

No. 19-5171

IN THE
Supreme Court of the United States

VICTOR HUGO SALDAÑO,
Petitioner,

v.

LORI DAVIS, DIRECTOR,
TEXAS DEPARTMENT OF CRIMINAL JUSTICE,
CORRECTIONAL INSTITUTIONS DIVISION,
Respondent.

**On Petition for Writ of Certiorari to the
Court of Criminal Appeals of Texas**

**BRIEF FOR THE GOVERNMENT OF THE
REPUBLIC OF ARGENTINA AND OTHER
GOVERNMENTS OF THE AMERICAS AS
AMICUS CURIAE IN SUPPORT OF PETITIONER
[Additional amici listed on inside cover]**

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**BRIEF FOR THE GOVERNMENT OF THE
REPUBLIC OF ARGENTINA AND OTHER
GOVERNMENTS OF THE AMERICAS**

The Government of the Republic of Argentina respectfully submits this brief as Amicus Curiae in support of the Petition for a Writ of Certiorari of its citizen, Victor Hugo Saldaño,¹ and is joined by the Governments of the Dominican Republic, the Oriental Republic of Uruguay, the Plurinational State of Bolivia, the Republic of Chile, the Republic of Colombia, the Republic of Ecuador, the Republic of El Salvador, the Republic of Guatemala, the Republic of Honduras, the Republic of Nicaragua, the Republic of Paraguay, the Republic of Peru and the United Mexican States.

¹ Counsel of record for all parties received timely notice of the intention to file this amicus brief and gave their consent. Counsel for the Petition for Writ of Certiorari had no role in drafting this brief, in whole or in part, and no person or entity other than the Government of the Republic of Argentina made any monetary contribution toward the preparation or submission of this brief. The Government of Argentina has actively assisted Petitioner since shortly before his first trial, in July 1996, including providing counsel with potential evidence, obtaining counsel to work on the case *pro bono* for some trial motions and appellate proceedings, sending observers to all proceedings, and generally providing full consular services to Petitioner, including monthly consular visits. Professor Jonathan M. Miller, counsel of record on this amicus brief, assisted Petitioner's court-appointed counsel during pre-trial, trial and post-trial proceedings at the request of the Argentine Government, was counsel for oral argument before the Texas Court of Criminal Appeals, and has generally assisted Mr. Saldaño's Federal habeas counsel, including on the Petition for Writ of Certiorari. Professor Miller's work in the case has been pro bono.

**STATEMENT OF INTEREST OF
THE GOVERNMENT OF THE
ARGENTINE REPUBLIC AND OTHER
GOVERNMENTS IN THE AMERICAS**

The Argentine government, like the government of the United States, has an interest as a sovereign in protecting the rights of its citizens when they travel abroad.² In pursuing this protection, the government of Argentina seeks the fair and equal treatment of its citizens by other governments and respect for their fundamental human rights. Petitioner, Victor Hugo Saldaño, is a citizen of Argentina. The government of Argentina considers the treatment of Mr. Saldaño an important bilateral issue and has raised the issue in Cabinet-level discussions with the U.S. government.³ Public opinion in Argentina has also focused on the

² Protection of nationals is a central consular function under the Vienna Convention on Consular Relations, art. 5(a), April 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261. See also art. 36(b) & (c) (providing for consular assistance for imprisoned nationals).

³ See, e.g., U.S. Department of State, *Secretary of State Michael R. Pompeo and Argentine Foreign Minister Jorge Faurie at a Press Availability at the Western Hemisphere Counterterrorism Ministerial Plenary* (July 19, 2019), available at <https://www.state.gov/secretary-of-state-michael-r-pompeo-and-argentine-foreign-minister-jorge-faurie-at-a-press-availability-at-the-western-hemisphere-counterterrorism-ministerial-plenary/> (the Argentine Foreign Minister noting that the Saldaño case was raised during their meeting); Natasha Niebieskikwiat, *La comunidad judía pidió a EE.UU. que ayude a capturar a los iraníes*, Clarín (February 8, 2007), available at <http://www.clarin.com/diario/2007/02/08/elpais/p-00501.htm> (noting the case was discussed by U.S. Attorney General Alberto Gonzales and Argentina's Minister of Justice Alberto Iribarne during a meeting held in Buenos Aires on February 7, 2007).

case, with hundreds of media references over the past twenty-four years.⁴

The Governments of the Americas joining the Argentine Republic as amici, and the Argentine Republic, have a shared interest in assuring that nations comply with their international obligations. The Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. Doc. A/810 (1948); the International Covenant on Civil and Political Rights, Dec. 19, 1966,

⁴ All of Argentina's major newspapers have extensively covered the case at all its stages. See, e.g., Sol Amaya, *La Historia de Víctor Saldaño, el cordobés que lleva 23 años condenado a muerte en EE.UU.*, La Nación (March 13, 2018), available at <https://www.lanacion.com.ar/sociedad/la-triste-historia-de-victor-saldano-el-cordobes-condenado-a-muerte-en-eeuu-nid2116550> (offering an overview of the case); Hugo Alconada Mon, *Cómo pasa sus días el único argentino condenado a muerte*, La Nación (Sept. 18, 2005), available at <https://www.lanacion.com.ar/sociedad/como-pasa-sus-dias-el-unico-argentino-condenado-a-muerte-nid739903> (describing Mr. Saldaño's years on death row and his mental decline); *Condenaron a muerte a Saldaño en fallo unánime*, La Nación (July 16, 1996), available at <https://www.lanacion.com.ar/sociedad/condenaron-a-muerte-a-saldano-en-fallo-unanime-nid172623> (describing the trial and death verdict); Cristina Aizpeolea, *Saldaño se masturbó frente al jurado*, La Voz del Interior (Nov. 11, 2004), available at http://buscador.lavoz.com.ar/2004/1112/sucesos/nota282943_1.htm (describing Mr. Saldaño's bizarre behavior at his second trial); Victoria de Masi, *Entrevista: Habla la madre del primer argentino condenado a muerte en los EE.UU.*, Clarín (June 8, 2019), available at https://www.clarin.com/viva/historia-madre-primer-argentino-condenado-muerte-ee-uu_0_uv_VC KPYa.html (extended interview with Mr. Saldaño's mother and description of the case).

999 U.N.T.S. 171 (entered into force Mar. 23, 1976); customary international law, and the American Declaration on the Rights and Duties of Man (OAS, 1948) as an enunciation of the “fundamental rights of the individual” in the Charter of the Organization of American States, art. 3(1), April 30, 1948, 2 U.S.T. 2394, 119 U.N.T.S. 3, all require nations to afford the full protection of basic international human rights to all persons within their territories, including foreign nationals. These sources of international law likewise require the United States to secure the right to a fair trial, without discrimination based on race or ethnicity. When such discrimination occurs, its effects must be wiped out so that the prosecution does not benefit from the State’s prior illegal conduct.

I. INTRODUCTION

The Argentine Government spent eight years helping Petitioner get his racially-tainted sentence of July 15, 1996 set aside. After multiple appeals by local prosecutors, that decision was finally overturned in 2004, *Saldaño v. Roach*, 363 F.3d 545 (5th Cir. March 23, 2004) *cert. denied*, 543 U.S. 820 (Oct. 4, 2004). But the taint was not cured. Texas is a State where the Special Issue of future dangerousness, “whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society,” Tex. Code Crim. Proc. art. 37.071, § 2(b)(1) (2004), is a required finding for imposition of a death sentence. Argentine consular officials witnessed Petitioner’s sharp psychiatric decline once Texas death row was moved to the Polunsky Unit in early 2000. Moreover, they anticipated problems at Petitioner’s second trial. But the Argentine Government has been unsuccessful in getting either the Texas or the Federal courts to address the unfairness of a trial centered on

future dangerousness when the State, through its extraordinary isolation of a death row inmate after a racially-tainted proceeding, has made it impossible for a jury to fairly evaluate the defendant.

