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

PETITION ALLEGING VIOLATIONS OF THE HUMAN RIGHTS OF BRENDA EVERS ANDREW BY THE UNITED STATES OF AMERICA

By the undersigned, appearing as counsel for the Petitioner under the provisions of Article 23 of the Commission's Regulations, on behalf of Brenda Evers Andrew

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INTRODUCTION

Brenda Evers Andrew was condemned to die not for what she did, but for who she was perceived to be. Convicted of killing her husband, Ms. Andrew has consistently maintained her innocence. She had no criminal record prior to her arrest for the murder of Rob Andrew, and the forensic evidence linking her to the killing was inconclusive. The crime itself bore few of the hallmarks of a capital case: Mr. Andrew was killed by gunshots, with no evidence of prolonged suffering or torment.

In the absence of traditional aggravating factors, the prosecution vilified Ms. Andrew to secure her death sentence. Prosecutors repeatedly introduced evidence of Ms. Andrew's provocative clothing, flirtatious behavior, and past sexual relationships as evidence of moral depravity. Their case reached a crescendo in closing argument, when they called Ms. Andrew a "slut puppy" and waved her thong underwear in front of the jury, claiming that it was not the sort of undergarment a grieving widow would wear. At the penalty phase, her defense attorneys failed to counter the prosecution's gendered narrative, as they never performed the investigation they were ethically required to carry out.

Ms. Andrew now awaits execution on Oklahoma's death row as her case nears the end of the appellate process. She petitions this Honorable Commission for relief from ongoing violations of her human rights in contravention of binding treaty obligations and customary international law.

This petition raises five claims under the American Declaration of the Rights and Duties of Man (American Declaration or ADRM).

First, the United States violated Ms. Andrew's right to equality and non-discrimination pursuant to Article II, and Ms. Andrew's right to a fair trial and impartial tribunal under Articles XVII and XXVI by employing gender-based stereotypes to sentence her to death.

Second, the United States violated Ms. Andrew's right to a fair trial under Article XXVI by barring several witnesses from testifying on her behalf.

Third, Ms. Andrew's lawyers provided ineffective assistance when they failed to investigate and present mitigating evidence at her trial, violating Articles XVIII and XXVI of the ADRDM.

Fourth, by holding Ms. Andrew in prolonged solitary as she awaits her execution, the United States has subjected her to cruel, infamous, and unusual punishment and inhumane treatment in violation of Articles XXVI and XXV.

Finally, the methods of execution employed by the state of Oklahoma would subject Ms. Andrew to cruel, infamous, or unusual punishment, in violation of Article XXVI.

Ms. Andrew does not currently seek precautionary measures, as she is in no danger of receiving an execution date for at least six months. Nevertheless, she asks this Commission to merge its consideration of admissibility and merits in order to expedite its review of Ms. Andrew's claims. Ms. Andrew is nearing the end of the appellate process, and is in danger of receiving an execution date within the next year. She brings this petition now so that she can receive a final merits ruling from the Commission before she is executed.

ADMISSIBILITY

I. COMPETENCE OF THE COMMISSION

Petitioner asserts that the United States has violated her rights under Article I (right to not be arbitrarily deprived of life), Article II (right to equality under the law), Article XVIII (right to a fair trial), Article XXV (right to humane treatment in custody), and Article XXVI (right to an impartial hearing and right not to receive cruel, unusual, or infamous punishment) of the ADRDM. The Commission has competence over a claim where the alleged victim is a natural person "whose

rights are protected under American Declaration, the provisions of which the State is bound to respect in conformity with the OAS Charter, Article 20 of the Commission's Statute and Article 49 of the Commission's Rules of Procedure."[1] Petitioner is a natural person. The events raised in Petitioner's claim occurred while the alleged victim was within United States territory and jurisdiction and after its ratification of the OAS Charter. Counsel for the Petitioner is authorized under Article 23 of the Commission's Rules of Procedure to represent her before the Commission. Therefore, the Commission is competent to hear this claim.

II. EXHAUSTION OF DOMESTIC REMEDIES

Although the claims Ms. Andrew raises have not been fully exhausted, her petition is admissible because she meets the exceptions to exhaustion set forth in Article 31 of the Commission's Rules of Procedure.

The claims she raises in her petition to this Honorable Commission include: (1) that the State violated her rights to equal protection and due process by appealing to negative stereotypes based on Ms. Andrew's gender; (2) that she was provided incompetent legal representation at trial; (3) that she was deprived of her right to a fair trial; (4) that her conditions of confinement constitute cruel, infamous or unusual punishment; and (5) that her execution by lethal injection would constitute cruel, infamous or unusual punishment. The first three claims are partially exhausted, but the fourth and fifth have not been presented to domestic courts. Nonetheless, Ms. Andrew's failure to fully exhaust is excused under Article 31 of this Commission's Rules of Procedure, which expressly provides that exhaustion is not required where:

> a. the domestic legislation of the State concerned does not afford due process of law for protection of the right or rights that have allegedly been violated;

[1] Inter-Am. Comm. H.R., Report No 39/03, Petition 136/02 (Admissibility), *Abdur'Rahman v. United States*, ¶ 22.

b. the party alleging violation of his or her rights has been denied access to the remedies under domestic law or has been prevented from exhausting them; or,

c. there has been unwarranted delay in rendering a final judgment under the aforementioned remedies.

The application of these exceptions is explained in more detail below.

A. Oklahoma's Procedures for Scheduling Execution Dates and its Refusal to Respect Provisional Measures from International Bodies Makes it Impossible for Ms. Andrew to Fully Exhaust Domestic Remedies on Three of the Five Claims Raised Here.

State and federal courts have denied relief on three of the five claims raised in Ms. Andrew's petition. Specifically, in both state and federal courts, Ms. Andrew has repeatedly argued, *inter alia*, that her trial lawyers were ineffective; that the trial court's refusal to permit critical witness testimony deprived her of her right to a fair trial; and that the introduction of prior bad acts, including evidence of her romantic affairs, violated her right to due process. The most recent court to address these arguments, the federal district court for the Western District of Oklahoma, denied her petition without holding an evidentiary hearing.[2] Ms. Andrew appealed that decision to the Court of Appeals for the Tenth Circuit on December 27, 2016,[3] and has been waiting for a decision for the past four and half years. The Tenth Circuit could issue a decision any day, at which point Ms. Andrew will have fully exhausted all appellate avenues, with the exception of seeking review by the U.S. Supreme Court—review that is only granted in around 1 percent of all cases.[4]

[2] *See* Brenda Evers Andrew, v. Rickey Moham, No. CIV-08-832-R (W.D. Okla, Sept. 9 2015) (Doc. 68, Order). The United States Court of Appeals for the Tenth Circuit granted a certificate of appealability on these claims and others. Brenda Evers Andrew v. Debbie Aldridge, No. 15-6190 (10th Cir., Mar. 30, 2017) (Doc. 01019787359, Order).

[3] Brenda Evers Andrew v. Debbie Aldridge, No. 15-6190 (10th Cir., Dec. 27, 2016) (Doc. 01019741067, Opening Brief).

[4] *See* Public Information Office, Supreme Court of the United States, *A Reporter's Guide to Applications Pending Before the Supreme Court of the United States*, (2020) at 15–16 (explaining that the U.S. Supreme Court grants approximately 80 of the 7,000 to 8,000 petitions it receives each Term).

As this Commission is well aware, the United States has not hesitated to execute prisoners while petitions to this Commission are pending, notwithstanding the existence of precautionary measures. If Ms. Andrews waits until the Tenth Circuit issues its ruling, it is highly likely that Oklahoma will carry out her execution before this Commission is able to address the merits of her claims. This result is overwhelmingly likely because of the timing of executions in Oklahoma, combined with Oklahoma's historic refusal to defer to provisional measures issued by international bodies.

In Oklahoma, the Oklahoma Court of Criminal Appeals schedules execution dates at the request of the Oklahoma Attorney General.[5] The act that triggers the scheduling of the execution date is typically the U.S. Supreme Court's denial of certiorari.[6] Ms. Andrews, like most other death row prisoners, will seek certiorari from the U.S. Supreme Court if the Tenth Circuit denies relief on her legal claims. As noted above, the U.S. Supreme Court *almost never* grants certiorari. The deadline for seeking certiorari is ninety days after the Tenth Circuit issues its decision,[7] and the Supreme Court will usually dispose of the petition within six weeks of that filing.[8] Thus, if the Tenth Circuit denies Ms. Andrew's appeal tomorrow, she may have as little as five months before the Oklahoma Court of Criminal Appeals would schedule an execution date.

In 2004, the Oklahoma Court of Criminal Appeals refused to defer the scheduling of an execution date for death row inmate Osbaldo Torres, even though the International Court of Justice (ICJ) had issued provisional measures calling on the United States to take all necessary measures to prevent his execution until they issued a judgment in *Avena and Other Mexican Nationals.*[9]

[5] Okla. Stat. Ann. tit. 22, § 1001.1.
[6] *Cf. id.* (stating the grounds under which the State can set an execution date).
[7] SUP. CT. R. 13.
[8] Public Information Office, *supra* note 4, at 16.
[9] *See* Case Concerning Avena and Other Mexican Nationals (Mexico v. United States), Provisional Measures, Order (ICJ. Feb 5, 2003) ¶ 59 (granting provisional measures). *See also* Torres v. Oklahoma, Case No. D. 96-350 (Okla. Crim. App. March 1, 2004) (Order Setting Execution Date) (unpublished) Ex. ZZ.

