

Nos. A-1101 and 00-10631

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IN THE SUPREME COURT OF THE UNITED STATES

JUAN RAUL GARZA, PETITIONER

v.

HARLEY G. LAPPIN, WARDEN

ON APPLICATION FOR A STAY OF EXECUTION AND  
ON PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE SEVENTH CIRCUIT

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BRIEF FOR THE RESPONDENT IN OPPOSITION

THEODORE B. OLSON  
Solicitor General  
Counsel of Record

MICHAEL CHERTOFF  
Assistant Attorney General

ROBERT J. ERICKSON  
MARGARET P. GRIFFEY  
GWYNN X KINSEY, JR.  
Attorneys

Department of Justice  
Washington, D.C. 20530-0001

(202) 514-2217

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## QUESTIONS PRESENTED

1. Whether petitioner has satisfied the requirements for a stay of execution, as described in Barefoot v. Estelle, 463 U.S. 880 (1983).

2. Whether petitioner is entitled to have his death sentences vacated based on Report No. 52/01 of the Inter-American Commission on Human Rights, which concluded that his sentences violate his rights under the American Declaration of the Rights and Duties of Man (American Declaration), and that his execution would violate the Charter of the Organization of American States, 21 U.S.T. 607, and the American Declaration.

(I)

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OPINIONS BELOW

The opinion of the court of appeals denying petitioner's motion for a stay of execution (Pet. App. 63-74) is not yet reported. The opinion of the district court dismissing petitioner's petition for a writ of habeas corpus (Pet. App. 1-8) is also not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on June 14, 2001. The application for a stay of execution and the petition for a writ of certiorari were filed on June 15, 2001. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

After a jury trial in the United States District Court for the Southern District of Texas, petitioner was convicted of numerous offenses, including engaging in a continuing criminal enterprise, in violation of 21 U.S.C. 848(a) and (c), and committing three murders while engaged in and in furtherance of a continuing criminal enterprise, in violation of 21 U.S.C. 848(e). He was sentenced to death for each of the murders.<sup>1</sup> The

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<sup>1</sup> Petitioner was also convicted of conspiring to import and to possess with intent to distribute more than 1000 kilograms of marijuana, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(A)(vii), 952(a)(2), 960(b)(1)(G), and 963; possession of marijuana with intent to distribute it, in violation of 21 U.S.C. 841(a)(1) and 21 U.S.C. (b)(1)(B) or (C) (1994 & Supp. V 1999); and money laundering, in violation of 18 U.S.C.

Fifth Circuit affirmed petitioner's convictions and sentence. United States v. Flores, 63 F.3d 1342 (1995). This Court denied his petition for a writ of certiorari, 519 U.S. 825 (1996), and his petition for rehearing, 519 U.S. 1022 (1996).

Following direct review, petitioner filed a motion to vacate his sentences under 28 U.S.C. 2255 (1994 & Supp. V 1999), challenging, inter alia, the admissibility at his penalty hearing of evidence of various unadjudicated murders for which he was responsible. The district court denied the motion and declined to issue a certificate of appealability. Petitioner then applied to the court of appeals for a certificate of appealability under 28 U.S.C. 2253(c)(1)(B) (Supp. V 1999). The court of appeals denied the application. United States v. Garza, 165 F.3d 312 (5th Cir. 1999). This Court denied certiorari. 528 U.S. 1006 (1999).

Petitioner is scheduled to be executed on June 19, 2001. On May 4, 2001, petitioner filed in the Fifth Circuit a motion for

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1956(a)(1)(A). Petitioner does not challenge his convictions and sentences on those charges in this Court.

a stay of execution and for leave to file a second or successive Section 2255 motion to vacate his sentence so that he could raise a claim that the rule in Simmons v. South Carolina, 512 U.S. 154 (1994), was violated in his capital sentencing hearing.

On May 30, 2001, the Fifth Circuit denied petitioner's request for a stay and leave to file a second or successive Section 2255 motion. In re Garza, No. 01-40473 (May 30, 2001). In light of that denial, on June 7, 2001, petitioner filed an original petition for a writ of habeas corpus and a stay application in this Court, which are pending as Nos. A-1072 and 00-10456.

On April 24, 2001, in the United States District Court for the Southern District of Indiana (the district of petitioner's incarceration), petitioner filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. 2241 and a motion for stay of execution, alleging that the introduction at his penalty hearing of evidence of unadjudicated murders committed or procured by him in Mexico violated international law. The district court dismissed the habeas petition for lack of jurisdiction, and petitioner noted an appeal to the Seventh Circuit.<sup>2</sup> On June 14,

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<sup>2</sup> On June 6, 2001, petitioner filed in the Fifth Circuit another motion for authorization to file a successive motion under Section 2255, raising the same substantive international law claim as he raised in the Seventh Circuit. On June 11, 2001, the Fifth Circuit denied leave to file the successive claim. See Order, No. 01-40596.

2001, the Seventh Circuit denied petitioner's motion for a stay of execution, finding that petitioner had failed to "present[] any substantial ground" on which habeas relief could be granted.

Pet. App. 74. On June 15, 2001, petitioner filed in this Court the instant application for a stay of execution and petition for a writ of certiorari.