Victor Saldaño's death sentence has a procedural and political history that has given it special importance to the Argentine government and which offers important background to the petition for certiorari. The Government of Argentina appreciates the rich constitutional tradition of the U.S. legal system, which has often served as the model for its own. However, the Texas Court of Criminal Appeals has failed in its basic obligations to Petitioner. The Texas Court was openly hostile toward and mocking of Petitioner's efforts to have his constitutional claims heard because it was openly upset that Petitioner ever had a new penalty phase ordered to begin with. While it is important for the U.S. Supreme Court to hear Petitioner's case for the reasons set forth in Petitioner's Petition for Writ of Certiorari, those arguments need to be understood against the backdrop of how Texas has treated Petitioner's case, and in light of the psychiatric decline and medical treatment that Argentine consular officials have witnessed and documented over the past twenty-four years.

II. ARGUMENT

There are three ways that the Argentine Government can provide the Court with useful additional perspective. First, it is important for the Court to understand precisely how and why the Texas Court of Criminal Appeals, having been politically stung in its earlier confrontation with Texas Attorney General John Cornyn in Petitioner's case, invented a procedural default – an error that was only partially resolved by the Fifth Circuit and that needs to be understood in

light of the history of the case. Second, the Argentine Government, through its monthly consular visits and regular monitoring of Mr. Saldaño's medications, can provide the Court with insight on Mr. Saldaño's mental decline. Third, the Argentine Government and the nations of the Americas that have joined Argentina on this brief, regard the treatment of Mr. Saldaño to have violated international law.

A. Texas Politics Infected the Texas Court of Criminal Appeals in This Case.

The Texas Court of Criminal Appeals invented a procedural default on Mr. Saldaño's central claim from his second penalty proceeding in a ruling that explicitly indicates the Court's ire at Mr. Saldaño having received a second penalty trial. The Fifth Circuit recognized that this ruling was constitutionally improper; yet because the Fifth Circuit then failed to properly apply the Supreme Court's standard for granting a certificate of appealability, Mr. Saldaño has never received consideration of the most important issue in his case.

As then Texas Attorney General John Cornyn would ultimately recognize, the sentencing phase of Mr. Saldaño's first trial for capital murder, in July 1996, was tainted by racist testimony. For imposition of a death sentence, Texas law requires a jury finding of "a probability that the defendant would commit future criminal acts of violence that would constitute a continuing threat to society." Tex. Code Crim. Proc. art. 37.071, § (2)(b)(1) (2004). In support of the State's claim of a "continuing threat," Walter Quijano, the former chief psychologist of the Texas Department of Criminal Justice, testified that being African American or Latino is a factor that increases the likelihood that an individual will commit future acts of violence, and

could be weighed as such by the jury in evaluating Mr. Saldaño's future dangerousness. State of Texas's Response to Petition for Writ of Certiorari at 4-5 (filed May 4, 2000), *Saldano v. Texas*, 530 U.S. 1212 (2000) (No. 99-8119). Mr. Saldaño's court-appointed counsel did not object; however, Argentine observers prevailed upon counsel to appeal the issue. This appeal, while rejected by the Texas Court of Criminal Appeals as insufficiently fundamental to justify Mr. Saldaño's failure to object at trial,⁵ opened the door to a petition for writ of certiorari on the issue by prominent counsel secured through the efforts of the Argentine government. The Government of Argentina also filed an amicus brief joined by twelve other Latin American countries.⁶

These consular and defense efforts generated a legal and political response in Texas. The Texas Attorney General responded to the petition for writ of certiorari with a confession of error, acknowledging that "the infusion of race as a factor for the jury to weigh in making its determination violated [Saldaño's] constitutional right to be sentenced without regard to the color of his skin," Response to Petition for Certiorari at 8, and "seriously undermined the fairness, integrity, or public reputation of the judicial process," *id.* at 7. The U.S. Supreme Court then vacated the judgement and remanded the case to the Texas Court of Criminal Appeals in light of the confession of error. *Saldano v. Texas*, 530 U.S. 1212 (2000). Mr. Saldaño's case also led the Texas Attorney General to review other cases

⁵ *Saldano v. Texas*, No. 72,556 at 9-10 (Tex. Crim. App. Sept. 15, 1999) (en banc) (not designated for publication).

⁶ Brief of Amicus Curie the Government of the Republic of Argentina and other Governments in Support of Petitioner Saldaño, *Saldano v. Texas*, 530 U.S. 1212 (2000) (No. 99-8119).

in which Walter Quijano testified, and in turn to make six other admissions of error.⁷ Most recently, the U.S. Supreme Court overturned one of Dr. Quijano's race-tainted death sentences in *Buck v. Davis*, a decision that recounts much of this history, 137 S. Ct. 759, 769-770 (2017). Given the U.S. Supreme Court's vacation of the judgement and remand, rapid provision of a new sentencing trial would have seemed the logical result.

The Texas Court of Criminal Appeals, however, then refused to admit error in Mr. Saldaño's case. Despite the fact that the U.S. Supreme Court remanded the case on June 5, 2000, a new penalty proceeding was not held until November 2004. First, local prosecutors challenged the Attorney General's confession of error as unauthorized and improper. Then the Texas Court of Criminal Appeals ruled that while the Texas Attorney General had the legal authority to represent the State before the U.S. Supreme Court in Mr. Saldaño's case, *Saldano v. State of Texas*, 70 S.W.3d 873, 884 (Tex. Crim. App. 2002), the confession of error was improper, *id.* at 891. The Texas Court reached the startling conclusion that even if the prosecution presented testimony "for the sole purpose of appealing to the potential racial prejudices of the jury," a defendant's failure to object would prevent him from raising that issue on appeal. *Id.* at 889. Moreover, the Court held that no hearing was required to determine whether defense counsel's failure to object constituted ineffective assistance of counsel. *Id.* at 886. Instead the Court found that the lack of an objection was part of a deliberate trial strategy by the defense, since defense counsel cross-examined the State's expert on whether Argentines

⁷ Jim Yardley, *Racial Bias Found in Six More Capital Cases*, N.Y. Times (June 11, 2000), available at <https://www.nytimes.com/2000/06/11/us/racial-bias-found-in-six-more-capital-cases.html>.

are part of the same racial group as most U.S. Hispanics, *see id.* at 885,⁸ and because the defendant's expert testified that being Black or Hispanic is not what causes the criminal conduct, regardless of the existence of a correlation, *id.* This decision, which became an electoral issue and triggered a public spat between the Texas Attorney General and the Court of Criminal Appeals,⁹ was followed by an agreement between Mr. Saldaño's counsel and the Texas Attorney General that if Mr. Saldaño filed a federal habeas corpus action, the Attorney General would once again confess error. That strategy ultimately worked, and after further delays resulting from continuing attempts by local prosecutors to intervene, habeas relief was granted, *Saldano v. Roach*, 363 F.3d 545 (5th Cir. 2004) *cert. denied* 543 U.S. 820 (2004). But by the time that finally happened, Mr. Saldaño was no longer fit for trial on the issue of future dangerousness.

⁸ The Court of Criminal Appeals was likely alluding to a troubling series of questions in which defense counsel noted that most U.S. Hispanics have "mixtures in their blood lines of Spanish people with Indians," ROA.9394, and "a mixture of Indian and Spanish blood from Mexico," ROA.9395, presumably unlike an Argentine.

