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REPORT No. 173/18
PETITION 1312-10
REPORT ON ADMISSIBILITY

NELSON MENDOZA
UNITED STATES OF AMERICA

Approved electronically by the Commission on December 23, 2018.

Cite as: IACHR, Report No. 173/18. Petition 1312-10. Admissibility. Nelson Mendoza. United States of America. December 23, 2018.

I. INFORMATION ABOUT THE PETITION

Petitioner:	Nelson Mendoza, Kenneth Rhinehart
Alleged victim:	Nelson Mendoza
Respondent State:	United States of America ¹
Rights invoked:	No articles are specified

II. PROCEEDINGS BEFORE THE IACHR²

Filing of the petition:	September 17, 2010
Additional information received at the stage of initial review:	September 29, 2012; February 26, and April 8, 2013; January 28, and March 21, 2014
Notification of the petition to the State:	November 18, 2014
State's first response:	May 20, 2015

III. COMPETENCE

Competence <i>Ratione personae</i>:	Yes
Competence <i>Ratione loci</i>:	Yes
Competence <i>Ratione temporis</i>:	Yes
Competence <i>Ratione materiae</i>:	Yes, American Declaration of the Rights and Duties of Man ³ (ratification of the OAS Charter on June 19, 1951)

IV. DUPLICATION OF PROCEDURES AND INTERNATIONAL *RES JUDICATA*, COLORABLE CLAIM, EXHAUSTION OF DOMESTIC REMEDIES AND TIMELINESS OF THE PETITION

Duplication of procedures and International <i>res judicata</i>:	No
Rights declared admissible	Articles II (equality before law), XVIII (fair trial), and XXVI (due process of law)
Exhaustion of domestic remedies or applicability of an exception to the rule:	Yes, exception set forth in Article 31.2 (b) of the IACHR Rules of Procedure is applicable
Timeliness of the petition:	Yes, in terms of section VI

V. ALLEGED FACTS

1. The Petitioner and alleged victim Nelson Mendoza ("Mr. Mendoza"), alleges that in 2008, he was convicted of a murder that he did not commit in Michigan, USA. The alleged victim is originally from El Salvador. He was subsequently sentenced to three concurrent terms of life imprisonment. He claims that he was subjected to various due process violations including discrimination, lack of access to language interpretation facilities, and lack of access to consular notification services. The alleged victim was originally incarcerated at the Cotton Correctional Facility in Jackson, Michigan.

¹ Hereinafter "United States" or "the State."

² The observations submitted by each party were duly transmitted to the opposing party; with the exception of correspondence received by the Commission from the Petitioner that raised procedural queries rather than substantive observations on the State's submission. The last communication of this nature was received on September 18, 2017.

³ Hereinafter "American Declaration."

2. According to the information available, Mr. Mendoza was convicted by a jury of two counts of first degree premeditated murder and sentenced to three concurrent terms of life imprisonment. According to the petition, Mr. Mendoza was represented by court-appointed counsel. Mr. Mendoza asserts that he appealed his conviction to the Court of Appeal of Michigan, but that his appeal was dismissed. There is no information on the file as to whether Mr. Mendoza was represented by counsel during his appeal.

3. The convictions arise from the alleged murder-for-hire killings of a married couple, in which it was alleged that the alleged victim aided and abetted one Miguel Servando in carrying out the murders, by driving him from Texas to Michigan to the couple's house, and then waiting in the car while Servando went inside and shot the victims, then driving him back to Texas on March 1, 2008.

4. The alleged victim states that he is a hard-working migrant worker, is innocent, that he was essentially lured by Servando to come to Michigan on the promise of a job waiting for him and that the alleged victim was subsequently set up by Servando for the crime.

5. According to the petition, the alleged victim cannot speak or understand English proficiently and needs help to navigate the legal system. The alleged victim contends that he "had a bad lawyer at trial who pretty much sat back and allowed the prosecutor to do what he would to get the conviction." Mr Mendoza believes that he was charged and convicted because he was an alien from the south and "it was easy for a prosecutor to make a name for himself in this high profile case."

6. Mr. Mendoza alleges that he was not allowed to testify because of his inability to speak English, and that this "resulted in [his] inability to rebuke the testimony presented against [him] from the codefendant." The alleged victim attached a newspaper article commenting on the lack of interpreters and translators in Michigan Courts and in that article, there is a picture of a man standing before the Court and the alleged victim indicates that that is his picture.