Concurring in the court's order to set an execution date, Judge Lumpkin observed that the ICJ had "no jurisdiction" over the state of Oklahoma.[10]

The Commission has previously noted that "the rule of prior exhaustion of domestic remedies should not lead to the result that access to international protection is detained or delayed to the point of being ineffective."[11] In the authors' experience, this Commission typically requires years to complete its review of a petition filed on behalf of a U.S. death row prisoner. Thus, if Ms. Andrews awaits the Tenth Circuit ruling, she will effectively be deprived of her right to petition this Commission for review of the human rights violations in her case. In effect, the United States has prevented Ms. Andrew from fully exhausting her claims, because it has put her in an impossible position. If she waits until the Tenth Circuit rules—thereby fully exhausting three of her claims—she will likely be executed before this Commission is able to issue a decision on the merits. For this reason, Ms. Andrews satisfies the exception to the exhaustion requirement set forth in Article 31(b).

B. <u>Conditions of Confinement and Lethal Injection Claims</u>

Exhaustion is not required for consideration of the merits of Ms. Andrew's conditions of confinement and lethal injection claims. Specifically, this Commission has previously determined that where a petitioner's presentation of legal claims to domestic courts would have "no reasonable prospect of success," domestic remedies are not "effective" under international law.[12] As outlined

[10] Torres v. Oklahoma, Case No. D. 96-350 (Okla. Crim. App. March 1, 2004) (Order Setting Execution Date) (unpublished) Ex. ZZ.

[11] *See Julius Omar Robinson v. United States*, Case 13.361, Inter-Am. Comm'n H.R., Report No. 210/20, OEA/Ser.L/V/II, doc. 224 ¶¶ 16–18 (2020); *Victor Hugo Saldaño v. United States*, Case 12. 254, Inter-Am. Comm'n H.R., Report No. 24/17, OEA/Ser.L/V/161, doc. 31 ¶ 82 (2017).

[12] *Gary T. Graham v. United States*, Case 11.193, Inter-Am. Comm'n H.R., Report No. 51/00, OEA/Ser.L/V/II.111, doc. 20 rev. ¶¶ 60–61 (2000); *Ramón Martinez Villareal v. United States*, Case 11.753, Inter-Am. Comm'n H.R., Report No. 108/00, OEA/Ser.L/V/II.111, doc. 20 rev., ¶ 70 (2000).

below, the unexhausted claims in this petition have no prospect of success and should therefore be deemed admissible under Article 31 of the Commission's Regulations.[13]

i. Conditions of Confinement Claim

The United States Supreme Court has refused to consider arguments relating to the conditions of confinement on death row as a violation of the prisoner's right to be protected from cruel and unusual punishment. *See, e.g., Knight v. Florida*, 528 U.S. 990 (1999) (refusing to review claim that length of time spent on death row could constitute cruel and unusual punishment). Indeed, U.S. courts have repeatedly rejected such claims.[14] For this reason, it would be futile for Ms. Andrew to seek to exhaust her claim in domestic court as it would have no prospect of success.

ii. Lethal Injection Claim

In *Glossip v. Gross*, the U.S. Supreme Court held that petitioners seeking to challenge lethal injection as cruel and unusual punishment must:

> establish a likelihood that they can establish both that [the State]'s lethal injection protocol creates a demonstrated risk of severe pain and that the risk is substantial when compared to the known and available alternatives.[15]

In order to meet this burden, a condemned prisoner must first know the specific drugs the State intends to use for his execution. He must also know the source of those drugs, for reasons that are

[13] *See Graham*, Case 11.193, ¶ 61; *Ramón Martinez Villareal*, Case 11.753, ¶ 70.
[14] *Hutto v. Finney*, 437 U.S. 678 (1978)(finding that solitary confinement does not itself constitute cruel and unusual punishment); *Ruiz v. Texas*, 580 U. S. ___, ___–___ (2017) (Breyer, J., dissenting from denial of stay of execution) ("Mr. Ruiz argues that his execution 'violates the Eighth Amendment' because it 'follow[s] lengthy [death row] incarceration in traumatic conditions,' principally his "permanent solitary confinement." I believe his claim is a strong one, and we should consider it."); *Davis v. Ayala*, 576 U. S. 257, 288–89 (2015) (Kennedy, J., concurring in the denial of relief) ("Too often, discussion in the legal academy and among practitioners and policymakers concentrates simply on the adjudication of guilt or innocence. Too easily ignored is the question of what comes next. Prisoners are shut away—out of sight, out of mind."); *Apodoca v. Raemisch*, 586 U. S. ____ (2018) (Sotomayor, J., issuing a statement on the denial of certiorari) ("Courts and corrections officials must accordingly remain alert to the clear constitutional problems raised by keeping prisoners like Apodaca, Vigil, and Lowe in 'near-total isolation' from the living world.").
[15] *Glossip v. Gross*, 135 S.Ct. 2726, 2737 (2015).

explained more fully below. Finally, he must have an opportunity to test the purity of the drugs. Yet in Oklahoma, the State has passed a secrecy law that allows prison officials to withhold the identity of the individuals or companies that provide their lethal injection drugs.[16] Moreover, under Oklahoma law, the Warden is not required to specify which drug will be used until ten days before the prisoner's execution date.[17] Under these circumstances, it would be practically impossible for a petitioner to fully exhaust domestic remedies regarding the constitutionality of the lethal injection protocol prior to petitioning this Commission. By the time Ms. Andrew is certain of the protocol Oklahoma intends to use, it will very likely be too late for this Commission to adjudicate the violations of the ADRDM presented in her petition. Under Rule 31, therefore, Ms. Andrew has no access to an effective mechanism that would allow her to exhaust his domestic remedies in a timely manner.

Despite the uncertainty surrounding Oklahoma's execution method, Ms. Andrew has joined a lawsuit challenging its lethal injection protocol as cruel and unusual under the Eighth Amendment to the U.S. Constitution. The lawsuit is currently pending in the federal district court for the Western District of Oklahoma.[18] If the Commission were to require a final decision on the merits prior to considering her claim, it would defeat the very purpose of petitioning the

[16] 22 OK Stat §22-1015 (2021).

[17] Oklahoma Department of Correction, *Execution of Inmates Sentenced to Death* OP-040301 Attachment D (20 Feb. 2020), https://oklahoma.gov/content/dam/ok/en/doc/documents/policy/section-04/040301ad.pdf. Oklahoma's protocol specifies that one of three drugs must be used (pentobarbital, sodium pentothal, or a three-drug protocol of midazolam, vecuronium bromide, and potassium chloride). As explained below, however, the Warden is not obligated to identify the specific drug that will be used until ten days before the execution is to be carried out. Moreover, Oklahoma is permitted by law to keep secret the source of the drug, making it nearly impossible for a prisoner to challenge the purity of the drug. In February 2020, Oklahoma State officials announced an updated protocol that relies on midazolam, vecuronium bromide, and potassium chloride, but to the best of Petitioner's knowledge the announcement does not alter state law. *See* Darla Shelden, *Oklahoma to Resume State Killings After Acquiring Same Lethal Injection Drugs Used in Botched Executions*, THE CITY SENTINEL (Feb. 13, 2020), https://www.city-sentinel.com/2020/02/oklahoma-to-resume-state-killings-after-acquiring-same-lethal-injection-drugs-used-in-botched-executions/.

[18] *See In re: Oklahoma Lethal Injection Protocol Litigation*, Third Amended Omnibus Complaint, No. 2:11-cv-1016 (W.D. Okla, Sept. 24, 2015).

Commission for review of violations of the ADRDM. Federal litigation over Oklahoma's lethal injection protocol may not be resolved until the months or weeks preceding Ms. Andrew's execution date. At that juncture, it would be too late for this Commission to review the merits of her claims. Ms. Andrew is making a good faith effort to exhaust her claim but should not be penalized for the delays occasioned by Oklahoma's inability to determine how it intends to execute her.

III. DUPLICATION

A petition raising the claims presented herein has never been submitted to any other international organization, nor is the subject matter of the petition "pending settlement before an international governmental organization," nor does it duplicate a petition "pending or already examined and settled by the Commission or by another international governmental organization of which the State concerned is a member." The petition therefore complies with Article 33 of the Commission's Rules of Procedure.

IV. TIMELINESS OF THE PETITION

This petition also meets the terms of Article 32(2) of the Rules of Procedure: "In those cases in which the exceptions to the requirement of prior exhaustion of domestic remedies are applicable, the petition shall be presented within a reasonable period of time, as determined by the Commission. . . [considering] the date on which the alleged violation of rights occurred and the circumstances of each case." As noted above, Ms. Andrew has availed herself of all available domestic avenues for appeal, and has even filed this petition at an earlier time than required in order to allow this Commission sufficient time to review her claims.