⁹ As noted in the Petition for Writ of Certiorari at 5, Texas Attorney General John Cornyn was running for the U.S. Senate, three judges of the Texas Court of Criminal Appeals were up for re-election, and the split between the Republican Attorney General and the completely Republican Court drew substantial public attention. Diane Jennings, *AG, Court Dispute Still Simmering*, Dallas Morning News (April 14, 2002), *available at* 2002 WLNR 13698549; *Appeals Court Races Offer Voter Dilemma; Republicans Must Make Runoff Decisions for a Crazy Court of Criminal Appeals*, San Antonio Express-news (April 1, 2002), *available at* 2002 WLNR 13894163; *see also Texas' Worst Court Slaps Cornyn, Upholds Nazi-like Quackery*, San Antonio Express-News (March 22, 2002), *available at* 2002 WLNR 1388602.

The Argentine Consulate in Houston's monthly visits provided Mr. Saldaño with his primary link to the outside world after his 1996 death sentence. Unfortunately, that meant the Consulate also witnessed Mr. Saldaño's severe mental decline across those many visits. The stark deterioration began when Texas dramatically altered its system of incarceration of death row inmates in early 2000. This shift, which established a regime of confinement in severe isolation, provoked psychotic episodes and led to Mr. Saldaño's hospitalization for twenty weeks in the psychiatric hospital of the Texas prison system, from March 20 to August 3, 2001. Understandably, when a new penalty trial approached in November 2004, the Consulate and Victor Saldaño's family were therefore extremely anxious that the Texas courts consider whether Mr. Saldaño was fit for trial. The Texas Court of Criminal Appeals ultimately dealt with this issue as though it held a grudge against Mr. Saldaño for having frustrated its efforts to uphold his original death sentence.

Prior to trial, the Argentine Government urged defense counsel to bring Mr. Saldaño's mental condition to the attention of the trial court even if his decline did not reach the level of incompetency to stand trial. It was the Argentine Government's concern that led to defense counsel's motion that even if Mr. Saldaño satisfied Texas competency requirements, he had suffered such severe decline in his mental faculties while on death row that it was unconstitutional to subject him to a new penalty proceeding in which the jury would evaluate his apparent dangerousness. In practice, this motion was prescient, since at trial, while the trial judge remarked that Mr. Saldaño was never disruptive or unfriendly toward the court, ROA.5619, the record also established that he appeared unfocused

on the proceedings, ROA.5098; ROA.5619; rocked in his chair and laughed inappropriately, ROA.5645; insisted on wearing prison clothes, ROA.4478; ROA.4506; ROA.4563; ROA.4678; ROA.4758; ROA.4841; ROA.4946, and masturbated under the table inside his jail uniform, ROA.5618-ROA.5619; ROA.5645. The trial court also heard testimony from the bailiffs on Mr. Saldaño's behavior in court and discussed the matter with Mr. Saldaño, ROA.5644-ROA.5648.

Mr. Saldaño's pre-trial motion had two key arguments. First, he argued that as a matter of Due Process and unconstitutional vagueness under the Eighth Amendment, it was improper to subject him to a new death penalty proceeding. Even if he was legally competent, his mental decline from the severe isolation of death row had severely diminished his ability to assist in his own defense, made a principled assessment for dangerousness by a jury impossible, and increased the likelihood that the jury would perceive him as a future danger. ROA.4108-ROA.4113. Second, he argued the related issue that because his misconduct on death row was a product of confinement in severe isolation, and his presence on death row was a product of prior State misconduct at his original trial, the State should be estopped from using evidence of his misconduct on death row against him at trial to prove future dangerousness. ROA.4114-ROA.4115. The trial court then held a hearing on the motion on November 5, 2004, at which the primary witness for Mr. Saldaño was to be Dr. Orlando Peccora, the psychiatrist whom as a Texas Department of Criminal Justice employee had treated Mr. Saldaño during his twenty-week stay in the psychiatric hospital in 2001.¹⁰

¹⁰ Dr. Peccora was identified and located through the Argentine Consulate's efforts.

Saldano v. State of Texas, 232 S.W.3d 77, 84-85 (Tex. Crim. App. 2007).

The trial court never heard testimony on Mr. Saldaño's mental state, however, because on the day of the hearing the State demanded the right to examine Mr. Saldaño prior to any testimony by Dr. Peccora. The trial court granted the State's motion on the basis of *Lagrone v. State of Texas*, 942 S.W.2d 602 (Tex. Crim. App. 1997), a Texas decision that authorizes a mental examination of a defendant by an expert for the State before a defense expert who has examined the defendant may testify at trial, *id.* at 609-612. However, the trial court refused to address Mr. Saldaño's concern about the extent of the Fifth Amendment waiver he was being asked to make, since he was anxious that evidence obtained by the State during a *Lagrone* examination for pre-trial purposes not be used by the State at trial. 232 S.W.2d at 85, 87. Mr. Saldaño then declined to submit to the State's examination, so the trial court barred Dr. Peccora from testifying. *Id.* at 85.

After Mr. Saldaño masturbated at trial and was placed in restraints, defense counsel renewed his earlier motion, explicitly offering to subject Mr. Saldaño to a mental examination by the State if the court guaranteed that it would only be used for rebuttal purposes, and not at trial (where the State's expert might argue that Mr. Saldaño was dangerous or had other characteristics making the death penalty appropriate). *Id.* at 86-87. The trial court, however, held that if the State were permitted to conduct an examination, it could use that examination not only to rebut Dr. Peccora's testimony before the trial judge (i.e., the testimony that Mr. Saldaño's mental decline made it improper to subject him to a new penalty proceeding), but also to testify before the jury "about anything

relevant to his mental state, including future dangerousness, which is the defense concern.” *Id.* at 87-88. Mr. Saldaño was therefore forced to insist upon his Fifth Amendment right that the examination not go forward. Remarkably, the trial court never heard Mr. Saldaño’s key witness on his mental decline as a result of years of confinement in complete isolation on death row – in a case where the defendant was both placed in restraints as a consequence of having masturbated in open court, yet found by the court not to have acted in a disruptive or unfriendly fashion. *See id.* at 88.

On appeal, the Texas Court of Criminal Appeals focused more on the earlier political history of the case than on the issues before it concerning Mr. Saldaño’s second penalty proceeding. The issue of the racist 1996 testimony was *res judicata*, but the Court’s 2007 opinion begins: “In 1996, appellant was convicted of capital murder and sentenced to death. The conviction was upheld, but the death sentence was overturned in federal habeas proceedings ***based on a procedurally defaulted claim of prosecutorial misconduct at appellant’s 1996 trial.***” *Id.* at 82 (emphasis added). The opinion then makes no fewer than five further references to “the procedurally defaulted claim of prosecutorial misconduct” at the 1996 trial, even altering three quotations from the record of the 2004 proceeding to insert the words “procedurally defaulted claim” into the defense counsel’s mouth.¹¹ Then, perhaps in

¹¹ The Court of Criminal Appeals’ decision offered the following “quotation” from the transcript:

[THE DEFENSE]: Now, in legal terms, the way this fits in is, the State should not be able to enjoy the fruits of [***the procedurally defaulted claim of prosecutorial misconduct at appellant’s 1996 trial***] that it committed eight and one-half years ago.

an attempt to achieve poetic justice, the Court of Criminal Appeals ruled that Mr. Saldaño had “procedurally defaulted” his Points of Error that he should not have been forced to undergo an expert examination by the State that could be used for any purpose whatsoever as a condition for presenting his constitu-

And if the Court finds that [appellant] has suffered a decline in his cognitive abilities and emotional stability—and, your Honor, it doesn’t require a finding on our part that he is psychotic, we’re not arguing he’s not competent to stand trial; we’re only arguing a significant decline in cognitive ability and emotional stability.

If that’s the case, our argument is he may no longer be tried. The State committed [*the procedurally defaulted claim of prosecutorial misconduct at appellant’s 1996 trial*] by putting him on death row, they caused him to be diminished as a result of many years in isolation there, and they can’t enjoy the fruits of [*85] that at the new sentencing proceeding today.