1. The evidence at trial is summarized in the opinion of the court of appeals on direct appeal. 63 F.3d at 1351-1352. From the early 1980s until 1992, petitioner controlled an extensive marijuana trafficking organization headquartered in Brownsville, Texas. During that period, he and his subordinates imported thousands of pounds of marijuana from Mexico, packaged the marijuana at various stash houses located in the Brownsville and Corpus Christi areas, and then resold the marijuana to wholesale distributors in Texas, Louisiana, and Michigan. Id. at 1351.

Law enforcement officers occasionally seized marijuana loads, currency shipments, or both, belonging to petitioner. Petitioner suspected that those seizures were linked to informants within his drug-trafficking organization. In retaliation, petitioner murdered or caused the murder of Gilberto Matos, Erasmo De La Fuente, and Thomas Rumbo. 63 F.3d at 1351-1352. The circumstances surrounding those murders are

described in our brief in opposition in Nos. A-1072 and 00-10456 at pages 4-5 (filed June 14, 2001).

2. Under 21 U.S.C. 848(k), the jury must find the existence of at least two statutory aggravating factors before it is authorized to sentence to death a defendant found guilty of committing murder in furtherance of a continuing criminal enterprise, in violation of 21 U.S.C. 848(e). First, the jury must find the existence of at least one of four "intent" factors enumerated in Section 848(n)(1) to ensure that the defendant acted with a degree of culpability sufficient to make imposition of the death penalty a constitutionally proportionate punishment. See Tison v. Arizona, 481 U.S. 137 (1987). In addition, the jury must find the existence of at least one of the aggravating factors enumerated in Section 848(n)(2)-(12). See 21 U.S.C. 848(k). If the jury finds the existence of one of the aggravating factors set forth in paragraph one of subsection (n) and one of the aggravating factors set forth in paragraphs two through 12 of subsection (n), then the jury may consider any non-statutory aggravating factors for which notice has been given, and it may weigh all aggravating factors it has found against any mitigating factors that any individual juror finds to exist. See 21 U.S.C. 848(k). Although the jury "is never required to impose a death sentence," it may do so if it

unanimously concludes that "the aggravating factors found to exist sufficiently outweigh any mitigating factor or factors found to exist, or in the absence of mitigating factors, [that] the aggravating factors are themselves sufficient to justify a sentence of death." 21 U.S.C. 848(k).

In its original and amended notice of its intent to seek the death penalty for the murders of Matos, De La Fuente, and Rumbo (see 21 U.S.C. 848(h)), the government alleged, inter alia, as non-statutory aggravating factors the previously unadjudicated murders of Oscar Cantu, Antonio Nieto, Diana Flores Villarreal, Bernabe Sosa (petitioner's son-in-law), and Fernando Escobar Garcia. Gov't C.A. Br. 4. With the exception of the Villarreal murder, all of the unadjudicated murders occurred in Mexico. As detailed below, the government presented extensive evidence at the penalty phase of petitioner's capital trial establishing that petitioner participated in or ordered each of the previously unadjudicated murders alleged as non-statutory aggravating factors, and that his motivation for doing so variously related to the mishandling of the proceeds from his drug trafficking enterprise, the loss of a marijuana shipment belonging to him, connections to a suspected informant, or personal animosity. Petitioner did not raise at any stage of the sentencing hearing any claim that the admission of this

evidence violated United States obligations under international law or was inconsistent with any principles contained in any international instrument, including the American Declaration of Rights and Duties of Man (American Declaration).<sup>3</sup>

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<sup>3</sup> The American Declaration is available on Westlaw at 2000 BDPHRIAMS 15, and is reprinted in 43 Am. J. Int'l L. supp. 133 (1949).

With respect to the Escobar and Nieto murders, Israel Flores testified at the penalty hearing that he and Nieto, one of petitioner's associates, went to Mexico to purchase marijuana for petitioner. Nieto was arrested and Flores lent him \$10,000 of petitioner's drug money to get out of jail. Complaining that they were taking too long to complete the marijuana deal, petitioner called Flores and directed him to return to Brownsville. After learning of the spent funds, petitioner initially responded that he was going to kill Nieto, Flores, and Escobar (who he believed was an instigator), but he later told Flores and Nieto privately that he was going to kill Escobar because he had no use for him. Afterwards, petitioner and another individual drove Flores, Nieto, and Escobar to a secluded area. While the car was moving, petitioner shot Escobar three times, killing him. Gov't C.O.A. Opp. 18-19.<sup>4</sup>

Israel Flores further testified that, about a week later, petitioner ordered him to kill Nieto; if he refused, petitioner threatened, both he and Nieto would be killed. Pursuant to petitioner's instructions, Flores and Raul Amaro drove Nieto to a secluded country road near Matamoros, where Flores shot him

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<sup>4</sup> The government's brief in opposition to petitioner's application for a certificate of appealability from the denial of his initial Section 2255 motion is cited as "Gov't C.O.A. Opp." The government's brief in the court of appeals on petitioner's direct appeal is cited as "Gov't C.A. Br."

four times. Jesus Flores testified that petitioner told him that Israel Flores had killed Nieto because Nieto had "wasted [petitioner's] money over there in Mexico." Gov't C.O.A. Opp. 19.