STATEMENT OF FACTS[19]

Brenda Andrew is the only woman sentenced to death in Oklahoma. Prosecutors secured her conviction and death sentence by presenting evidence "that had no purpose other than to hammer home that Brenda Andrew is a bad wife, bad mother, and a bad woman."[20] The jury was allowed to consider this evidence with no limiting instruction and handed Ms. Andrew "a death sentence imposed under the influence of passion, prejudice and other arbitrary factors."[21] The most aggravating facts presented against Ms. Andrew had little to do with the offense itself, but rather involved intimate details about Ms. Andrew's sexual history. Ms. Andrew's divorce attorney, who doubled as her lead defense counsel in what was his first ever capital trial, failed to conduct even the most basic mitigation investigation. Her trial attorneys knew little about her. Their lack of preparation set the stage for Ms. Andrew's eventual conviction and condemnation. In September 2004, Ms. Andrew was sentenced to death for the murder of her ex-husband Robert Andrew. Ms. Andrew's alleged romantic partner James Pavatt was also convicted and sentenced to death for the same crime, but in a separate trial. The prosecution alleged Ms. Andrew and Pavatt acted together in order to collect Robert Andrew's life insurance proceeds. Since being sentenced to death in 2004, Ms. Andrew has been detained in solitary confinement for sixteen years. During that time, her sole interactions with other human beings have consisted of brief exchanges with guards and periodic visits from a priest.

The Prosecution Made Ms. Andrew's Sexuality a Centerpiece of the Trial.

The prosecutors in Ms. Andrew's trial repeatedly highlighted her sexual history. Among the prosecutors' first witnesses were two of Ms. Andrew's former sexual partners: James Higgins

[19] The criminal trial transcript is cited throughout this application as Trial Tr. #. The trial was conducted in 2004 in the District Court of Oklahoma County, State of Oklahoma before Judge Susan W. Bragg.
[20] Andrew v. State, 164 P.3d 176, 206 ¶ 1 (Okla. Crim. App. 2007) (Johnson J., dissenting), Ex. A.
[21] *Id*. at ¶11.

and Rick Nunley. Mr. Higgins and Mr. Nunley knew nothing about the crime; instead, the prosecution used their testimony to detail for the jury Ms. Andrew's past sexual relationships. Ms. Andrew had stopped seeing Mr. Higgins over six months before the crime and she ended her sexual relationship with Mr. Nunley several years earlier, prompting Mr. Nunley to admit he "rarely saw her for a four-year period of time."[22] The prosecution asked Mr. Higgins questions like "was it always the same motel?" and "how many occasions did you have sex with her in her car?" without objections or limitations.[23] The prosecution frequently referred to descriptions of her clothing as "short skirt, low-cut tops, just sexy outfits, provocative"[24] throughout the trial. One of the last actions by the prosecution before ending closing arguments was reading from the deceased's computerized journal entries about an affair that Ms. Andrew had had almost twenty years before the day of the crime.[25]

The judge's permissive attitude towards prejudicial evidence allowed the prosecution to bring nearly anything they wanted into evidence without limitations. One prosecution witness, David Ostrowe, described Ms. Andrew as a "hoochie" and her clothes as "very tight, very short with lots of cleavage exposed."[26] Ms. Andrew's attorneys anticipated this testimony, objected to its relevance, and were promptly overruled without explanation.[27] Prosecutors also admitted into evidence a book found in Ms. Andrew's possession, called "203 Ways to Drive a Man Wild in Bed."[28] When Ms. Andrew's attorneys objected, the prosecution conceded the testimony was intended to attack Ms. Andrew's character and to put in doubt whether Ms. Andrew "was a good

[22] Trial Tr. 250, Ex. B; Trial Tr. 367, Ex. C.
[23] Trial Tr. 251, Ex. B.
[24] *Id*. at 246-247.
[25] Trial Tr. 4124, Ex. D.
[26] Trial Tr. 323, Ex. E.
[27] *Id*. at 319.
[28] Trial Tr. 2318, Ex. F.

person, if she was a good mother."[29] Without thinking twice, the trial court overruled the defense's objection.

Indeed, the judge repeatedly dismissed the defense's objections to prejudicial evidence. Ms. Andrew's attorneys raised over 150 objections to State testimony about Ms. Andrew's appearance and her sexual relationships on the grounds that the testimony was overly prejudicial and irrelevant.[30] The trial judge upheld almost none of them, rationalizing the barrage of inflammatory testimony by saying "maybe I'm hardened to it but the State is not trying to show they care about the sexual relationship, only as it relates to her ability to manipulate men."[31] By the time the prosecutor stood before the jury to give his closing argument, the judge remained silent as he called Ms. Andrew a "slut puppy"[32] and waived her "thong underwear" in the air for the jury to see.[33]

The prosecution's arguments were calculated to appeal to an Oklahoma jury. Eighty percent of the population in Oklahoma is Christian.[34] Further, the percentage of Evangelical Christians in Oklahoma is almost twice the national average of the United States.[35] When the prosecution was not indirectly appealing to the jury's religious sensibilities of traditional gender roles, they were directly using religious authority figures tell the jury what to think. In the punishment stage, one of the prosecutors recalled a preacher who said his interactions with Ms. Andrew were bizarre, saying "his instinct on being a preacher kicked in."[36] Later in the punishment

[29] *Id*. at 2314.
[30] The Oklahoma Evidence Code prohibits the admission of testimony that is irrelevant or that is prejudicial to the point of outweighing its probative value. Okla. Stat. Ann. Tit. 12, §§ 2401–03 (West).
[31] Trial Tr. 2958, Ex. G.
[32] Trial Tr. 4125, Ex. D.
[33] Trial Tr. 4101-03, Ex. H.
[34] Pew Research Center, *State Study: Oklahoma*, https://www.pewforum.org/religious-landscape-study/state/oklahoma/.
[35] *Id*.
[36] Trial Tr. 4102, Ex.H.

stage, another prosecutor deliberately mischaracterized a pastor's testimony to suggest the pastor said Ms. Andrew deserved no mercy.[37] He said no such thing.

The Prosecution Invited the Jury to Condemn Ms. Andrew for Being a Bad Mother.

In the absence of aggravating facts, the prosecution resorted to humiliating Ms. Andrew as someone who was sexually deviant, a bad wife, a bad homemaker and a bad mother. The State frequently asked witnesses to pass judgement on what they thought of Ms. Andrew, particularly as a homemaker and as a mother. State witnesses were asked to describe Ms. Andrew's house, which they said was "filthy," "unkempt," and "shocking."[38] The prosecution asked multiple witnesses repeated questions beginning with "does a good mother…?"[39] The prosecution pressed one witness, Ms. Andrew's neighbor Mrs. Garrison, with nine rhetorical questions, in succession, about what a good mother would do in a variety of situations. Mrs. Garrison, however, refused to succumb to the prosecution's tactics. In response, the prosecutor challenged her. He dredged up lurid details about Ms. Andrew's romantic past. With each question and new piece of information, the prosecution asked expectantly if the witness would change her opinion. This witness, however, would not take the bait, insisting "I don't feel I have the right to judge that."[40] After weeks of the prosecution pressing witnesses with impunity on Ms. Andrew's sexual history, Mrs. Garrison, on the last day of the trial, was the first and only witness to recognize and resist the tenuous and disturbing link the prosecution had been attempting to make between Ms. Andrew's sexual history and her moral culpability.

[37] Ms. Smith misquoted the pastor testimony as saying "the person who did the execution should have no mercy." When the defense objected as mischaracterization of his testimony, Ms. Smith said "I believe he said there was no mercy on the part of the executioner… but it doesn't matter the way I remember it. It's the way you remember it." The defense asked that this mischaracterization be struck and the jury be admonished, but the judge denied that request. Trial Tr. 4413, Ex. I.
[38] Trial Tr. 1991, Ex. J.
[39] Trial Tr. 419-420, Ex. K; Trial Tr. 4312-14, 4345-46 Ex. L.
[40] Trial Tr. 4342-44, Ex. M.