And, in fact, he can’t even be evaluated fairly as a future danger because he’s not just the same person today, and the statute requires an evaluation of future dangerousness as of the time of trial.

Second, on the issue of whether [appellant] would have committed aggressive acts while incarcerated if not for the isolation that he was subjected to, the question is whether the State can present evidence of his misconduct on death row on the issue of future dangerousness.

And our position is that the State committed the primary illegality here [with *the procedurally defaulted claim of prosecutorial misconduct at appellant’s 1996 trial*].

If the State can show by a preponderance of the evidence that the defendant’s misconduct on death row would have occurred anyway, then we have nothing to complain about.

232 S.W.3d at 84-85 (emphasis added, bracketed words from original).

tional claims. *Id.* at 88. According to the Court of Criminal Appeals, Mr. Saldaño had procedurally defaulted even though he had explained to the trial court that he could not allow an examination to go forward if it could be used for more than pre-trial purposes by the State, and even though during trial Mr. Saldaño renewed his motion in writing and indicated that he would allow an examination if the trial court would guarantee that it not be used by the State for more than rebutting the defendant’s evidence on mental decline. The Court of Criminal Appeals held that Mr. Saldaño from the start should have offered to allow an examination in return for a “guarantee” that it not be used for other purposes, and that when Mr. Saldaño made such an offer during trial (after bizarre courtroom behavior), it was simply too late. *Id.* The Court of Criminal Appeals never explained why the renewed motion in response to Mr. Saldaño’s courtroom conduct was too late,¹² the trial court never indicated that it regarded the offer as too late – it simply indicated that legally it could not provide the requested guarantee, *id.* at 87-88 – and the State never argued procedural default in its briefs.¹³

¹² The Court of Criminal Appeals also never explains why a defendant must ask the trial court to guarantee that his examination for pre-trial will not be used for more than rebuttal purposes by the State. In the competency area, the U.S. Supreme Court has indicated that the trial court should take the initiative to guarantee limited use of a State-sponsored competency exam once the problem is brought to its attention. *Estelle v. Smith*, 451 U.S. 454, 468-469 (1981).

¹³ Oddly, only five of the nine judges of the Texas Court of Criminal Appeals joined in the opinion finding procedural default. The other four judges merely concurred in the judgement without explanation. 232 S.W.3d at 109.

In Federal habeas corpus, the Fifth Circuit seems to have rejected the Texas Court of Criminal Appeals' finding of procedural default. The panel noted that the trial court "may have erred" when it told the defense that submitting to an exam by the State to support its pre-trial motion would have opened up the issue of Mr. Saldano's mental state for the trial stage. *Saldano v. Davis*, 701 Fed. Appx. 302, 309-310 (5th Cir. 2017). Moreover, the Fifth Circuit seems to accept that Mr. Saldaño suffered severe mental decline while in isolation on death row, since it takes the position that Dr. Peccora's testimony "was not absolutely critical to Saldaño's motion," *id.* at 310. But then, with almost no reasoning, the Fifth Circuit failed to grant a Certificate of Appealability on the issues that the Argentine Consulate has been trying to get some court to fully consider since the 2004 pre-trial motion.

A significant Constitutional claim in a death penalty case deserves full consideration by some court of the U.S. judicial system. To get to the point where Petitioner's original pre-trial arguments might get heard, Petitioner's attorneys first had to overcome an unconstitutional ruling by the trial court, and then had to overcome a ruling of procedural default that the Texas Court of Criminal Appeals wrote because it was openly upset that Mr. Saldaño's first death sentence was ever set aside. That does not leave a lot of room for analysis of the underlying issue of the unconstitutionality of the Texas future dangerousness special issue applied to Mr. Saldaño given his psychiatric decline on death row and offers a prime example of issues jurists could conclude "deserve encouragement to proceed further," *Buck v. Davis*, 137 S. Ct. at 773.

The U.S. legal system assumes a level of good faith by State high courts, and Federal habeas corpus ordi-

narily assumes that those courts deserve respect and confidence. But sometimes troubling exceptions emerge. A majority of the Texas Court of Criminal Appeals in 2007 could not put its earlier political embarrassment behind it, and as a result, the racial bias of 1996 truly remained unremedied. Not only is there a serious concern when severe isolation leaves an individual diminished in his ability to defend himself, but there is a separate concern when an appellate court, stung by earlier accusations of racism, openly shows that it cannot evaluate a defendant's legal questions on a clean slate.

B. Texas Has Been Treating Petitioner for Severe Mental Illness.

Given that since mid-2006 Mr. Saldaño has regularly received strong anti-psychotic medications prescribed by Texas Department of Criminal Justice psychiatrists, presumably the State of Texas agrees that at least since that time Mr. Saldaño has been severely mentally ill. Mr. Saldaño's mental decline prior to his November 2004 trial is documented in the record by affidavits by consular officials.

The Argentine Consulate in Houston has regularly requested and received Mr. Saldaño's prison medical and disciplinary records. Until 2006, approximately two years after his second penalty trial, Mr. Saldaño only received very limited medication. During a period of approximately four months, starting in mid-2001, he received the anti-psychotic medication Haldol,¹⁴

¹⁴ All descriptions of the medical effects of medications are taken from www.pdr.net, which incorporates the information from the *Physicians Desk Reference*. While the Argentine Government would have preferred that information on Mr. Saldaño's medication since mid-2006 be part of the record, it took some time for

and was also treated with the anti-depressant Zoloft, which was later switched to Silenor, and given Benadryl. By November 2001, he was no longer taking these medications, and the only additional medication that appears in his medical records before 2006 is during the period from August 2004 through late 2004, while in the Collin County Jail, when he was proscribed Trazodone, an antidepressant also used for insomnia, with no anti-psychotic qualities. Trazodone is the only medication that he received during his 2004 trial.

Since 2006, Mr. Saldaño has had three major hospitalizations in Jester IV, the psychiatric hospital of the Texas prison system (from May 19 to August 17, 2006; from September 25, 2007 until January 4, 2008; and from January 8, 2009 until April 22, 2009). As a result of examinations during his 2006 and 2007 hospitalization, Mr. Saldaño has received large doses of the anti-psychotic medication Haldol almost without interruption since 2006, with oral dosage typically of 10 mg. twice a day, with an additional intramuscular dose of 100 to 200 mg of Haldol Decanoate every four weeks, and with Cogentin prescribed for side effects. In addition, he has often received the anti-depressant Celexa (citalopram), and received lithium, a mood stabilizer, during portions of 2009 and 2010.

Mr. Saldaño's prison disciplinary record has improved radically since consistent medication began in 2006 and 2007. Mr. Saldaño's disciplinary conduct deteriorated enormously with his transfer to the isolation of

the new pattern of medications to become clear to the Consulate and it is not clear that a mechanism exists through which Federal habeas counsel could have supplemented the record under 18 U.S.C. § 2254(e) (2019) or Tex. Code Crim. Proc. art. 11.071, § 5(a) (2019) to add information on recent medication administered by the State.

the Polunsky Unit in March 2000, which gave rise to extensive testimony by death row prison guards at his 2004 penalty proceedings. ROA.5716-ROA.5747. 2007 was the first year in which Mr. Saldaño did not have a single major disciplinary incident, and disciplinary incidents are dramatically lower at all times post-2006 compared to the 2001 through 2005 period.

The Argentine Consulate in Houston submitted two affidavits as part of Mr. Saldaño's habeas corpus petition, one by a permanent employee of the Consulate, Joe McLaughlin, ROA.219, attached as Appendix A, and one by Deputy Consul General Valeria Gonzalez Posse, ROA.282, attached as Appendix B, based on her personal observations and the notes of visits kept in the Consulate's records. It does not require special expertise to see from Mr. Saldaño's consular visits, medication and disciplinary record that regardless of whether he was competent at his 2004 trial, at least in recent years the Texas prison system has treated him as someone suffering from serious mental illness, and that there is a strong correlation between that illness and the isolation of the Polunsky unit.