With regard to the Bernabe Sosa murder, Jesus Flores testified that petitioner wanted Sosa killed because petitioner believed that Sosa was responsible for a January 1992 police seizure of marijuana in Houston. Pursuant to a plan developed by petitioner, Amaro drove Sosa, Flores, and Emilio Gonzales to a prearranged location under the pretext of inspecting a landing strip. Once there, Gonzales and Amaro shot Sosa three times in the head and neck. At petitioner's direction, Gonzales then handcuffed Sosa to give the appearance that the Mexican Federales had murdered him. Gov't C.O.A. Opp. 21-22.

Israel Flores and Greg Srader testified about the murder of Oscar Cantu, one of petitioner's pilots. In 1991, Cantu reported to petitioner that Mexican police had pulled him over, tortured him, and seized \$40,000-\$60,000 that was to be used to purchase marijuana for petitioner. Petitioner believed that Cantu had stolen the money and stated that he was going to kill him. Thereafter, petitioner and Jesus Flores took Cantu on a trip to Mexico from which he never returned. Srader testified that petitioner told him that they had killed Cantu. Gov't

C.O.A. Opp. 22-23.<sup>5</sup>

Jesus Flores testified that petitioner asked him to help kill Diana Villarreal in Texas. Petitioner was angry with Villarreal because she had introduced petitioner to government informant Emilia Galvan and because he thought Villarreal was laughing at him over the government's seizure of a large amount of his drug proceeds. In carrying out his plan to murder Villarreal, petitioner told Flores, Gonzales, and Villarreal to snort cocaine with him. At petitioner's instruction, Gonzales sat down beside Villarreal, punched her unconscious, and then began strangling her. Because petitioner believed that Gonzales

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<sup>5</sup> In addition to the testimony of petitioner's accomplices, the government presented at the penalty hearing the testimony of the United States Customs agents who investigated the murders in Mexico and the United States and Mexican pathologists who performed the autopsies on the victims. Gov't C.O.A. Opp. 17-18.

was not "doing it right," petitioner strangled her himself. In the meantime, Flores injected Villarreal with cocaine. When she started having convulsions, petitioner ordered Gonzales to tie a plastic bag over her head. They dumped her body in a secluded area of Brownsville. Petitioner paid Flores, Gonzales, and a third individual who helped dispose of the body an ounce of cocaine each for their help. Gov't C.A. Br. 29-30.

3. At the conclusion of the penalty hearing, the district court submitted to the jury each of the four Section 848(n)(1) "intent" factors with respect to each of the three capital murders for which petitioner was convicted. As to the De La Fuente and Rumbo murders, the jury found unanimously and beyond a reasonable doubt that petitioner intentionally killed both victims (Section 848(n)(1)(A)), and that he intentionally engaged in conduct intending that both of the victims be killed or that lethal force be employed against each of the victims resulting in their deaths (Section 848(n)(1)(C)). As to the Matos murder, the jury found unanimously and beyond a reasonable doubt that petitioner intentionally engaged in conduct intending that Matos be killed or that lethal force be employed against him resulting in his death (Section 848(n)(1)(C)). 63 F.3d at 1366. Having found the requisite aggravating intent for all three murders, the jury next found unanimously and beyond a

reasonable doubt, from the second category of required statutory aggravating factors, that petitioner committed each of the three murders after substantial planning and premeditation (Section 848(n)(8)) and that he procured De La Fuente's and Matos's murders by payment of something of pecuniary value (Section 848(n)(6)). Id. at 1367. Finally, as non-statutory aggravating factors, the jury found unanimously and beyond a reasonable doubt that petitioner was responsible for the killings of Escobar, Nieto, Sosa, Cantu, and Villareal; that petitioner committed four of these previously unadjudicated killings after substantial planning and premeditation; that petitioner intentionally committed two of these unadjudicated killings in furtherance of his continuing criminal enterprise; and that petitioner represented a continuing danger to others based on his pattern of violent and brutal conduct. Ibid.

At least one juror found each of the following statutory mitigating factors by a preponderance of the evidence: that petitioner was under unusual and substantial duress at the time of the killings; that he was youthful; that other defendants who were equally culpable would not be punished by death; and that each of the victims consented to the criminal conduct that ultimately resulted in his death. See 21 U.S.C. 848(m)(2), (5), (8) and (9). At least one juror also found the existence of one

non-statutory mitigating factor. 63 F.3d at 1367. The jury unanimously concluded that the aggravating factors sufficiently outweighed the mitigating factors and recommended that petitioner be sentenced to death for each of the three murders.

Ibid. As required by the statute, the district court then sentenced petitioner to death. 21 U.S.C. 848(1).

4. On direct appeal, petitioner's sole contentions with respect to the non-statutory aggravating factors were (1) that the government's amended notices of non-statutory aggravating factors were untimely; (2) that he received inadequate discovery of the evidence related to those factors; (3) that the district court lacked subject matter jurisdiction over the unadjudicated foreign murders; (4) that he was unable to prepare an adequate defense because he lacked subpoena power in Mexico; and (5) that the evidence related to those factors should have been excluded because its probative value was outweighed by its prejudicial effect on the jury. Appellant C.A. Br. 83-97; Appellant C.A. Reply Br. 24-25. The court of appeals found no merit in petitioner's discovery claim because "[petitioner] d[id] not point to any failure of the government to comply with the district court's discovery orders and d[id] not argue that the court erred by failing to order discovery of aggravating evidence." 63 F.3d at 1364. The court rejected petitioner's

other challenges to the non-statutory aggravating factors without discussion. Id. at 1351, 1364. Petitioner sought this Court's review on issues unrelated to those raised in his current petition, and the Court denied certiorari. 519 U.S. 825 (1996).