The prosecution also successfully fought to admit into evidence the murder mystery novels found in Ms. Andrew's children's luggage in Mexico. The prosecution argued that the titles of the books were relevant because giving her kids murder mystery novels was "clearly indicative that she is not a good mother."[41] When Ms. Andrew's defense attorney objected to this evidence, the judge dismissed the objection saying "Excuse me. You opened the door as a wonderful mother. Yeah, you did. Not them."[42]

The State spent most of the punishment stage trying to convince the jury that Ms. Andrew was not a good mother and reached for evidence to depict her as a manipulative and controlling woman, especially towards children. The prosecution asked the jury, "Would she bring men into her house with her children there and her husband at work? Would she do all of the things that you have heard that she's done to those children in this trial and be a good mother? I submit to you no."[43] Then, when Ms. Andrew's children expressed a desire to be with their mother after her arrest, the prosecution spun it for the jury, telling them the children "were acting as if they had been programmed. And I submit to you that when they are out from under the spell of Brenda Andrew that they will also realize how special their father is to them."[44] Even a story about Ms. Andrew telling her kids that a puppy needs its mommy was used as a witness' "first sign I had that Brenda was using those children."[45] In closing, the prosecution called her "so evil that… she would use that innocent child, Tricity"[46] and said that "she put her children through hell. She's not remorseful. She continues to manipulate her children."[47] By doing this, the prosecution vilified the

[41] Trial Tr. 2345, Ex. N.
[42] The judge here was referring to day two of the trial, when the defense asked a witness if Ms. Andrew was a good mother. The prosecution moved to admit these books into evidence twelve days later. *Id*. at 2347.
[43] Trial Tr. 4394, Ex. O.
[44] Trial Tr. 4410, Ex. P.
[45] Trial Tr. 2661, Ex. Q.
[46] Trial Tr. 4385, Ex. R.
[47] Trial Tr. 4402, Ex. S.

defense's attempt to humanize Ms. Andrew by calling her niece and daughter to testify.[48] The prosecution asked the jury "would you put your 15-year-old niece on the stand to do that? I wouldn't."[49] The prosecution used every opportunity to impute insidious motivations to Ms. Andrew and those who supported her defense. The prosecution concluded its penalty stage presentation by suggesting that Ms. Andrew's 13-year-old daughter who testified at trial on her mother's behalf did not actually want her mother to live.[50]

The Prosecution Denigrated Ms. Andrew for Being an Emotionless Widow.[51]

Not only was Ms. Andrew's sexuality and motherhood on trial, so was her demeanor. Repeatedly, the prosecution reminded the jury that Ms. Andrew's reactions to her husband's death were abnormal. For her apparent absence of remorse, the prosecution argued that Ms. Andrew deserved to be executed. The prosecution asked every witness to the crime scene to comment on her demeanor after the crime. In just over a day of testimony, Ms. Andrew's demeanor or lack of tears was brought up 15 times,[52] and a total of 24 times throughout the trial. State witnesses contrasted what they observed with what they expected. One officer said "I thought she was unusually calm. I thought that was odd… usually they're very emotional, very distraught… so normally you have to calm them down… but with her she was just unusually calm. It actually kinda bothered me."[53] The prosecution not only built its case on Ms. Andrew's demeanor at the crime scene, but also at trial. The State exploited her stoicism to paint her as unfeeling. "[U]ntil today she's never shed a tear. She never shed a tear until people started testifying about what she

[48] Trial Tr. 4477, Ex. T.
[49] Trial Tr. 4485, Ex. U.
[50] Trial Tr. 4478, Ex. T.
[51] To conclude the punishment stage of the trial, Ms. Smith told the jury "she's different. She's not like you and me. She described Rob Andrew's death to Roland Garrett like it was nothing. It was like describing the planting of a garden or the mopping of a floor. No emotion. No remorse. No grief. And that's because she's different." Trial Tr. 4493, Ex.V.
[52] Trial Tr. at 1800-2285.
[53] Trial Tr. 2030, Ex. W.

deserved and that's another reason why she deserves the death penalty."[54] One officer, the first officer on the scene, could have rebutted the prosecution's narrative. He had observed Ms. Andrew distraught, but the judge blocked his testimony, letting the prosecution's characterization go unchallenged.[55]

The State's repeated and gratuitous references to Ms. Andrew's appearance reflect the pervasive gender bias that tainted the proceedings. In closing, the prosecution said to the jury, "she sits over here today and has for the last five weeks all meek and quiet and pretty. She's a pretty woman. And she's been on her best behavior. But that's not the real Brenda Andrew."[56] The judge too deployed her appearance against her. About three weeks into the trial, Ms. Andrew was also no longer allowed to wear makeup or pantyhose.[57] When the defense objected to this sudden change and the prejudicial effect it may have on the jury to see Ms. Andrew's appearance suddenly change, the judge said "I could see your concern if your client wasn't pretty, but she's pretty and she doesn't need makeup. I mean, you may think she does but I've looked at her when she didn't have it on. She's a pretty woman okay? She can't help that. And certainly, I'm sure even with pretty women makeup enhances their prettiness but she's pretty on her own."[58] In essence, state actors made Ms. Andrew's access to makeup during trial contingent on her looks. The constant commentary about Ms. Andrew's physical appearance underscored state actors' chauvinistic attitude to the defendant, whose life was a stake. Instead of seeing her as defendant who had rights

[54] Trial Tr. 4475, Ex. T.
[55] The judge did not allow Officer Ramsey to testify regarding his observations of Ms. Andrew's demeanor because it was not in his report. The defense argued "he doesn't put that in his report. That's a standard question [the prosecution] got to ask all their witnesses," but the judge drew the line when the defense asked their witness the identical question. Trial Tr. 3404, Ex. X.
[56] Trial Tr. 3908, Ex. Y; Later in closing, the prosecution called Ms. Andrew "an attractive woman" and suggested that that somehow made the evidence harder to believe. Trial Tr. 4121, Ex. D.
[57] Trial Tr. 1130, Ex. Z.
[58] Trial Tr. 1145, Ex. AA.

they were duty bound to respect, prosecutors and the trial judge saw her as a woman who had transgressed her assigned gender roles and therefore deserved to be punished.

Two of Five Judges on Oklahoma's Highest Court Would Have Reversed Her Sentence.

The prosecution's antics and trial judge's bias did not go unnoticed. On direct appeal, two of the five judges on the Oklahoma Court of Criminal Appeals found that the trial court failed to protect Ms. Andrew's trial rights. Judges Johnson and Chapel dissented with their colleagues and would have reversed Ms. Andrew's sentence because of the impermissible, improper, and prejudicial evidence and opinion testimony littered throughout the proceedings. Judge Chapel found the errors and prejudice so severe that he would have reversed and remanded for a new trial. Judge Johnson would have reversed and remanded for resentencing. In dissent, Judge Johnson characterized Ms. Andrew's trial as one that was rife with error and included "a pattern of introducing evidence that has no purpose other than to hammer home that Brenda Andrew is a bad wife, a bad mother, and a bad woman."[59] The effect of this evidence was to "trivialize the value of her life in the minds of the jurors,"[60] making her trial "fundamentally unfair."[61] In Judge Johnson's words, the jury issued the death sentence under "influence of passion, prejudice, and other arbitrary factors."[62] Despite the judges' denunciations, Ms. Andrew's conviction and sentence remain intact.

Ms. Andrew's Attorneys Failed to Conduct Any Mitigation Investigation Allowing the Prosecution's Characterization of Her as a Bad Woman to Dominate the Trial.

Ms. Andrew's trial was so tainted by bias because her lawyers failed to challenge the prosecution's characterization of her. Inexperience and potential misconduct hampered Ms.

[59] In her dissent, Johnson found that the inclusion of this evidence violated the Oklahoma Evidence Code and judicial precedent precluding the admission of evidence of other crimes or bad acts. "[A] defendant must be convicted, if at all, for the crime charged and not of being a bad woman." Andrew v. State, 164 P.3d 176, 206 ¶1 (Okla. Crim. App. 2007) (Johnson, dissenting), Ex. A.
[60] *Id*. at ¶7.
[61] *Id*. at ¶11.
[62] *Id*.

Andrew's defense team and undermined its performance at her capital trial. Ms. Andrew's lead attorney, Greg McCracken, had never defended a capital trial before Ms. Andrew's. He had primarily served as her divorce attorney, and his inexperience was apparent. Another attorney on the case, George Miskovsky, was arrested as many as three times for alcohol related offenses while representing Ms. Andrew.[63] Just two weeks before Ms. Andrew's trial began, Miskovsky was arrested for drunken-driving after police saw him driving on a flat tire.[64] A few months after Ms. Andrew's trial, Miskovsky was embroiled again in criminal activity: This time, he was caught paying for and having sex with a 15-year old girl. [65] After being initially charged with second-degree rape and sodomy, Miskovsky eventually pled guilty to two misdemeanors, surrendered his law license and served a year in jail.[66]

These professional deficits and significant conflicts had devastating ramifications for Ms. Andrew. The defense team put all their eggs in the innocence basket and failed to conduct a mitigation investigation or compile a social history of Ms. Andrew's life. Her lawyers never retained a mitigation specialist and failed to pursue leads that could have produced mitigating evidence, including Ms. Andrew's own statements. The American Bar Association's death penalty representation guidelines specify that a capital defense team should include a mitigation specialist and the defense team "must conduct an ongoing, exhaustive and independent investigation of every aspect" of the client's character and history.[67] But the defense team failed to conduct any

[63] Diana Baldwin, *Attorney Arrested on Drunken-Driving Complaint*, THE OKLAHOMAN (May 29, 2004) https://www.oklahoman.com/article/1904708/attorney-arrested-on-drunken-driving-complaint.
[64] *Id.*
[65] Jay F. Marks, OKC Attorney Will Lose License, Go to Jail, THE OKLAHOMAN (Oct. 16, 2008), https://www.oklahoman.com/article/3311929/okc-attorney-will-lose-license-go-to-jail. Ms. Andrew had three defense attorneys at trial: Greg McCracken, George Miskovsky and Andrea Miller.
[66] *Id.*
[67] ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases, 2003 Guidelines 4.1(A)1 (2003); ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases, 2008 Supplementary Guideline 10.11(B).

meaningful investigation, let alone the comprehensive investigation mandated by prevailing professional norms.

