged Sufficient Facts to Support Violations of Articles I and XVIII

This Commission has held that the right to life under Article I of the Declaration prohibits the death penalty if it "would otherwise be rendered cruel, infamous or unusual punishment."[32] As described above, the excessive delays in addressing his appeal coupled with the conditions of his detention which include inadequate health care amount

[24] Petition, pages 3-4, and Exhibits 12, 14, 15.
[25] Petition, Exhibit 1, paragraphs 8, 12.
[26] Petition, Exhibit 1, paragraph 9.
[27] Petition, Exhibit 1, paragraphs 10, 11 and letter attached thereto.
[28] Petition, Exhibit 23, Declaration of Yvonne Pols.
[29] *Coleman v. Schwarzenegger*, 2:90-cv-00520-LKK-JFM (E.D. Cal.), supra note 23.
[30] *Plata v. Schwarzenegger*, 3:01-cv-01351-TEH (N.D. Cal), supra note 23.
[31] Prison hospital plans dropped, San Francisco Chronicle, June 26, 2009, page A1, *available at* http://www6.lexisnexis.com/publisher/EndUser?Action=UserDisplayFullDocument&orgId=574&topicId=100019196&docId=l:996515786&start=4.
[32] Michael Domingues v. the United States, Case 12.285, Inter-Am. C.H.R., Report No. 62/02, ¶ 52.