5. Thereafter, petitioner filed a motion to vacate his sentence under 28 U.S.C. 2255 (1994 & Supp. V 1999). Petitioner did not raise any claim that the admission of evidence of the unadjudicated foreign murders was inconsistent with any principles contained in the American Declaration or violated United States obligations under international law. Instead, he argued that the Fifth Circuit violated his constitutional right to meaningful appellate review by affirming his death sentence on direct appeal without addressing his challenge to the non-statutory aggravating factors relating to the four murders in Mexico. Mot. to Vacate Def.'s Sentence 2-8. In addition, he argued that he was denied due process in that he did not have a fair opportunity to contest the government's evidence of the four murders in Mexico because he had no right of compulsory process or subpoena power in Mexico and thus no ability to procure witnesses or to protect against the suppression, destruction, or fabrication of evidence by Mexican authorities.

Id. at 8-21.<sup>6</sup> The district court denied the motion and rejected petitioner's request for a certificate of appealability under 28 U.S.C. 2253(c)(1)(B) (Supp. V 1999).

Petitioner then sought a certificate of appealability from the Fifth Circuit. Petitioner renewed the "meaningful appellate review" and due process claims raised in the district court, and he did not attempt to argue any claim that the admission of the evidence of foreign murders was inconsistent with any principles contained in the American Declaration or violated United States obligations under international law. The court denied a certificate of appealability, concluding that petitioner had not made a substantial showing of the denial of a constitutional right, as required by 28 U.S.C. 2253(c)(2) (Supp. V 1999). 165 F.3d at 314-315. This Court denied certiorari. 528 U.S. 1006 (1999).

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<sup>6</sup> Petitioner also raised an ineffective assistance of counsel claim that is not relevant to his present claims.

6. On December 20, 1999, petitioner filed a petition with the Inter-American Commission on Human Rights (Inter-American Commission or Commission) of the Organization of American States (OAS), alleging that his purported rights under the American Declaration, the OAS Charter, 21 U.S.T. 607, and international law in general were violated by the introduction at the capital punishment phase of evidence of the unadjudicated murders committed in Mexico. Although relying on the American Declaration and international law, the complaint and underlying analysis presented to the Inter-American Commission paralleled the complaint presented on direct appeal and raised again in petitioner's initial motion for collateral relief under Section 2255. On April 4, 2001, the Inter-American Commission released a report concluding that the United States had violated Articles I, XVIII, and XXVI of the American Declaration by introducing evidence of the unadjudicated murders committed in Mexico and "recommend[ing]" that the United States "[p]rovide [petitioner] with an effective remedy, which includes commutation of sentence."<sup>7</sup> Case 12.243, Inter-Am. C.H.R. 52/01, OEA/Serv.

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<sup>7</sup> Articles I, XVIII, and XXVI of the American Declaration (the only substantive provisions identified as bases for the Report's recommendation, Pet. App. 50) provide as follows:

Right to life, liberty and personal security.

Article I. Every human being has the right to life,

L/V/II.111, doc. 6 (2001) (Report) at 35-36 (Pet. App. 49-50).

7. Petitioner filed a petition for writ of habeas corpus in the United States District Court for the Southern District of Indiana, arguing that the Inter-American Commission's Report created a judicially enforceable individual right that was unavailable at the time he filed his initial Section 2255 motion. He further argued that the Report entitled him to a new capital sentencing hearing at which evidence of the unadjudicated murders committed in Mexico would be excluded.

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liberty and the security of his person.

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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 fundamental constitutional rights.

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Right to due process of law.

Article XXVI. Every accused 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, infamous or unusual punishment.

Pet. App. 39, 42.

The district court concluded that it lacked jurisdiction to consider the claim and dismissed the petition; it then denied his motion for a stay of execution as moot. Pet. App. 1-9.

8. The court of appeals denied petitioner's request for a stay of execution. Pet. App. 63-74. The court concluded that it had jurisdiction to consider petitioner's claim for habeas relief under Section 2241. Id. at 66-71.<sup>8</sup> But the court held that petitioner failed to demonstrate "any substantial ground" on which relief could be granted. Id. at 71-74. Noting the "general rule" that "international agreements, even those benefitting private parties, do not create private rights

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<sup>8</sup> Because the court believed that petitioner's instant international law claim was unavailable at the time of petitioner's initial Section 2255 motion and because it did not meet the gatekeeping criteria that would permit it to be raised in a second or successive Section 2255 motion (see Section 2255, para. 8), the court of appeals concluded that it could be raised under Section 2241 by virtue of the savings clause in Section 2255, para. 5, which permits a federal prisoner to proceed by Section 2241 when Section 2255 is "inadequate or ineffective to test the legality of his detention."

enforceable in domestic courts," the court of appeals stated that there was "no indication in the treaties [petitioner] relies on that the parties to the treaties intended for the Inter-American Commission's reports to create privately-enforceable rights, and ample evidence that they did not." Id. at 71.