Paradoxically, it was the prosecution that introduced what little is known about Ms. Andrew's social history. On two separate occasions, officers testified that Mr. Andrew may have been physically abusive towards Ms. Andrew. First, Officer Frost testified that he had asked Ms. Andrew if Rob Andrew had "ever hit her during their marriage," to which Ms. Andrew replied "he hasn't hit [me] since the kids had been born."[68] Second, Officer Garrett testified that Ms. Andrew confided to him that her ex-husband "had been mean to her," but Ms. Andrew hesitated to provide more information.[69] Both of these significant revelations about the potential abuse Ms. Andrew endured at the hands of her ex-husband were a product of direct examination *by the prosecution.* Ms. Andrew's attorneys did not investigate these claims or even so much as ask about them on cross-examination. By failing to humanize Ms. Andrew, her attorneys allowed the prosecution to construct a narrative about her with little to no resistance.

Ms. Andrew's attorneys also overlooked a critical opportunity to spare Ms. Andrew from the possibility of execution. Three days after Ms. Andrew entered Mexico on November 29, 2001, the Oklahoma County District Court issued a warrant for her arrest. Ms. Andrew remained in Mexico from November of 2001 to February of 2002. During that time, Ms. Andrew and her lead trial attorney Mr. McCracken were in constant communication, exchanging over 100 phone calls. But Mr. McCracken never informed Ms. Andrew about the Protocol to Extradition with Mexico Treaty,[70] which gives the Mexican government the right "to demand assurances that the death penalty will not be imposed, or, if it is imposed, will not be executed." Mr. McCracken did not

[68] Trial Tr. 1821-22, Ex. BB.
[69] Trial Tr. 2562, Ex. CC.
[70] Protocol to Extradition With Mexico Treaty, Mx.-U.S., May 4, 1978, Senate Treaty Doc. 105–46.

advise Ms. Andrew to surrender to Mexican authorities who could have secured a guarantee that the death penalty would not be imposed. Instead, Ms. Andrew surrendered in the United States, and was subsequently given the death penalty.

The Trial Court Precluded Critical Defense Witnesses from Testifying.

Ms. Andrew was seriously wounded in the course of the crime for which she was eventually convicted and sentenced to death. A bullet pierced through her left arm. At the scene, she told the responding officers that two men in black and of average height had come into the garage and shot and her ex-husband, and then ran out of the garage.[71] A trial, prosecutors implausibly alleged Ms. Andrew had staged her own injury. In response, Ms. Andrew's defense team had prepared to call two witnesses who would have eviscerated the prosecution's staging theory. Lisa Gisler and Carol Shadid were Ms. Andrew's neighbors at the time of the crime. They had heard three shots in quick succession. Their observations ruled out the prosecution's version of events—there would not have been enough time between the shots for Ms. Andrew to carefully self-inflict a gun shot. But the jury never heard from the neighbors. The State moved to preclude Gisler and Shadid's testimony on the grounds the defense had not provided adequate notice of their testimony. Instead of granting a continuance to give the prosecution more time to prepare, the trial court acceded to the prosecution's drastic request and barred Gisler and Shadid from testifying entirely.[72]

The trial court systematically precluded several other critical witnesses on similar grounds, thwarting Ms. Andrew's defense. For example, the prosecution called Teresa Sullivan, a jail house informant who claimed Ms. Andrew had confessed to the crime while in detention awaiting her trial. Officer Donna Tyra worked at the jail where Sullivan and Ms. Andrew were detained. She

[71] Trial Tr. 1796-1801.
[72] Trial Tr. 3387-88.

would have exposed that the informant's testimony was factually incredible.[73] Ms. Andrew was held in protective custody at the time of the fabricated confession, which made any conversation or communication with another inmate impossible. But the prosecution moved to bar Officer Tyra from testifying and succeeded.[74]

Ms. Andrew had also intended to call Police Officer Warren in her defense: He would have rebutted the prosecution's narrative that Ms. Andrew was indifferent to her ex-husband's health. Warren was the first officer who arrived at the scene of the crime and observed Ms. Andrew's concern for Robert Andrew: Warren found Ms. Andrew "kneeling at [the] side" of her husband when he first approached her at the scene of the crime.[75] Warren, too, was precluded from testifying in Ms. Andrew's defense. Finally, Officers Frost and Northcutt were also prevented from testifying for Ms. Andrew. They too would have inject doubt in the prosecution's theory of events.[76] But the trial judge ruled the defense had failed to provide adequate notice of their testimony. Their testimony, however, was memorialized in police paperwork, undermining the prosecution's claim that it was deprived of notice. On appeal, the Oklahoma Court of Criminal Appeals (OCCA) found that the trial court had abused its discretion by barring several vital defense witnesses. Yet the OCCA's finding offered no real benefit to Ms. Andrew because it found the error was ultimately harmless.[77]

Ms. Andrew Spent Sixteen Years in Solitary Confinement.

Ms. Andrew has been on Oklahoma's death row for seventeen years. She has been held in solitary confinement for sixteen of those years. During her time in solitary confinement, Ms.

[73] Trial Tr. 3776-77, Ex. SS.
[74] Trial Tr. 3480-81, Ex. RR.
[75] Trial Tr. 3779-82, Ex. NN.
[76] Many Oklahoma City police officers earn extra money working for neighborhood-watch groups as private security guards.
[77] *Andrew*, 164 P.3d at 197.

Andrew's only contact with other inmates was a brief ten-minute haircut every three months. Her concrete cell was sealed from the outside to prevent all human contact. Her daily recreational time, which consisted of pacing around a 15 feet by 30 by 15 triangular yard with high walls, was usually scheduled early in the morning before the sun rose. For months at a time in the winter, Ms. Andrew was deprived of the warmth of natural sunlight. When Ms. Andrew was escorted to the showers, she walked with iron restraints around her legs, cuffs around her wrists, and shackles around her waist that restricted her hands. After over a decade, Ms. Andrew fought, and finally received, a weekly visit from a priest for worship service.

Methods of Execution

For the past seventeen years, Ms. Andrew has awaited her execution. In that time, the State of Oklahoma has experimented with new and barbaric forms of execution. The last words spoken by Charles Warner, the last prisoner executed by the state of Oklahoma, are as harrowing as they are tragic: "It hurts. It feels like acid… my body is on fire."[78] The State executed Mr. Warner with a three-drug cocktail that uses midazolam, vecuronium bromide, and potassium chloride; however, an autopsy revealed that the State used the wrong drug to stop Mr. Warner's heart after syringes labeled potassium chloride were filled with vials containing potassium acetate.[79] Mr. Warner's botched execution in January 2015 was the second in a year. Oklahoma mismanaged Clayton Lockett's execution just eight months prior. Ms. Andrew may face a similar fate.

In April 2014, Oklahoma used the new three-drug lethal injection cocktail for the first time to try to execute Mr. Lockett. The authorities substituted sedatives and relied on midazolam to

[78] Dana Ford, *Oklahoma Executes Charles Warner*, CNN (16 Jan. 2015), https://www.cnn.com/2015/01/15/us/oklahoma-execution-charles-frederick-warner.

[79] Eyder Peralta, *Oklahoma Used the Wrong Drug to Execute Charles Warner*, NPR (8 Oct. 2015), https://www.npr.org/sections/thetwo-way/2015/10/08/446862121/oklahoma-used-the-wrong-drug-to-execute-charles-warner.

disastrous effect. The execution lasted 43 minutes, instead of ten.[80] Instead of being sedated, Mr. Lockett woke up midway through the procedure. Because of a misplaced IV line, the lethal chemicals seeped into his tissue instead of his vein.[81] There is no way to know the pain Mr. Lockett may have experienced during this excruciatingly long process. But witnesses observed that he was breathing heavily, writhing, clenching his teeth and straining to lift his head off the pillow.[82] The warden called off the execution because the State was uncertain how much of the drugs entered Mr. Lockett's body.[83] Mr. Lockett eventually died of a heart attack in the execution chamber sometime later.

The primary method of execution in Oklahoma is lethal injection, followed by three alternative methods: nitrogen hypoxia, electrocution, and firing squad.[84] Lethal injection in Oklahoma has three chemical options: pentobarbital, sodium pentothal, or the cocktail of midazolam, vecuronium bromide and potassium chloride.[85] Oklahoma has been on a six-year execution moratorium after the State botched the last two executions it conducted, but the State plans to resume executions by lethal injection in 2021.[86] In February 2020, Oklahoma state officials announced they would resume executions, after claiming to have acquired a "reliable supply of drugs" to perform executions. The State revealed it would be using midazolam, vecuronium bromide and potassium chloride, the very same drug cocktail used in Lockett and

[80] Associated Press, *Midazolam is Common Thread in 3 Lengthy Executions*, APNEWS (24 July 2014), https://apnews.com/article/a31bf46b3db74d158955768a09a9d38c.
[81] NBC News, *New Docs Detail Chaos of Oklahoma's Botched Execution of Clayton Lockett*, NBCNEWS (17 Mar. 2015), https://www.nbcnews.com/news/us-news/new-docs-detail-chaos-oklahomas-botched-execution-clayton-lockett-n325021.
[82] Bailey Elise McBride & Sean Murphy, *Oklahoma Inmate Dies After Execution is Botched*, APNEWS (29 Apr. 2014), https://apnews.com/article/mcalester-oklahoma-archive-executions-00a761ac0ea241a4b89f386bfa841d38.
[83] *Id*.
[84] Okla. Stat. Ann. Tit. 22 § 1014.
[85] Oklahoma Department of Correction, *Execution of Inmates Sentenced to Death* OP-040301 Attachment D (20 Feb. 2020), https://oklahoma.gov/content/dam/ok/en/doc/documents/policy/section-04/040301ad.pdf.
[86] Graham Lee Brewer & Manny Fernandez, *Oklahoma Botched 2 Executions. It Says It's Ready to Try Again*, NEW YORK TIMES (13 Feb. 2020), https://www.nytimes.com/2020/02/13/us/oklahoma-executions.html.