7. The judgment of the Court of Appeals (dated February 11, 2010) indicates that petitioner challenged his conviction on 2 main grounds: (1) insufficiency of evidence and (2) ineffective assistance of court appointed counsel.

8. As to the second ground - ineffective assistance of counsel- the alleged victim contends that counsel was ineffective in failing to object to the prosecutor's use of leading questions, disregarding information that the alleged victim provided and not presenting a defense. The petitioner alleged that he was not allowed to testify because of his inability to speak English, and that this "resulted in [his] inability to rebuke the testimony presented against [him] from the codefendant."

9. The court found that the alleged victim failed to provide factual support for his various claims that defense counsel ignored evidence or failed to present a substantial defense. Information on the file indicates that an application for leave to appeal this judgment was denied by the Supreme Court of Michigan on July 26, 2010. According to the information available, the alleged victim's case is now in the federal court on a habeas petition, however, the petitioner has provided no information on its status.

10. The State contends that the petition should be ruled inadmissible on grounds that petitioner has failed to exhaust his domestic remedies and has not state fact that tend to establish a violation of the American Declaration. The State provides chronology of the criminal litigation involving the alleged victim.

11. The State indicates that on September 22, 2008, the Oakland County 6th Judicial Circuit Court of Michigan found the Petitioner guilty of two counts of first degree murder and one count of conspiracy to commit murder, and on October 15, 2008 sentenced him to three concurrent terms of life imprisonment.

12. The State further indicates that on February 10, the Court of Appeals of Michigan upheld the Petitioner's trial court conviction and sentence; and that on July 26, 2010, the Supreme Court of Michigan denied the Petitioner's application for leave to appeal the appellate court's decision.

13. The State indicates that on December 29, 2010, the Petitioner filed his first petition for habeas corpus in the US District for the Eastern District of Michigan, but that the petition was dismissed on January 11, 2011, on the ground that the Petitioner had not exhausted his claims in the Michigan courts. On August 29, 2011, the Petitioner filed a Motion for Relief from Judgment with the Oakland County 6th Judicial Circuit Court which that court denied on February 21, 2013. The State adds that the Petitioner's appeal from this decision was denied by the Michigan Court of Appeals on October 16, 2013 and by the Michigan Supreme Court on May 27, 2014. On August 1, 2014, the Petitioner filed a second petition for habeas corpus that is still pending before in the US District Court for the Eastern District of Michigan.

14. The State observes that the Petitioners appeals, motions, and applications for habeas corpus allege that his conviction was based on insufficient evidence; that he had ineffective counsel; and that he was deprived of language interpretation services.

15. Generally, the State contends that all of the Petitioner's complaints have been fully ventilated by the Michigan courts and rejected. The only pending litigation is the habeas corpus proceedings in the Federal Courts. In relation to the petitioner's contention about language interpretation, the State contends that the trial court reviewed the video-recording of the arrest of the alleged victim and found that he understood the English language and never spoke Spanish. In any event, the State contends that the alleged victim had the opportunity to pursue interpretation-related matters on appeal but declined to.

16. The State further contends that the Petitioner has not shown that his language ability or inability impacted his attorney's strategy in any way. The State adds that in the United States, the Fifth Amendment to the Constitution protects a defendant's right not to testify and it is very common for English and non-English speaking defendants alike not to testify in criminal trials. In this regard, the State notes that there are many reasons for which counsel to criminal defendants may recommend that their clients should exercise their right not to testify at trial. Further, the State asserts that the Petitioner has presented no evidence that the attorney's recommendation not to testify was based solely or primarily on grounds relating to language.

17. In relation to consular notification procedures, the State contends that even if these procedures were not followed, this would not implicate any right contained in the American Declaration. In this regard, the State asserts that any failure to comply with obligations under Article 36 of the Vienna Convention on Consular Relations or bilateral consular conventions does not amount to a violation of a human right enshrined in an international instrument to which the United States is a party.

VI. ANALYSIS OF EXHAUSTION OF DOMESTIC REMEDIES AND TIMELINESS OF THE PETITION

18. In accordance with Article 31(1) of the Rules of Procedure of the Inter-American Commission, for a petition to be admissible, domestic remedies must have been pursued and exhausted pursuant to generally recognized principles of international law. This requirement is aimed at enabling national authorities to take cognizance of the alleged violation of the protected right and, if appropriate, resolve the matter before it is heard by an international body.