In particular, the court of appeals found "[n]othing in the OAS Charter" to suggest an intention that the United States would be bound by the Commission's decisions. Pet. App. 73. The court further noted that the language of the Commission's statute shows that the Commission does not have the power to bind member States: "The Commission's power is only to make 'recommendations,' which, according to the plain language of the term, are not binding." Ibid. Under those circumstances, the court of appeals concluded that "[petitioner's] likelihood of success on the merits can in no way be described as 'substantial'" because it is "quite unlikely that 'recommendations to the government of any member state' could create judicially-cognizable rights in individuals." Id. at 73-74. "By their very nature," the court reasoned, "non-binding recommendations to a government on how to conduct its affairs would appear to be addressed to the executive and legislative branches of the government, not to the courts." Id. at 74.

## ARGUMENT

Petitioner seeks a stay of execution pending the Court's resolution of his petition for a writ of certiorari. That petition seeks this Court's review of the decision of the court of appeals that the habeas petition that petitioner filed in the district court lacks merit. Petitioner's underlying claim is that he is entitled to have his death sentences vacated based on the Report of the Inter-American Commission (Pet. App. 14-62). That claim fails for the fundamental reason identified by the court of appeals: the Commission does not have the power to issue binding orders on member States, which could then be enforced by an individual in court. Instead, its power is limited to making "recommendations," as it did in this case. Such recommendations do not give rise to judicially enforceable rights that may be invoked in a petition for a writ of habeas corpus. Rather, the proper authority in the United States to

respond to those recommendations is the Executive Branch.<sup>9</sup>

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<sup>9</sup> The Commission has recently written to the Secretary of State to reiterate its recommendations and to request information about the government's response. See App. A, infra. The government, though the Ambassador and Acting Permanent Representative to the Organization of American States, replied, reiterating the government's consistent position that petitioner's petition under the American Declaration lacked merit and that the Commission does not have the authority to make binding findings or requests to the United States. See App. B, infra.

Because petitioner has previously exhausted a direct appeal and a first collateral review of his convictions and death sentences under Section 2255, a stay of his execution "should be granted only [if] there are 'substantial grounds upon which relief might be granted.'" DeLo v. Stokes, 495 U.S. 320, 321 (1990) (per curiam) (quoting Barefoot v. Estelle, 463 U.S. 880, 895 (1983)).<sup>10</sup> For the reasons given by the court of appeals, and the additional reasons discussed below, petitioner cannot meet that stringent standard. As the court of appeals

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<sup>10</sup> Although Barefoot involved a stay application by a state prisoner, we agree with petitioner (See Mot. for Stay of Execution 1, 2) that the Barefoot standard also applies where, as here, a federal prisoner seeks a stay in a successive collateral review proceeding. It is noteworthy that Congress, in the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214, adopted similar, if not identical standards, to govern when both federal and state prisoners are entitled to review of second or successive applications for collateral review. 28 U.S.C. 2244, 2255 (1994 & Supp. V 1999); Reyes-Requena v. United States, 243 F.3d 893, 897-899 (5th Cir. 2001).

explained, petitioner's reliance on the Report does not entitle him to relief. In addition, his claim is not cognizable on collateral review and, even if it were cognizable, it would be procedurally barred. For all of those reasons, the petition for a writ of certiorari does not warrant this Court's review, and the petition, and petitioner's request for a stay of execution, should be denied.

1. Petitioner contends that the Commission's Report "is an expression" of treaty-based rights that are enforceable in his petition for a writ of habeas corpus under 28 U.S.C. 2241. Pet. 16-32. As the court of appeals explained, however, neither the American Declaration, the OAS Charter, nor the Commission Report gives petitioner any judicially enforceable rights.<sup>11</sup>

a. In the Report, the Commission concluded that petitioner's sentences violate his rights under the American Declaration, and that his execution would violate the OAS Charter and the American Declaration. Pet. App. 49 (Report ¶¶ 118, 120). In particular, the Commission concluded that the government's introduction, at petitioner's sentencing hearing,

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<sup>11</sup> Petitioner errs in suggesting (Pet. 14) that the government did not rely on this theory below. See Opp. to Stay of Execution 14-15 (filed June 12, 2001).

of four unadjudicated murders that he committed in Mexico violated Articles I, XVIII and XXVI of the American Declaration.

Ibid. (Report ¶ 120); see also id. at 39-47 (Report ¶¶ 87-112).

In invoking the Report, petitioner cannot contend that the American Declaration and the OAS Charter by themselves give rise to any rights that petitioner may enforce. As the court of appeals explained, international agreements, even those benefitting private parties, generally do not create private rights enforceable in domestic courts. Pet. App. 71. See also Edye v. Robertson (The Head Money Cases), 112 U.S. 580, 598 (1884) ("A treaty is primarily a compact between independent nations. It depends for the enforcement of its provisions on the interest and the honor of the governments which are parties to it. If these fail, its infraction becomes the subject of international negotiations and reclamations, so far as the injured party chooses to seek redress. \* \* \* It is obvious that with all this the judicial courts have nothing to do and can give no redress."). An international agreement may be found to create such rights only when they are contemplated in the agreement itself. See Restatement (Third) of the Foreign Relations Law of the United States § 703, cmt. c (1989); id. § 907, cmt. a.; e.g., Frolova v. Union of Soviet Socialist Republics, 761 F.2d 370, 373 (7th Cir. 1985).