Warner's gruesome deaths.[87] The State's announcement came with no assurances against any further botched executions.[88]

All three of Oklahoma's lethal injection methods present an unnecessary risk of pain and suffering. Oklahoma used pentobarbital in the January 2014 execution of Michael Lee Wilson. His last words were "I feel my whole body on fire."[89] Sodium pentothal, the second chemical option, has been shown to cause pulmonary edema. The cocktail of midazolam, vecuronium bromide and potassium chloride also has a history of botched executions in Oklahoma. Midazolam is not approved by the Food and Drug Administration[90] for use as a general anesthetic. Protocols involving midazolam have caused unanticipated problems or side effects in at least seven recent executions.[91]

Oklahoma's other methods of execution include nitrogen hypoxia, electric chair and firing squad, but Oklahoma has not developed a protocol for any of these methods. Nitrogen hypoxia, or death by poison gas, has never before been used for execution. Oklahoma has not developed a plan to use nitrogen hypoxia even six years after first approving its use in executions. Electrocution also presents a significant risk of severe pain, agony, and suffering and Oklahoma has not executed anyone by electrocution in the modern era (since 1976). Lastly, Oklahoma has never executed

[87] Darla Shelden, *Oklahoma to Resume State Killings After Acquiring Same Lethal Injection Drugs Used in Botched Executions*, THE CITY SENTINEL (Feb. 13, 2020), https://www.city-sentinel.com/2020/02/oklahoma-to-resume-state-killings-after-acquiring-same-lethal-injection-drugs-used-in-botched-executions/.
[88] *Id.*
[89] Charlotte Alter, *Oklahoma Convict Who Felt "Body Burning" Executed With Controversial Drug*, TIME (10 Jan, 2014), https://nation.time.com/2014/01/10/oklahoma-convict-who-felt-body-burning-executed-with-controversial-drug/.
[90] The Food and Drug Administration is a governmental agency that is responsible regulating the production, efficacy, and security of pharmaceutical drugs. This regulation process includes authorizing drug use for specific purposes.
[91] Clayton Lockett, Robert Van Hook, Billy Ray Irick, Joseph Wood, Kenneth Williams, Dennis McGuire, and Ronald Smith all experienced botched executions using midazolam based lethal injection protocols.

anyone by firing squad nor have they developed a protocol to start. Ms. Andrew still does not know how Oklahoma plans to execute her.

LEGAL ARGUMENTS

Article XXVI of the American Declaration states: "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." The Commission has also looked to Article 14 of the International Covenant on Civil and Political Rights (ICCPR) as guidance for the minimum guarantees that tribunals must grant individuals facing criminal charges, which include "a fair and public hearing by a competent, independent and impartial tribunal established by law."[92]

This Commission specifically applies a "heightened scrutiny" to all cases "involving the death penalty."[93] Because of the importance of the right to life, the death penalty "differs in substance as well as in degree in comparison with other means of punishment."[94] The Commission has consequently determined that a State's application of the death penalty "warrants a particularly stringent need for reliability in determining whether a person is responsible for a crime that carries a penalty of death."[95] Similarly, state parties must ensure the most rigid possible compliance with the requirements of the American Declaration.[96] The ICCPR also imposes specific requirements courts must meet before sentencing individuals to death: "[S]entence of death may be imposed only for the most serious of crimes in accordance with the law in force at the time of the

[92] International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 171, Art. 14 (entered into force Mar. 23, 1976) [hereinafter ICCPR].
[93] *Julius Omar Robinson v. United States*, Case 13.361, Inter-Am. Comm'n H.R., Report No. 210/20, OEA/SER.L/V/II, doc. 224, ¶ 55 (2020).
[94] *Rocha*, ¶ 55.
[95] *Saldaño* ¶ 171, citing IACHR, Report No. 78/07, Case 12,625, Merits (Publication), Chad Roger Goodman, The Bahamas, October 15, 2007, ¶ 34.
[96] *Id.* at ¶ 56.

commission of the crime and not contrary to the provisions of the present Covenant . . . This penalty can only be carried out pursuant to a final judgment rendered by a competent court."[97] In considering the petitions before it, the Commission has emphasized that the guarantees enumerated in the ICCPR serve as the minimum threshold for a state's obligations when seeking the death penalty, and that capital proceedings specifically are held to the "strictest standards" of due process.[98]

I. THE UNITED STATES VIOLATED MS. ANDREW'S RIGHT TO EQUALITY AND NON-DISCRIMINATION PURSUANT TO ARTICLE II OF THE AMERICAN DECLARATION, AND HER RIGHT TO A FAIR AND IMPARTIAL TRIBUNAL UNDER ARTICLES XVIII AND XXVI OF THE AMERICAN DECLARATION.

Article II of the American Declaration provides that all persons are "equal before the law and have the rights and duties established in this Declaration, without distinction as to . . . sex." The United States denied Brenda Andrew her right to equality under the American Declaration when she was put on trial not only for a homicide but for her sexuality. As noted above, the crime for which Ms. Andrew was tried has none of the hallmarks of a capital case. Rather, Ms. Andrew's sentence rests on an amalgamation of State-manufactured evidence concerning her appearance, her clothing, her hair, her sexual practices, her maternal instincts, and her inability to react to tragedy in a stereotypically female manner. As one judge later recognized, the State introduced this evidence to secure Ms. Andrew's conviction as a "a bad wife, a bad mother, and a bad woman."[99] Because this Commission prohibits unequal treatment and discrimination on the

[97] ICCPR, Art. 6. *See also* Economic and Social Council Res. 1984/50 Safeguards Guaranteeing the Protection of the Rights of Those Facing the Death Penalty (May 25 1984) ("Capital punishment may only be carried out pursuant to a final judgement rendered by a competent court after legal process which gives all possible safeguards to ensure a fair trial.").

[98] *Bernardo Aban Tercero v. United States*, Case 12.994, Inter-Am Comm'n H.R., Report No. 79/15, OEA/Ser.L/II.156, doc. 32 ¶¶ 29, 30 (2015).

[99] Andrew v. State, 164 P.3d 176, 206 ¶ 1 (Okla. Crim. App. 2007) (Johnson J., dissenting), Ex. A.

grounds of sex, Ms. Andrew's trial violated her right to equality and, as a result, her death sentence cannot stand.

This Commission recognized in *William Andrews v. United States* that the presence of bias in the determination of a capital case leads to violations of the defendant's right to a fair and impartial trial.[100] By violating Article II of the American Declaration in the course of sentencing Ms. Andrew to death, the United States also violated Articles XVIII and XXVI—the rights to a fair trial and to an impartial hearing. The United States' violations of three Articles of the American Declaration in Ms. Andrew's capital trial render her death sentence arbitrary,[101] and her execution would thus amount to a violation of her right to life under Article

A. The Commission Must Apply a Heightened Standard of Review When Assessing Bias in Capital Cases, to Determine Whether There is a "Real Danger of Bias Affecting The Mind" of The Decisionmaker.

In "capital punishment cases, States Parties have an obligation to observe rigorously all the guarantees for an impartial trial,"[102] including the right to equality. The standard to assess the impartiality of capital proceedings, as articulated by the Commission, is an objective one that demands "reasonableness, and the appearance of impartiality."[103] The European Court of Human Rights also adopts this objective test for impartiality.[104] In *Remli v. France,* the European Court of Human Rights declared that national courts have an obligation to investigate when the impartiality of a tribunal is disputed on any ground that does not "immediately appear to be manifestly devoid of merit."[105]

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[100] *See William Andrews v. United States*, Case 11.139, Inter-Am. Comm'n H.R., Report No. 57/96, OEA/Ser.L/V/II.95, doc. 7, ¶¶ 171–74 (1997).
[101] *See id.*, ¶¶ 175–77.
[102] *Andrews* ¶ 172.
[103] *Id.* ¶ 159. *See also Saldaño* ¶ 186; *Moreno Ramos*, ¶ 66.
[104] *See, e.g. Piersack v. Belgium,* 53 Eur. Ct. H.R. (ser. A) (1982) and *Gregory v. United Kingdom,* 1997-I Eur. Ct. H.R. ¶¶ 45–46.
[105] *Remli v. France,* 1996-II Eur. Ct. H.R., ¶ 48.