C. Petitioner's Second Trial Did Not Remedy the International Law Violations of the First Trial.

Race discrimination violates International Law, *see* International Covenant on Civil and Political Rights, art. 2(1), and when a State engages in a serious violation of a defendant's human rights, international law requires elimination of the effects of the violation. The Inter-American Commission on Human Rights, an international human rights body created by the Charter of the Organization of American States to promote the observance and protection of human rights in the Americas, OAS Charter, art. 106, has accordingly

recommended commutation of Petitioner's death sentence. *Saldaño v. United States*, IACHR, Report No. 24/17, Case 12.254 (March 18, 2017).

International tribunals have long held that "reparation must, as far as possible, wipe out all the consequences of the illegal act." *Chorzów Factory Case* (F.R.G. v. Poland), 1928 Permanent Court of International Justice (Ser. A) No. 17, at 47 (September 1928). That principle, combined with the concept of *nullus commodum capere de sua injuria propria* (no one can be allowed to take advantage of his own wrong) constitutes a basic International Law rule, Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals* 149 (1987); see also Ian Brownlie, *Principles of Public International Law* 487 (6th ed. 2003) (explaining that "no benefit can be received from an illegal act"). International remedies include the rescinding of judicial measures unlawfully adopted with respect to the person of a foreigner. Int'l Law Comm'n, *Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries* art. 35, commentary 5 (2001).

The Inter-American Commission on Human Rights has addressed Mr. Saldaño's case after a Petition in which the Government of Argentina participated as *amicus curiae*. Its extensive report on the merits concludes by recommending commutation of Petitioner's sentence as the only possible solution given his mental decline from so many years in isolation. In particular, the Commission noted that the State's responsibility is to preserve the mental health of those in its custody "rather than using the existence of mental health-related symptoms as a justification for proving future risk in order to obtain the imposition of the harshest possible penalty." *Saldaño v. United States*, IACHR,

Report No. 24/17. Particularly in a context where “V́ctor Saldaño’s presence on death row was the result of a trial in which racist criteria played a part,” *id.* at ¶221, the impact of his time spent on death row could not become the basis for imposing the death penalty, *id.* at ¶223. In a letter to the Argentine Foreign Minister, The Honorable Jorge Marcelo Faurie, dated August 15, 2019, the Commission explicitly acknowledges that this brief reflects the determinations and conclusions of its Report.

International Law barred Texas prosecutors from receiving any advantage from the racially-biased 1996 proceeding. A new penalty proceeding when the defendant has suffered severe mental degradation as a result of eight years on Death Row is an inadequate remedy, especially when the jury that examines the very scary-looking, oddly acting defendant needs to determine if he represents a future danger. No legal system can claim that such a proceeding cures the defects of the original sentence. And the Texas Court of Criminal Appeals failed to correct the errors of the trial court. Hostile towards the Petitioner because of the embarrassment it suffered from its earlier decisions against the Petitioner, it breached its responsibility to fairly consider the Petitioner’s claims.

CONCLUSION

This Court should grant review of Victor Saldaño's case and reverse the failure of the Fifth Circuit to grant a Certificate of Appealability.

Respectfully submitted,

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August 15, 2019

APPENDIX

APPENDIX A

AFFIDAVIT OF JOE MCLOUGHLIN

ROA.219

AFFIDAVIT

The undersigned, Joe MacLoughlin, employee of the Consulate General of Argentina in Houston, hereby states:

That in my position as employee of the Consulate General of Argentina in Houston, and following specific instruction by my superiors, I have made numerous visits to Argentine citizen Victor Hugo SALDAÑO since the last two months of 1999 until the middle of 2006, both in the state penitentiaries of Ellis Unit in Huntsville as well as at the Allan B. Polunsky Unit in Livingston, Texas. Also, while he has held at the Jester IV psychiatric unit in Richmond, Texas, when hospitalized for psychiatric treatment.

During the visits made between the last two months of 1999 and the end of 2000, Saldaño showed absolutely no signs of mental deterioration, presenting instead a normal behavior, great enthusiasm in the many subjects of conversation that came up, as well as clarity and coherence in his thinking. It should be noted that during this period the undersigned visited Mr. Saldaño twice to three times per month – sometimes accompanied by an Argentine Consular Official and sometimes alone – which allowed for a close appraisal of his physical condition and his mental stability.

However, since the beginning of the year 2001, some thought disorders and irrational speech begin to appear during the visits at the Polunsky Unit. Statements such as that the Penitentiary authorities

2a

were training him to become chief warden or that the wardens were not human but machines made by a computer high above the Unit, inside an extraterrestrial ship, were relatively common during my conversations with Mr. Saldaño.

Then, in March 2001, the first crisis struck. He apparently tried to commit suicide and was transferred for proper medical treatment to the TDCJ Jester IV Psychiatric Unit in Richmond, Texas.

In said location, the undersigned visited Mr. Saldaño on several occasions during which signs of mental illness and apparent psychotic behavior became evident.

After several months of medical treatment and medication his condition improved noticeably and was transferred back to the Polunsky Unit.

However, since that first crisis, Mr. Saldaño's mental problems never ceased to appear, including an apparent self-destructive attitude that caused him to at least partially refused nourishment, with an evident and substantial loose of weight, as well as showing signs of increasing mental disorders.

In the beginning of 2003 and later around the middle of 2006 he was again hospitalized in the Jester IV Unit with severe mental disorders, showing an intensification in his mental deterioration.

The undersigned does not recall at present having been in personal contact with Mr. Saldaño since approximately May of 2006, while he was still hospitalized.

Date: February 09, 2007

Signed: Joe MacLoughlin

Consulate of Argentina in Houston

[Notarized]

APPENDIX B

**AFFIDAVIT OF DEPUTY CONSUL GENERAL
VALERIA M. GONZALEZ POSSE**

ROA.282

**Declaration of the Physical and
Mental Decline of the Argentine
Citizen Mr. Víctor Hugo Saldaño on Death Row**

1 This declaration is written by Valeria M. González Posse, Deputy Consul General of the Consulate of Argentina in Houston, temporarily in charge of the same, on the basis of official documents of this General Consulate, including notes and communications of the visits made to Mr. Víctor Hugo Saldaño between the beginning of 1996 and August of 2009. Further, it includes personal observations made by the following persons:

Mr. Ricardo Gauthier – Consul General
Mr. José MacLoughlin – Consular Employee
Mr. Marcelo Mesa – Consular Employee
Mr. Horacio Wamba – Consul General
Mr. Alejandro Meroniuc – Assistant Consul General
Mr. Facundo Vila – Deputy Consul General
Mr. Gustavo Garcia – Deputy Consul General
Mr. Armando Alvarez – Consular Agent
Mr. Enrique Pareja – Consul General a.i.
Mr. Gustavo Terrera – Assistant Consul General
Mr. Juan Miguel Cassissa – Consul General
Mr. Juan Jose Garibaldi – Consul General
Ms. Valeria M. Gonzalez Posse – Deputy Consul General

2. In addition, videos of the police interrogations that this Consulate General has in its possession, medical reports received from medical personnel, and transcripts of the trial were used as a basis.

3. The personnel of the Argentine Consulate in Houston has been in contact and has visited Víctor Hugo Saldaño since it became aware of his detention in 1995. The intervention of the Consulate started on December 26, 1995, when it received notice from the court-appointed defense attorney, Mr. David Haynes, communicating the detention of Argentine citizen Víctor Saldaño in the city of McKinney, Texas.