There is no indication in either the American Declaration or the OAS Charter that those instruments are intended to create privately enforceable rights. Indeed, as the court of appeals recognized, the American Declaration does not even create rights and obligations on the part of States. Rather, it "is an aspirational document which, as [petitioner] admitted in his petition in the district court, did not on its own create any enforceable obligations on the part of any of the OAS member nations." Pet. App. 72. As for the OAS Charter: that document is an international agreement that has been ratified by the United States. But it does not give rise to individual, judicially enforceable rights. Among other things, the Charter authorizes the creation of the Inter-American Commission "to promote the observance and protection of human rights and to serve as a consultative organ of [OAS] in these matters." OAS Charter (Amended), Feb. 27, 1967, art. 112, 21 U.S.T. 691. The Charter further states that "[a]n inter-American convention on human rights shall determine the structure, competence, and procedure of this Commission, as well as those of other organs responsible for these matters." Ibid. But nothing in the Charter creates any independent, privately enforceable rights. Nor, indeed, does petitioner identify any provision of the Charter that was allegedly violated by the government's

introduction at his capital sentencing hearing of the evidence of the murders in Mexico.

Even if the American Declaration or the OAS Charter by themselves gave rise to any privately enforceable rights, which they do not, that fact would not assist petitioner in seeking relief at this time in a petition for habeas corpus. Rights arising under treaties, just as rights arising under the Constitution, are subject to principles of procedural default. See Breard v. Greene, 523 U.S. 371, 375-376 (1998) (per curiam).

Petitioner failed to invoke the American Declaration or the OAS Charter at trial, on direct appeal, or in his first motion under 28 U.S.C. 2255 (1994 & Supp. V 1999). Any claims under those documents would be procedurally defaulted, and petitioner could not raise them now on collateral review. See Bousley v. United States, 523 U.S. 614 (1998). Moreover, as the court of appeals noted (Pet. App. 68-69), any filing raising them now would, without question, be a second or successive motion, barred by the gatekeeping provisions of Section 2255, paragraph 8. Nor would a defaulted claim of error brought directly under the American Declaration or the OAS Charter fit within the savings clause permitting review under 28 U.S.C. 2241 when Section 2255 is "inadequate or ineffective to test the legality of [a prisoner's] detention." 28 U.S.C. 2255 (1994 & Supp. V 1999).

The mere failure to satisfy the gatekeeping requirements does not make Section 2255 "inadequate or ineffective." See, e.g., Reyes-Requena v. United States, 243 F.3d 893, 901-902 (5th Cir. 2001).

b. Petitioner therefore relies on the proposition that the Report of the Inter-American Commission "created" a judicially enforceable right to have his death sentences vacated. Pet. 21; see also Pet. App. 71 (stating that petitioner's claim "depends on a showing that the Inter-American Commission's report created an enforceable obligation that the United States was bound by treaty to honor"). An examination of the instruments that form the basis for the Commission's action, however, reveals that the Commission is not empowered to "create" such rights.

The Commission's governing document is the Statute of the Inter-American Commission on Human Rights, which has been adopted by the OAS General Assembly.<sup>12</sup> The Statute recognizes a distinction between rights created by the OAS Charter and the American Declaration, on the one hand, and rights created by the American Convention on Human Rights (American Convention), on the other. The American Convention is an international human rights treaty that creates the Inter-American Court of Human

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<sup>12</sup> The Statute of the Inter-American Commission on Human Rights is available on Westlaw at 2000 BDPHRIAMS 113.

Rights. That court's decisions, the court of appeals stated, are potentially binding on the parties to the American Convention. The United States has signed the American Convention, but has not ratified it, so the United States is not a party to the American Convention. See Pet. App. 72.

With respect to countries, including the United States, who are members of OAS but have not become party to the American Convention, the Statute gives the Commission the following powers relevant to petitioner's case:

[T]o make recommendations to the governments of the states on the adoption of progressive measures in favor of human rights in the framework of their legislation, constitutional provisions and international commitments, as well as appropriate measures to further observance of those rights; \* \* \*

[T]o pay particular attention to the observance of the human rights referred to in Articles I, II, III, IV, XVIII, XXV, and XXVI of the American Declaration of the Rights and Duties of Man; [and] \* \* \*

[T]o examine communications submitted to it and any other available information, to address the government of any member state not a Party to the [American] 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.

Statute of the Inter-American Commission on Human Rights, Oct. 1979, arts. 18(b), 20(a) and (b). As the court of appeals explained, those provisions, and the provisions of the OAS Charter, indicate that the Commission's determinations are not binding on the United States and its courts:

Nothing in the OAS Charter suggests an intention that

member states will be bound by the Commission's decisions before the American Convention goes into effect. To the contrary, the OAS Charter's reference to the Convention shows that the signatories to the Charter intended to leave for another day any agreement to create an international human rights organization with the power to bind members. The language of the Commission's statute similarly shows that the Commission does not have the power to bind member states. The Commission's power is only to make "recommendations," which, according to the plain language of the term, are not binding.