19. The requirement of exhaustion of domestic remedies does not mean that the alleged victim has the obligation to exhaust every possible remedy available to them. In this respect, the Inter-American Commission has maintained that "if the alleged victim endeavored to resolve the matter by making use of a valid, adequate alternative available in the domestic legal system and the State had an opportunity to remedy the issue within its jurisdiction, the purpose of the international legal precept is fulfilled."⁴ In the present case, the alleged victim was convicted in the first instance on September 22, 2008. He subsequently appealed to the Court of Appeals of Michigan which upheld the conviction and sentence on February 10; and that on

⁴ IACHR Report No. 133/11 Petition 259-11 Admissibility Félix Rocha Díaz UNITED STATES October 19, 2011, para. 25.

July 26, 2010, the Supreme Court of Michigan denied the Petitioner's application for leave to appeal the appellate court's decision. The petition was received by the Commission on September 17, 2010.

20. In this case, the Commission accepts that the Petitioner 2014 (second) petition for habeas corpus is still pending before in the US District Court for the Eastern District of Michigan. The requirement of exhaustion of domestic remedies does not mean that the alleged victim has the obligation to exhaust every possible remedy available to them. The Inter-American Commission has maintained that if the alleged victim endeavored to resolve the matter by making use of a valid, adequate alternative available in the domestic legal system and the State had an opportunity to remedy the issue within its jurisdiction, the purpose of the international legal precept is fulfilled. The Commission therefore concludes that it has sufficient elements to believe that the exception set forth in Article 31.2 (b) of its Rules of Procedure is applicable in this case.

VII. ANALYSIS OF COLORABLE CLAIM

21. The Inter-American Commission's Rules of Procedure do not require a petitioner to identify the specific rights allegedly violated by the State in the matter brought before the Commission, although petitioners may do so. It is for the IACHR, based on the Inter-American system's jurisprudence, to determine in its admissibility report which provisions of the relevant instruments are applicable and could be found to have been violated if the alleged facts are proven by sufficient elements.

22. If corroborated, the alleged events could tend to establish a violation of Articles II, XVIII and XXVI of the American Declaration. The alleged victim claims he was discriminated against for being "an alien from the South" and not assisted by a translator or interpreter during his trial. This has been disputed by the State. However, the absence of translation or interpreting services during the trial could, *prima facie*, give rise to a violation of Articles II, XVIII and XXVI of the American Declaration. In addition, allegations relating to the inadequacy of the court appointed counsel at trial could also tend to establish a violation of Articles XVIII and XXVI of the American Declaration.

23. The Commission has determined in previous cases that it is necessary and appropriate to consider the extent to which a state party has given effect to the requirements of Article 36 of the Vienna Convention for the purpose of evaluating that state's compliance with a foreign national's due process rights under Articles XVIII and XXVI of the American Declaration. Therefore, it does consider compliance with Article 36 of the Vienna Convention when interpreting and applying the provisions of the American Declaration to a foreign national who has been arrested, committed to trial or to custody pending trial, or is detained in any other manner by that state. In this regard, the Commission has previously noted that "non-compliance with obligations under Article 36 of the Vienna Convention is a factor that must be evaluated together with all of the other circumstances of each case in order to determine whether a defendant received a fair trial."⁵

VIII. DECISION

1. To find the instant petition admissible in relation to Petitioner's claims regarding equality before the law, consular notification, lack of translation/interpretation facilities, and inadequacy of counsel in relation to Articles II, XVIII, and XXVI of the American Declaration;

2. To notify the parties of this decision; to continue with the analysis on the merits; and to publish this decision and include it in its Annual Report to the General Assembly of the Organization of American States.

Approved by the Inter-American Commission on Human Rights on the 23rd day of the month of December, 2018. (Signed): Margarete May Macaulay, President; Esmeralda E. Arosemena Bernal de Troitiño,

⁵ IACHR, Report No. 90/09, Case 12.644, Admissibility and Merits (Publication), Medellín, Ramírez Cardenas and Leal García, United States, August 7, 2009, para. 127

First Vice President; Luis Ernesto Vargas Silva, Second Vice President; Francisco José Eguiguren Praeli, Joel Hernández García (dissenting opinion), Antonia Urrejola, and Flávia Piovesan, Commissioners.