The critical question, therefore, is "whether there is a *real danger of bias* affecting the mind" of the decision-maker.[106] The Commission has also acknowledged that when the bias "may relate to a prohibited ground of discrimination, such as [sex], it may also implicate a violation of the principle of equality and non-discrimination."[107] Applying this heightened standard for capital cases, the Commission must examine the bias in Ms. Andrew's trial and consider the danger that the State's discriminatory tactics undermined the fairness and impartiality of Ms. Andrew's trial.

B. Ms. Andrew's Right to a Fair Trial Must Be Examined in the Context of Her Right to Equality and Non-Discrimination.

The gender-based discrimination that permeated Ms. Andrew's trial rendered it fundamentally unfair. The State's violation of Ms. Andrew's rights to a fair trial and an impartial tribunal are inseparable from the State's violation of her right to equality. As described below, Ms. Andrew's trial judge allowed the prosecution to present a barrage of evidence to the jury whose only purpose was to demonstrate that Ms. Andrew did not conform with stereotyped notions of women's roles and behaviors. Even though Ms. Andrew was on trial for murder, the State presented hours of testimony on her "inappropriate" sexual practices, her "bad" mothering skills, her "provocative" clothing, hair, and makeup, and her "unfeminine" reaction to her husband's passing. The judge allowed this evidence over the repeated objections of Ms. Andrew's attorneys, encouraging jurors to forgo the presumption of innocence and to condemn Ms. Andrew for transgressing her prescribed gender roles as a mother and chaste wife. The repeated invocation of gendered stereotypes in the State's case in chief and closing arguments distorted how jurors viewed the evidence and thus presents "a real danger of bias affecting the mind of jurors."[108] Consequently,

[106] *Moreno Ramos*, ¶ 66 (emphasis added).
[107] *Id. See* Article II of the American Declaration (listing sex as a prohibited ground of discrimination).
[108] *Moreno Ramos* ¶ 66.

Ms. Andrew's trial was not impartial. It follows that her conviction and death sentence cannot stand.

C. The State Violated Ms. Andrew's Right to Non-Discrimination When it Deployed Gender-Based Stereotypes to Sentence Her to Death.

i. *Legal standards governing gender-based discrimination in legal proceedings.*

The law only permits the State to deprive a person of their liberty if it does so without discrimination, and by respecting their right to equality before the law.[109] Article II of the American Declaration protects the right of all persons to equality and to be free from discrimination on the basis of sex. The principles of equality before the law and non-discrimination are "among the most basic human rights, and are in fact recognized as *jus cogens* norms, 'because the whole legal structure of national and international public order rests on it.'"[110]

Under the Commission's jurisprudence, "discrimination" is any distinction or restriction based on a protected ground, such as sex, "which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms."[111] States must refrain from discriminating against an individual on a protected ground, and State actors must adopt positive measures to remedy discrimination where it occurs.[112]

A State's obligation to respect all people's right to equality and non-discrimination applies to the State's criminal justice system actors. This Commission has previously held that actions by State prosecutors and judges in capital trials can violate an accused person's right to equality and

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[109] *Saldaño* ¶¶ 192–194.
[110] *Robinson* ¶ 59 (citations omitted). *See also* IACHR, *Compendium on Equality and Non-Discrimination: Inter-American Standards* (Feb. 12, 2019) at 9, available at https://www.oas.org/en/iachr/reports/pdfs/Compendium-EqualityNonDiscrimination.pdf.
[111] *Cf. Robinson* ¶ 59. *See also* IACHR, *Compendium on Equality and Non-Discrimination: Inter-American Standards*, *supra* note 110, at 10. The Commission has recognized that discrimination can manifest itself either directly (i.e. intentional discrimination) or indirectly (i.e. involuntary discrimination by outcome). *See Robinson* ¶ 59.
[112] IACHR, *Compendium on Equality and Non-Discrimination: Inter-American Standards*, *supra* note 110, at 11.

non-discrimination.[113] State actors violate an accused person's right to equality *when a protected characteristic plays a central part in the imposition of a death sentence*. For example, in *Saldaño v. United States,* the Commission held that the prosecutor's decision to elicit witness testimony on the criminality of persons of Hispanic ethnicity, when the defendant was Hispanic, violated Article II because "the Commission regards it as indisputable that . . . race . . . played a part in the determination of the penalty to be imposed on Mr. Saldaño."[114]

The U.N. Committee on the Elimination of Discrimination Against Women (CEDAW Committee) provides critical guidance on how to recognize and adjudicate sex-based discrimination.[115] Article 2 of CEDAW "condemn[s] discrimination against women in all its forms" and obliges States to "pursue by all appropriate means . . . a policy of eliminating discrimination against women." Specifically, States must "refrain from engaging in any act or practice of discrimination against women" and must "ensure that public authorities and institutions . . . act in conformity with this obligation."[116] The CEDAW Committee has stipulated that Article 2 requires States "to ensure that women are protected against discrimination committed by public authorities, [including] the judiciary."[117]

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[113] This issue has, thus far, largely arisen in the context of State actors' displays of racial and ethnic discrimination. For example, in *Moreno Ramos v. United States*, the United States violated the complainant's right to equality "when a prosecutor included the question of the accused's nationality in his arguments and no control over the reference was exercised or objection raised by the internal authorities, including the judge in the case." *Moreno Ramos* ¶¶ 68–69. Similarly, in *Saldaño v. United States*, the Commission found that a prosecutor's decision to put on a witness to testify that Hispanics are more likely to commit crimes violated the defendant's right to equality. *Saldaño* ¶¶ 189, 194.

[114] *Saldaño* ¶¶ 189, 192–194. Importantly, the prosecution put on this witness during the penalty phase of a capital trial in Texas, at which stage the prosecution must establish the "future dangerousness" of the defendant in order to secure a death sentence.

[115] The United States is a signatory to the Convention on the Elimination of All Forms of Discrimination Against Women, meaning that the State cannot act contrary to the purpose of the treaty.

[116] Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, 1249 U.N.T.S. 13, Art. 2(d) (entered into force Sept. 3, 1981) [hereinafter CEDAW].

[117] Committee on the Elimination of Discrimination Against Women (CEDAW Committee), General Recommendation No. 28 on the core obligations of States parties under article 2 of CEDAW, U.N. Doc. CEDAW/C/GC/28 (Dec. 16, 2010) ¶ 17 [hereinafter CEDAW General recommendation 28].

Sex-based discrimination includes the disparate treatment of a person because they do not conform to socially prescribed gender norms. The CEDAW Committee has repeatedly emphasized the harm of gender-based stereotypes as a form of discrimination against women. A stereotype "is a generalized view or preconception of . . . characteristics possessed by, or the role that should be performed by, members of a certain group."[118] In this way, "a stereotype presumes that all members of a certain social group possess particular attributes or characteristics . . . or perform specified roles.[119] Gendered stereotypes have an egregious effect on women, particularly if they do not conform to their stereotypically specified roles. In light of this, Article 5 of CEDAW provides that States must "take all appropriate measures to modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and . . . all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotypes roles for men and women." The CEDAW Committee has recognized the acute harm of gender stereotyping that is prevalent in courtroom settings: "[s]tereotyping and gender bias in the justice system have far-reaching consequences for women's full enjoyment of their human rights. They impede women's access to justice . . . . Stereotyping distorts perceptions and results in decisions based on preconceived beliefs and myths rather than relevant facts. *Often, judges adopt rigid standards about what they consider to be appropriate behaviour for women and penalize those who do not conform to those stereotypes*."[120]

This Commission has recognized that gender stereotyping perpetuates discrimination against women in violation of Article II. In *Morales de Sierra v. Guatemala*, the Commission

[118] REBECCA J. COOK & SIMONE CUSACK, GENDER STEREOTYPING: TRANSNATIONAL LEGAL PERSPECTIVES, 9 (2010).
[119] *Id.* at 9.
[120] CEDAW Committee, General Recommendation No. 33 on women's access to justice, U.N. Doc. CEDAW/C/GC/33 (Aug. 3, 2015) ¶ 26 (emphasis added) [hereinafter CEDAW General recommendation 33].

concluded that Guatemala's enforcement of gendered stereotypes in a law prescribing women's marital roles constituted discrimination against women on the basis of their sex.[121] The Commission, interpreting the American Declaration and relying on CEDAW, held that where a State "appl[ies] stereotyped notions of the roles of women and men, [the State] perpetuate[s] de facto discrimination against women."[122] Additionally, the Commission underscored that a State's use of gendered stereotypes institutionalizes and normalizes the stereotype, rendering the harm caused by the stereotype harder to remedy.[123]

Both judges and prosecutors can perpetuate harmful gendered stereotypes that unfairly penalize women defendants. The CEDAW Committee has explained that "[j]udges, magistrates and adjudicators are not the only actors in the justice system who apply, reinforce and perpetuate stereotypes. Prosecutors, law enforcement officials and other actors often allow stereotypes to influence investigations and trials."[124] Women "should be able to rely on a justice system free of myths and stereotypes, and on a judiciary whose impartiality is not compromised by those biased assumptions."[125] The Committee concludes that "[s]tereotyping can, therefore, permeate both the investigation and trial phases *and shape the final judgement*."[126] To this end, CEDAW requires States to ensure that women are not exposed to discrimination in legal proceedings, "either as victims *or as perpetrators of criminal acts*."[127]

[121] *María Eugenia Morales de Sierra v. Guatemala*, Inter-Am. Comm'n H.R., Case 11.625, Report No. 4/01, ¶ 44 (2001).
[122] *Morales de Sierra* ¶ 44. *See also* ¶ 41 (interpreting the American Declaration with reference to the requirements of CEDAW regarding gender-based discrimination).
[123] *Morales de Sierra* ¶ 52.
[124] CEDAW General Recommendation 33, ¶ 27.
[125] *Id.* ¶ 28.
[126] *Id.* ¶ 27 (emphasis added).
[127] *Id.* ¶ 47 (emphasis added).

ii. The harm of gender-based stereotyping in criminal trials.