Pet. App. 73 (emphasis added).

Petitioner contends (Pet. 25-28) that the Commission is empowered to make binding rulings on violations and "recommendations" as to remedies. That distinction has no grounding in either the Statute or the OAS Charter. Petitioner identifies no language that empowers the Commission to bind the United States government, let alone to bind its courts. Petitioner's contention (Pet. 22) that the Commission's recommendations are binding on United States courts because the Commission believes that they are fails for the same reason. The Commission's governing Statute empowers it to make only "recommendations," and recommendations do not create rights in individual citizens of the United States that are enforceable in the United States courts. Rather, the non-binding recommendations of the Commission are, as the court of appeals properly concluded (Pet. App. 74), addressed to the Executive

Branch.<sup>13</sup>

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<sup>13</sup> Because the question whether a particular international agreement creates judicially enforceable rights is answered by the terms of that agreement, petitioner's citations (Pet. 30-32)

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of court decisions that purportedly recognize the authoritative nature of interpretations by other international bodies of other international agreements are beside the point. In any event, the only court of appeals decision that petitioner cites did not hold that the interpretation by the international body was binding on the United States courts. See United States v. Duarte-Acero, 208 F.3d 1282 (11th Cir. 2000). Rather, the court made an extensive independent examination of the relevant international agreement, in one part of which it gave the views of the international body significant but not controlling weight. See id. at 1284-1288; see also Knight v. Florida, 528 U.S. 990, 998 (1999) (Breyer, J., dissenting from denial of certiorari) (finding the views of the European Court of Human Rights and other foreign courts "useful even though not binding").

Consistent with the view that the Commission's recommendations are properly addressed to diplomatic channels for consideration by the Executive Branch, the Executive Secretary of the Inter-American Commission wrote on June 14, 2001, to the Secretary of State to reiterate the conclusions reflected in the Commission's Report. See Letter from Jorge E. Taiana, Executive Secretary, Inter-American Commission on Human Rights, to Colin L. Powell, Secretary of State (App. A, infra).

The letter further requested the government to indicate its response to those recommendations. The United States Ambassador to OAS yesterday responded to the Executive Secretary by reiterating that the United States does not agree with the Commission's conclusions that petitioner's rights under the American Declaration were violated and that the government adheres to "our consistent view that the petition is manifestly groundless." Letter from Thomas A. Shannon, Ambassador and Acting Permanent Representative to the Organization of American States, to Jorge E. Taiana, Executive Secretary, Inter-American Commission on Human Rights 2 (June 15, 2001) (App. B, infra). The letter reaffirms the position of the United States that the Commission lacks authority to make binding findings or requests, such as the Commission's request for "precautionary measures" to prevent petitioner's execution, and indicates that "we consider

this request a non-binding recommendation." Ibid.<sup>14</sup>

Those ongoing diplomatic communications reinforce the conclusion of the court of appeals that it is for the Executive Branch, in exercising its authority over foreign relations, not

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<sup>14</sup> Petitioner contends (Pet. 28-29) that the participation by the United States in the proceedings before the Commission somehow amounts to a concession that the recommendations of the Commission are binding on the United States and its courts. That is not so. Indeed, as Ambassador Shannon's letter reflects, the United States has consistently taken the contrary view, both before the Commission and in our filings in the United States courts, that the Commission has no power to bind the United States. See, e.g., Reply of the Government of the United States to Jan. 27, 2000 Pet., Case No. 12.243, Juan Raul Garza.

for the courts, to determine what effect to give to the Commission's Report. Cf. Breard, 523 U.S. at 378 (noting that it is the role of the Executive Branch, "in exercising its authority over foreign relations," to "utilize diplomatic discussions" to address treaty issues that were found not to be cognizable in court). As petitioner acknowledges (Pet. 16), no court of appeals has disagreed with that conclusion. See Pet. App. 73. Cf. Roach v. Aiken, 781 F.2d 379, 380-381 (4th Cir.) (finding it "doubtful at the very best" that an adjudication by the Inter-American Commission on Human Rights could have any effect in a habeas case; "we are not advised that the United States has any treaty obligation which would require the enforcement, in the domestic courts of this nation, state and federal, of any future decision of the Commission favorable [to the capital defendant in that case]"), cert. denied, 474 U.S. 1039 (1986).

In sum, the process for adjudicating complaints brought before the Commission does not contemplate the issuance of binding, individually enforceable determinations of treaty-based rights. Rather, the Commission is empowered to issue recommendations, which the member States are entitled to address diplomatically in such fashion as they see fit in light of relevant foreign relations interests. The United States has not

interpreted the Commission's Report as creating any rights cognizable in petitioner's habeas corpus petition, and the court of appeals correctly held that his claims based on the Report provide no basis for a stay of petitioner's execution.