4. Over this period, changes have been observed in the physical and mental state of Víctor Saldaño that have culminated in a profound deterioration of his person and a marked mental decline, as a consequence of his time on Death Row.

5. The consular visits took place in:

- the jail of Plano County, Texas
- the prison of Ellis Unit in Huntsville, Texas
- the Allan B. Polunsky Unit in Livingston, Texas (formerly called Terrell Unit)
- Jester IV Psychiatric Hospital, in Richmond, Texas

6. During the frequent visits made by personnel of the Consulate during the first years of his detention, Mr. Saldaño's attitude was determined, he sought to cooperate in his defense, he urged the Consulate to find him better legal representation and he requested assistance to stay in touch with his family and to acquire foods and personal hygiene articles in the store at the prison. Although he suffered some emotional ups and downs (he considered ending the appeals process on two occasions), he actively sought to be incorporated into a work program inside the prison (Ellis Unit) that would keep him occupied. During this period, the correspondence with the Consulate is abundant. Also, the Consular notes of the

visits do not have further observations, since the central matter is his legal defense. Similarly, the video of the police interrogation at the moment of his detention, as well as the transcript of his first trial indicate that they develop without abnormal behaviors or outbursts on behalf of Mr. Saldaño.

7. Víctor Saldaño was sentenced to death on July 15, 1996, and transferred on September 18, 1996 from the jail in Plano, Texas, to the Ellis Unit in Huntsville, Texas. Based on consular visits and conversations that took place with Víctor Saldaño at that time, it becomes evident that although the Ellis Unit presented a setting stricter than the County Prison, because it was maximum security, Mr. Saldaño's new place of detention allowed prisoners some social contact and recreation, including making telephone calls and access to religious services. In their cells, they could have a radio and they had access to television, magazines obtained by mail, and books.

8. The authorities of Texas decided to build a new center, the Polunsky Prison Unit, and to move all the "Death Row" prisoners there, starting in late 1999, near the city of Livingston, Texas. The Polunsky Unit was formerly known under the name of Terrell Unit. Mr. Saldaño was transferred to said institution on March 1, 2000.

9. On the consular visits the drastic change of regime in the new prison was noted. In said unit, no possibility exists of any type of physical contact or communication between the prisoners. It consists of a regime of total isolation. The prisoners' cells measure 5.4 square meters (60 square feet, 6 feet long by 10 feet wide), including the space occupied by the cot, sink, and built-in toilet. The cell has a solid door, which increases its isolation.

10. The “recreation” – which is individual and, as explained by the authorities to this Consulate, is defined as “leaving his cell” – takes place in accordance with the availability of the officials and at the times convenient to them. Normally, the so-called recreation consists of being escorted to a small inside patio surrounded by cement walls and covered by a roof, where the prisoner is in total isolation.

11. During the visits made by consular officials from 1996 to approximately the end of 2000, Mr. Saldaño was not presenting any type of evident mental deterioration, showing, on the contrary, normal behavior, participating with enthusiasm in the numerous topics that interested him, such as history, arms, airplanes, his travels around the continent, and other diverse subjects. He always demonstrated coherence and clarity in his thoughts. He frequently discussed affairs of international politics and at times demonstrated fairly accurate knowledge of events that occurred in the last World Wars or regional wars.

12. He showed great interest in things of daily life outside of the prison and he remembered matters related to the relatives of the people that visited him. He also maintained frequent and normal correspondence with the officials of the Argentine Consulate and with his relatives in Córdoba, his native province in Argentina.

13. In the notes corresponding to his June 22, 1996 visit to the jail in Plano, Deputy Consul Mr. Facundo Vila indicates: “Mr. Saldaño was absolutely calm and surprisingly cheerful during the entire course of the interview.”

14. On August 30, 1996, the notes of Consul General Mr. Juan Luis Garibaldi state the following: “On this

date [Mr.] Saldaño communicated by telephone, as he does normally, and expressed being comfortable in his new cell [in Plano, Texas] that he does not share with anybody, where he even has a television, which makes it possible to distract himself.”

15. On September 18, 1996, Mr. Víctor Saldaño is transferred to the maximum security prison of Huntsville (Ellis Unit).

16. On February 13, 1997, the Deputy Consul Mr. Facundo Vila comments in a letter to Ms. Lidia Guerrero, Mr. Saldaño’s mother: “Two weeks ago, I went to visit Víctor at the Huntsville prison, where I had a meeting that lasted approximately three hours, during which we talked about a series of subjects, the majority of them obviously connected to his future prospects, as well as to the conditions he is presently in.” “In general terms, I found him to be quite well, with great strength of mind and an intelligent attitude as to how he should handle himself in an environment like the one he is in presently.”

17. On August 15, 1998, it is recorded in the notes of Deputy Consul Mr. Facundo Vila’s visit that: “Mr. Saldaño showed in general terms good physical condition, and an alert and active disposition. He conversed animatedly, without any apparent symptoms of depression being detected at any time.”

18. In notes from September 4, 1998, referring to a letter by Víctor Saldaño dated August 17, 1998, to the Consulate, Consul General Mr. Juan Miguel Cassissa indicates: “Mr. Saldaño insists in various parts of his letter about the urgency that they get him a good attorney, . . . Mr. Saldaño also expresses that he will send a list of attorneys to this Consulate, comprised of professionals who have had an important record with

regard to death penalty cases.” According to notes of an official the letter denotes an “. . . attitude of greater hope and willingness to fight.”

19. The September 7, 1998 notes of Deputy Consul Mr. Facundo Vila about a letter received from Mr. Víctor Saldaño indicate that he requests to be transferred to a less violent wing inside the Huntsville prison, since for Mr. Saldaño: “. . . the terrible conditions imposed on the life of an inmate in Huntsville, particularly the area he is presently in, and which to a certain extent is psychologically affecting him with the high number, as he states, of people with serious mental imbalances. In that sense [Mr. Saldaño] requests that steps be taken . . . to transfer him to wings where there would be inmates that are less aggressive and without serious psychological problems.”

20. The September 19, 1998 notes of Deputy Consul Mr. Facundo Vila’s visit with reference to Mr. Saldaño indicate: “. . . his priorities consist of trying to improve his living conditions inside the prison.”

21. On October 20, 1998, the notes of the visit to Víctor Saldaño made by Deputy Consul Mr. Facundo Vila and Ms. Lidia Guerrero (Mr. Saldaño’s mother), evidenced finding him in “. . . an excellent state of health and in good spirits generally.”

22. On October 10, 1998, with respect to the visit of Mr. Saldaño’s mother, Ms. Lidia Guerrero, according to notes of Deputy Consul Mr. Facundo Vila: “Once the visit was over Ms. Guerrero commented that, although she found her son in a fairly good general state of health, she observed certain attitudes and comments that worried her with regard to his mental balance.”

23. The notes of the May 10, 1999 visit of Deputy Consul Mr. Facundo Vila express that: “On this

occasion, a good part of the conversation centered around Argentina, the country he had left more than ten years ago, with him inquiring about the most important changes that had occurred in different areas since his absence.”

24. There is a record that visits were made to Mr. Saldaño regularly between three and four times a month during the first years, and sometimes two officials of the Consulate went on those visits that commonly lasted around two hours, which allowed evaluation of his physical conditions and mental stability.

25. His high level of participation continues to be evident in the notes of December 28, 1999, corresponding to the visit of Consul General Mr. Horacio Wamba: “V́ctor Saldaño insisted during my visit this past Wednesday 22, that the only way to save his life was to prevent the court from designating “*motu proprio*” a new court-appointed attorney that, like the previous one, would exercise an inefficient defense.”

26. On March 1, 2000, Mr. V́ctor Saldaño is transferred to the Polunsky Unit.

27. The mental state of Mr. Saldaño changed radically since the beginning of 2001, in which some symptoms of mental disorder started becoming evident in his attitudes, as well as in his conversations, which would turn from normal one moment, to irrational the next.

28. Mr. Joś MacLoughlin – employee of the Consulate that visited Mr. Saldaño weekly during this period – expressed that the change in V́ctor Saldaño was quite abrupt and that the prison regime, along with the extreme isolation, affected him enormously, generating a marked change in attitude.

29. Upon carrying out a reconstruction of the correspondence, however, after the first trimester of the year 2000, growing incoherencies are detected in the abundant correspondence that Mr. Saldaño maintains with the Consulate, which initially was attributed to fluctuations in his state of mind.

30. Comments by Víctor Saldaño obtained by Mr. José MacLoughlin during his weekly visits over the course of the first trimester of 2001, such as that some authorities of the prison were training him to become a warden or that the guards that circulated around were not human beings, but extraterrestrial humanoids from a spaceship that was suspended over the prison, turned into common expressions that were gradually appearing with more frequency and greater emphasis.

31. A request for a consular visit to Víctor Saldaño is denied verbally and then in writing, on February 6, 2001 by a note from the Texas Department of Criminal Justice, informing the Consulate that Víctor Saldaño would be incommunicado for an indefinite time and that he will not be able to receive visits. This is reflected in Deputy Consul Mr. Gustavo García's notes of the same date, and is in violation of Article 36 of the Vienna Convention on Consular Relations.

32. On February 12, 2001, notes of the visit made by Consul General Mr. Horacio Wamba to Víctor Saldaño indicate: ". . . I found Víctor Saldaño in a state of extreme deterioration physically and mentally. Saldaño has lost more than twenty kilograms and he expresses to me that he is the object of discriminatory mistreatment by the prison guards."

33. Later, in March of 2001, the first clear evidence of a mental crisis appeared. Due to a suicide attempt,

Mr. Saldaño was transferred on March 20, 2001 to a Psychiatric Hospital of the penitentiary system, known as TDCJ Jester IV Psychiatric Unit, located in Richmond, Texas.

34. Notes from the March 23, 2001 visit of Consul General Mr. Horacio Wamba: “As a result of intensive efforts, I was able to visit him. Notwithstanding the permission given, I faced a lot of impediments from the Warden and the Director of the Hospital . . . the prison authorities ended up giving in and I was able to see Víctor Saldaño. I found him to be seriously deteriorated. Also incoherent. He would only repeat “It is impossible to go against them and they will kill you too.” Saldaño had a laceration from the jugular area to the cervical vertebrae. I asked him what it was due to. He said that he preferred to commit suicide rather than be a victim of a cruel or underhanded death.”

35. Mr. Víctor Saldaño’s suicide attempt arises within the framework of an intensification of “disciplinary” actions, which include the prohibition of receiving visits, the elimination of recreation, not permitting access to the prison’s store (which implies not being able to have elements of hygiene and other foods) and the limitation to a diet restricted to only cold foods, usually a peanut butter sandwich.

36. In conversations they had with officials of the Consulate, the prison authorities recognized a possible psychiatric cause to Mr. Saldaño’s condition, but they did not provide medical assistance, and the extreme isolation resulted in Mr. Saldaño’s suicide attempt. After the suicide attempt, Mr. Saldaño was finally transferred on March 20, 2001 to the psychiatric hospital mentioned above for his evaluation. He was hospitalized in that institution until the month of August of the same year.

37. Notes of Consul General Mr. Horacio Wamba of the interview he had on April 14, 2001 with Carl Reynolds and Gary Johnson (authorities of TDCJ) and with the Attorney General of Texas, John Cornyn state:

“. . . they gave a broad and detailed explanation about Víctor Saldaño’s behavior [in the] prison, in order to justify different sanctions that he received ‘not as a consequence of discrimination but as a result of his own misconduct . . .’ [even when] the possibility of a psychiatric explanation . . . was present.”

38. Notes from the same date indicate: “Péccora (psychiatric doctor of Jester IV Psychiatric Hospital) confirmed to me the worsening of the mental illness of Víctor Saldaño, who he attends to almost daily . . . [Mr.] Saldaño refuses to receive visits, he does not accept medication either, and lately he does not want to leave his cell.”

39. The notes of the Consul General Mr. Horacio Wamba of the April 12, 2001 visit indicate: “Saldaño insists that he does not have any more strength to continue living.”

40. Dr. Orlando Péccora, psychiatric doctor and employee of the penitentiary system of Texas, expresses to Consul General Mr. Horacio Wamba, – recorded in notes of April 16, 2001-that Víctor Saldaño “shows symptoms of paranoid psychosis . . . but that it was still premature to make a definitive diagnosis.”

41. During the first hospitalization of Mr. Saldaño in the Psychiatric Hospital – from March to August of 2001 – officials of the Consulate visited him numerous times from the first day of his transfer until he finished his treatment. During these visits his condition

of total disconnection with reality appeared more evident than ever.

42. After finishing his first treatment at the Psychiatric Hospital, he was returned to his usual cell at the Livingston Prison. Nevertheless, the Consular officials have observed that since that first crisis his mental problems never stopped being present and they led him to a clearly self-destructive attitude, where he refused to maintain the most minimal and elemental hygiene and even refused to ingest foods.

43. This situation became evident to the consular employees and officials in the physical conditions of Mr. Saldaño, with a considerable loss in weight, and an emaciated and neglected appearance due to his meager nutrition and lack of hygiene.

44. In addition, on numerous occasions over the course of 2002 and 2003, according to Mr. José MacLoughlin, the consular visits needed to be abruptly interrupted due to Mr. Saldaño's irrational behavior. On one occasion, as he maintained a normal conversation, he interrupted it to announce that he had the intention to urinate and defecate in a brown paper bag that contained foods. On another occasion, the visit was interrupted because he was showing signs of wanting to masturbate. Numerous and similar episodes, of which there is no exact record of the date, abound during this period.

45. Since then the terrible mental state of Mr. Víctor Saldaño forced the prison authorities to rehospitalize him at the Psychiatric Hospital on nine occasions, demonstrating clear signs of intense mental deterioration.

HOSPITALIZATIONS AT THE JESTER IV
PSYCHIATRIC HOSPITAL

Admission to Jester IV	Return to Polunsky
03-20-2001	08-03-2001
03-03-2003	03-18-2003
12-23-2004	01-19-2005
04-06-2005	04-13-2005
05-18-2006	08-17-2006
01-29-2007	02-02-2007
09-25-2007	01-04-2008
03-20-2008	04-07-2008
01-08-2009	04-22-2009

46. Víctor Saldaño's initial death sentence was annulled by order of the Fifth Circuit on March 23, 2004 and it led to the institution of a new jury trial – penalty phase – during the months of October and November of 2004.

47. According to declarations of Consul General Mr. Ricardo Gauthier, who closely followed his second proceeding, Mr. Saldaño had a series of unusual and inexplicable behaviors such as refusing to take off his overalls (prison clothing) to attend the trial in a more presentable manner. He looked at the ceiling, he smiled for no reason, and he moved his lips without emitting sounds. On one occasion he stood up for no reason, having to be restrained by police officers in the courtroom. On another occasion he masturbated inside his prisoner overalls in front of the jury. He refused to have an interpreter at his side during part of the trial and only at the end of the trial, after the verdict, he asked if there was going to be a verdict, and the interpreter had to – per the judge's instructions –

explain that the verdict had already been read, since Mr. Saldaño had not realized that he had been sentenced to death.