2. That conclusion is reinforced by the fact that petitioner's claim is subject to independent procedural bars under conventional principles of habeas corpus law.

a. The court of appeals concluded that petitioner's filing is second or successive and that it does not satisfy the gatekeeping requirements of paragraph 8 of Section 2255. Pet. App. 71. Petitioner has not challenged that conclusion in this Court. The court of appeals also concluded, however, that petitioner's claim falls within the savings clause of Section 2255, which permits a federal prisoner to bring an action under 28 U.S.C. 2241 when Section 2255 is "inadequate or ineffective to test the legality of his detention." As we explained in our brief in opposition in Nos. A-1072 and 00-10456, contrary to that conclusion, the savings clause only exempts from the gatekeeping requirements claims of actual innocence based on intervening changes in the law. See Br. in Opp. at 25-27, Nos. A-1072 and 00-10456 (filed June 14, 2001). Petitioner's claim is not one of actual innocence, either of the three capital murders of which he was convicted or of the death sentences he

received. See Sawyer v. Whitley, 505 U.S. 333, 348 (1992); Cade v. Haley, 222 F.3d 1298, 1308 (11th Cir. 2000). Thus, his claim is precluded as second or successive, and he cannot escape that bar by bringing a petition under Section 2241.<sup>15</sup>

b. Even if petitioner could invoke the savings clause, his claim based on the Report is not cognizable on collateral review. Petitioner's claim derives not from the United States Constitution, but from an asserted treaty obligation. Although the habeas statute does authorize relief based on treaties and statutes as well the Constitution, this Court has made clear that collateral relief for non-constitutional violations is available only to rectify "a fundamental defect which inherently results in a complete miscarriage of justice [or] an omission inconsistent with the rudimentary demands of fair procedure."

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<sup>15</sup> Although the ruling of the court of appeals in this case creates a conflict among the courts of appeals concerning the scope of Section 2255's savings clause, petitioner's case is not an appropriate one in which to resolve that conflict. As the court of appeals held, and we have explained above, petitioner cannot prevail on the merits even if he could raise his claim in a petition under Section 2241.

Hill v. United States, 368 U.S. 424, 428 (1962); see United States v. Timmreck, 441 U.S. 780, 783 (1979).

Petitioner's claim does not meet that demanding standard. The provisions of the American Declaration on which his claim ultimately rests guarantee a fair trial and due process. Those rights are essentially counterparts to the federal constitutional guarantee of due process. In his initial motion under Section 2255, petitioner contended that his due process rights were violated by the introduction at his sentencing hearing of the evidence of the murders in Mexico. The district court and court of appeals considered that claim so insubstantial that they denied petitioner a certificate of appealability. See United States v. Garza, 165 F.3d 312 (5th Cir. 1999). Petitioner sought certiorari review, and the government explained in its brief in opposition why due process was not violated by the introduction of the evidence of the foreign murders in petitioner's sentencing hearing. This Court denied certiorari. 528 U.S. 1006 (1999).

Implicit in the rejection of petitioner's due process claim is the conclusion that his sentencing hearing did not result in a complete miscarriage of justice or involve an error that denied the rudiments of a fair procedure. The same underlying trial proceedings that three courts found unworthy of even a

certificate of appealability cannot be considered a complete miscarriage of justice simply because petitioner's claim now arises under a treaty, rather than the United States Constitution. That is particularly true because any claim based on the Commission's interpretation of the American Declaration would be a "new rule," not in existence at the time of petitioner's trial, and would not be retroactively applicable to cases on collateral review. See Breard, 523 U.S. at 377; Teague v. Lane, 489 U.S. 288 (1989).

c. Finally, petitioner's claim is barred because it is procedurally defaulted. The essence of petitioner's claim is one of error in his capital sentencing proceeding. He contends that his capital sentencing hearing did not comport with principles of fundamental fairness imposed by United States treaty obligations, as now interpreted by the Commission. But neither at trial nor at sentencing did petitioner call the Court's attention to the provisions of the American Declaration that he now claims prevented the introduction of evidence of the murders that he committed in Mexico. A defendant's failure to raise his claim in a timely manner at his trial constitutes a procedural default that bars collateral review absent a showing of cause and prejudice or actual innocence. See Bousley, 523 U.S. at 620-621; United States v. Frady, 456 U.S. 152, 167

(1982).

Petitioner does not claim actual innocence, and he cannot show cause for his default. In the court of appeals, petitioner contended that he could not have raised his claim earlier because he had no enforceable rights until the Inter-American Commission filed its Report. Pet. App. 68-69. But the contention that his rights were not yet enforceable should not excuse his failure to alert the district court to the substantive provisions of the American Declaration that petitioner believed would ultimately mature into enforceable rights. By failing to call those provisions to the district court's attention, he deprived the district court of the opportunity to conform the trial and sentencing hearing to those provisions. Petitioner should not be permitted, years after his trial and sentencing, when vast amounts of government resources have already been expended and witnesses may no longer be available, to demand a new sentencing hearing based on provisions of law that he never called to the attention of the district court.

#### CONCLUSION

The application for a stay and the petition for a writ of certiorari should be denied.

Respectfully submitted.

THEODORE B. OLSON  
Solicitor General

MICHAEL CHERTOFF  
Assistant Attorney General

ROBERT J. ERICKSON  
MARGARET P. GRIFFEY  
GWYNN X KINSEY, JR.  
Attorneys

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