48. The scarce correspondence with the Consular officials and his family during this period is likewise incoherent to the point of being unintelligible. For example, in a July 27, 2004 letter addressed to friends in Córdoba, after pointing out that he awaits a new trial, he incorporates incoherent and unrelated phrases such as:

“Cloroformo, potasuis chloride (sic), sulfuric acid, la chapa no paga en Tejas, me dicen en Tejas nacido en Zacatecas, yo saco los autos de la basura, lo que dicen Yonkers, Ives Saint Thomas, el hijo del diablo,” etc.

These incoherencies continue over several pages of the same letter.

49. In a letter addressed to the Consulate from July 19, 2004, Mr. Víctor Saldaño includes phrases such as the following: “está a disposición mi coche y las llaves, el coche es un Peugeot 404 de la basura lo recogí en el cementerio de la basura en Buenos Aires, los Yonkers, party-wrecks-repuestos.

50. The notes from October 22, 2004 of Consul General Mr. Ricardo Gauthier indicate: “In the presence of the Judge hearing the case, Saldaño unexpectedly took a photo[graph] from the ones that his family had sent [to be presented as evidence], destroying it completely.”

51. The notes corresponding to November 10, 2004 of Consul General Mr. Ricardo Gauthier indicate that at the of the start of the trial, “upon trying to masturbate in front of the assistants, Víctor Saldaño had to

quickly be handcuffed by the police officers that were guarding him in the Court.”

52. The notes of November 16, 2004 of Consul General Mr. Ricardo Gauthier express: “The defense attorney announced . . . that . . . he had decided not to present the testimony of Ms. Lidia Guerrero as a witness, arguing that, after thorough conversations with her, he had determined that she maintains [the need to] . . . demand a psychiatric evaluation [for her son].”

53. It is evidenced in the same notes: “Meanwhile, Víctor Saldaño unfortunately continues to externalize uncontrollable and indecent attitudes before the Court. The authorities had to handcuff him once again yesterday when faced with a new attempt of masturbation.”

54. After the proceeding ended, Mr. Saldaño’s behavior continued to be erratic.

55. A few days before finishing a new hospitalization at the Psychiatric Hospital, Minister Mr. Enrique Pareja’s notes of his February 2, 2005 visit reflect that: “Saldaño showed himself to be scattered, distracted and making fantastical statements about his life in prison . . . he said that his slimness was due to the “poison” that they always put in the prison food, which he identified as “sulfuric acid.”

56. In 2006, Mr. Saldaño suffers a new breakdown and is hospitalized again at the Psychiatric Hospital from May 18 to August 17 of 2006. The following is a segment of the notes taken during the visit of May 23, 2006 by the undersigned:

“He is considerably incoherent. At times he tries to put together a phrase that ends in a way that is confusing and disjointed from the topic that is being discussed. He seems to

have difficulty understanding very simple phrases and it is necessary to repeat a question to him in different ways to get him to understand. At times he becomes absent from the conversation, looking absentmindedly at any object, moving his lips without emitting any sound. Later he seems to come to, to ask for, for example, a subscription to a newspaper of his particular preference.”

57. In notes of the same date taken by the undersigned it is recorded that: “. . . authorities of Jester IV (Officer Bragas Jr.) indicated that he was transferred [to the psychiatric hospital] due to his evident deterioration apparent in his state of total introversion and absence from all surrounding reality, plus the complete neglect of hygiene habits.”

58. Although on a subsequent visit of the undersigned the appearance of Mr. Saldaño seemed to be improving – as evidenced in the note of June 9, 2006 – Warden Kevin Estep informed the undersigned that they found him in the middle of a psychotic outbreak, having painted his body with feces and written on the walls with feces. On that occasion, “the psychiatric doctor, Dr. Cire Jane de León indicated that [Mr.] Saldaño had been found under his cot in a state of profound terror and they needed to give him a substance (gas) to be able to tranquilize him. She indicated that the deterioration was evident and that he would be medicated by force, since his behavior was unpredictable.” She added that the diagnosis was schizophrenia, since his behavior of hearing voices, smiling in an irrational manner and moving his lips in an intermittent way without emitting any sound, were signs of this disorder.

59. This occasion is the first time that the prison authorities recognize Mr. Saldaño's mental illness in front of Consulate officials. This same conduct had already been made evident during his second trial in McKinney, Texas.

60. Starting with Víctor Saldaño's fifth hospitalization at Jester IV Psychiatric Hospital, which took place in May of 2006, the medical authorities issued a diagnosis of Víctor Saldaño's mental illness as schizoaffective disorder. Since then he has suffered numerous ups and downs and the shortage of beds at the psychiatric hospital has forced him to spend most of his time in his small cell on death row, from where he rarely comes out.

61. Even though Mr. Saldaño seems to respond more quickly to medication after the last periods of care at the Psychiatric Hospital, he continues with serious episodes:

62. In October of 2007 a new suicide attempt, where he tried to hang himself using the bed sheet, sent him to the Psychiatric Hospital again, where the diagnosis of schizophrenia was reconfirmed. This is the second hospitalization in the same year and will extend to January of 2008. According to the report of Dr. Kimberly Samuel, a doctor of the Texas penitentiary system, Víctor Saldaño suffers from a paranoid type of schizophrenia, he hears voices that incite him to kill himself and he sees monsters that do not let him sleep. His therapist, Mrs. Gwendolyn Bundi MA, LPC, SP, also treats him for an episode of severe depression with psychotic elements.

63. After several months of stability in which Mr. Saldaño's cooperation with authorities stands out, in March of 2008 he manifested fear that they would

make an attempt on his life, for which he is returned to the Psychiatric Hospital as suicide threat.

64. Back in the prison and according to the undersigned's notes of her September 26, 2008 visit to Mr. Víctor Saldaño, and an exchange that took place with the Warden of the unit on the same date, Víctor Saldaño had gone weeks without bathing and despite complaining of intense cold he refuses to wear any clothes.

65. The notes corresponding to the November 19, 2008 visit, indicate: "Saldaño removed his clothing, urinated and defecated en the small cubicle for visiting and proceeded to sit down naked to continue to talk with the Consulate official." This behavior was reported by the undersigned to the prison authorities and medical personnel who, after carrying out an evaluation in the Polunsky Unit, indicated to this Consulate that Mr. Saldaño was well.

66. However, within a short time he needs to be transferred again to the Psychiatric Hospital where he would stay for almost four months (January 8, 2009 to April 22, 2009). According to the undersigned's notes of conversations she had with his therapist and the medical report received, Mr. Saldaño fears being poisoned and he only eats a little bit of white bread. The medical reports that cover the period of January and February of 2009 indicate that he has episodes in which he eats his excrement and/ or covers his body with it, that with certain persistence he wishes to put an end to his life and that he hears voices that tell him to hurt himself. On various occasions during such a lapse, he needed to be placed in the isolation unit of the hospital to guarantee his safety.

67. On subsequent visits he was noted to be incoherent and disoriented and with trembling in his

hands, which was a result of the numerous antipsychotic medications that were being administered to him.

68. The medical report of January 7, 2009 - electronically signed by the health professionals of the Psychiatric Hospital, John Christian, BS, LBSW, MHL, and by Julia Roy, LMA, SP – indicates:

“the cell presented total disorder, with feces everywhere; the patient also eats his feces . . . His overalls and skin (hands, face) had feces smeared everywhere.”

69. Numerous subsequent medical reports reiterate this behavior and add that he also ingests feces with the bread.

70. The Officials of the Argentine Consulate continue with a system of regular visits and when he is hospitalized at the Psychiatric Hospital, weekly visits, and on average no less than twenty visits per year. The physical and mental deterioration of Víctor Saldaño as a result of his time on death row, as it has been evidenced by the weekly visits and medical documentation, is such that he seems like a different person in comparison to his first years on death row.

Signed by:

Valeria M. Gonzalez Posse

Deputy Consul General

Houston, October 19th, 2009

[Notarized]