Stereotyping by State criminal justice system actors is harmful because it deprives women of equality in their trials. First, the State's reliance on stereotypes denies women defendants their individuality. Stereotypes remove nuance and classify people into categories. Practices that apply, enforce, or perpetuate a gender stereotype therefore "burden women [by] restrict[ing] them to culturally acceptable roles or behavior . . . [and the practice therefore] stigmatizes or punishes women for their failure to conform to such roles or behavior."[128] When a woman is subject to stereotyping, "she has been treated according to an impersonal generalized belief or preconception,"[129] as opposed to being treated as an individual. This practice is particularly nefarious in the context of criminal trials because defendants must be tried and convicted, if at all, on the basis of actions that they as individuals have carried out, and not for failure to conform to behaviors prescribed to the class of people to whom the defendant belongs.[130]

Second, State actors' use of stereotypes in criminal trials is harmful because they are dehumanizing.[131] As one scholar notes, "[i]ndividuals who clearly disconfirm stereotypical expectations tend to be devalued . . . Women who behave in line with the stereotype are evaluated more positively than women who seem to challenge gender-stereotypical expectations."[132] Moreover, research shows that individuals who violate stereotypical norms, like Ms. Andrew,

[128] Cook & Cusack, *supra* note 118, at 63.
[129] *Id.* at 61.
[130] Researchers specifically note the dangers posed by state actors' use of stereotypes in the trial context. "Court decisions can be a means of perpetuating gender stereotypes. Such decisions not only deny the rights of the individual woman who is before the court, but also degrade similarly situated women by perpetuating wrongful gender stereotypes of the subgroup of women to which they belong." *See* Cook & Cusack, *supra* note 118, at 87.
[131] Scholars of racial stereotypes and prosecutorial bias explain that "stereotypes . . . lessen empathy, particularly when connected to dehumanization." This is important in the context of a trial because "[e]motions also play a significant role in priming for retribution. 'When a decision-maker feels fear, anger, or both, the need for retribution automatically becomes heightened.'" *See* Mary Nicol Bowman, *Confronting Racist Prosecutorial Rhetoric at Trial*, 71 CASE W. RES. 39, 60 (2020) (quoting Justin D. Levinson, Robert J. Smith & Koichi Hioki, *Race and Retribution: An Empirical Study of Implicit Bias and Punishment in America*, 53 U.C. DAVIS L. REV. 839, 854 (2019)).
[132] Naomi Ellemers, *Gender Stereotypes*, 69 ANN. REV. PSY. 275, 286 (2018).

arouse public indignation and encourage negative judgment about her behavior and character.[133] As a result, jurors focus keenly on counter-stereotypical information about a defendant, and find it easier ostracize, dehumanize, and ultimately punish a defendant who is outside of their stereotypical expectations.

An example of a prevalent gendered stereotype is the categorization of women as mothers and caregivers. The belief that "motherhood is women's natural role and destiny"[134] has been a pervasive and persistent stereotype across time and societies,[135] to the extent that a member of the CEDAW Committee has stated that "the most globally pervasive of the harmful cultural practices . . . is the stereotyping of women exclusively as mothers."[136] Implicit in this stereotype is that women should be good mothers, as it is their natural role, and women who transgress the stereotype of good motherhood are judged particularly harshly—they are selfish, unnatural, and failures.[137]

A further example of a prevalent gendered stereotype is the expectation that women conform to prevailing concepts of sexual chastity and modesty.[138] American society "scripts chaste sexual identities for women,"[139] meaning that the public expects sexual fidelity from women and condemns women who have multiple sexual partners as counter to societal norms.[140] Moreover,

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[133] *Id.* at 282.
[134] Cook & Cusack, *supra* note 118, at 11.
[135] *Id.* at 2, 22.
[136] Frances Raday, *Culture, Religion, and CEDAW's Article 5(a)*, in HANNA BEATE SCHÖPP-SCHILLING & CEES FLINTERMAN (EDS.), THE CIRCLE OF EMPOWERMENT: TWENTY-FIVE YEARS OF THE UN COMMITTEE ON THE ELIMINATION OF DISCRIMINATION AGAINST WOMEN, 71 (2007). This Commission also recognized the prevalence and harm of the "women as natural mothers" stereotype in *Morales de Sierra v. Guatemala*. *See also President of the Republic of South Africa v. Hugo*, 1997 (4) SA 1 (CC) ¶ 80 (S. Afr., Constitutional Court) (Kriegler J., dissenting), in which Justice Kriegler of South Africa calls the stereotype of women as mothers "a relic and a feature of the patriarchy."
[137] Siobhan Weare, *"The Mad," "The Bad," "The Victim": Gendered Constructions of Women Who Kill within the Criminal Justice System* 2 LAWS 337, 343–44, 348 (2013); *see also* Cook & Cusack, *supra* note 118, at 53 (highlighting that women are expected to subordinate their own needs and interests to those of their children).
[138] Cook & Cusack, *supra* note 118, at 18.
[139] *Id.* at 27.
[140] *Id.*

women are expected to be sexually passive and meek;[141] women who have sexual autonomy are thus transgressive of their prescribed gender roles. Because of the prevalence of this stereotype, women who are seen as "promiscuous" are condemned particularly harshly. Women who have active sex lives, especially women who have sexual partners outside of marriage, are perceived to have loose sexual mores, be sexually deviant, and dress immodestly, thus inviting harm.[142] Indeed, scholars have noted that women who seen as promiscuous and who "are not modestly dressed as a 'good' woman should be" are perceived as less worthy of respect and dignity.[143]

The CEDAW Committee recognizes the harm of these gendered stereotypes in the trial context, and has repeatedly found that women are deprived of their right to be free from discrimination when stereotyping is prevalent in their legal proceedings. In *X. v. Timor Leste*, the Committee found evidence of impermissible discrimination in the complainant's trial when the State court partly based its verdict on her perceived violation of women's traditional roles in marriage and society.[144] The complainant, who was accused of murdering her husband, was deemed by State actors to be a bad wife because she did not protect and stand by her husband.[145] This assessment of a woman's role in a marriage was grounded in stereotypical views about "appropriate" behavior for women. The Committee concluded that the State court had

[141] *Id.* at 52.
[142] *See* R. v. Ewanchuk, [1999] 1 S.C.R. 330, ¶ 82 (Can., Supreme Court). In this rape case, the Supreme Court of Canada explained that arguing that women who dress immodestly are inviting rape draws on stereotypical notions of what women should wear. The Supreme Court of Canada condemned the stereotype that women who dress "immodestly" are looking for sex.
[143] Cook & Cusack, *supra* note 118, at 67 (noting that many rape cases involve arguments about women's clothing, which is sometimes used to justify rape by arguing that a woman who is "immodestly" dressed invited their sexual assault); Weare, *supra* note 137, at 347 (2013).
[144] *See X. v. Timor Leste*, CEDAW Committee, U.N. Doc. CEDAW/C/69/D/88/2015 (2018).
[145] *See id.* ¶ 6.5. When sentencing the complainant, one of the State's judges told her that the court had decided to give her a lengthy sentence because "you have taken the life of one of the nation's people . . . . As a wife, you must protect your husband." *See id*., ¶¶ 2.15, 6.5.

discriminated against the complainant on account of her sex, and thus compromised the impartiality of her trial.[146]

The Committee has similarly explained that women experience impermissible discrimination when prosecutors and judges employ stereotypes about women's roles in the family in the context of domestic violence proceedings[147] and child custody disputes.[148] The integrity of a State's legal proceedings is irrevocably compromised when the outcome of proceedings is grounded at least in part in gendered stereotypes.[149]

Because of the inevitable prejudice that results from stereotype-infected trials, a State must take measures to counteract gendered stereotypes in the courtroom wherever they occur. In *X. v. Timor Leste*, the CEDAW Committee noted that the State took no action to address discriminatory comments made about the complainant by the trial judge, in violation of Article 2.[150] In that case, the trial judge enjoined the complainant that "as a wife you must protect your husband."[151] According to the CEDAW Committee, this statement revealed "a pattern of deeply held bias" and was thus "enormously detrimental to the [complainant]."[152] The Committee concluded that States are thus "obliged to react actively against discrimination against women"[153] by "abolish[ing] customs and practices that constitute discrimination."[154] In order to achieve this, the Committee

[146] *See id.* ¶ 6.5. *See also* CEDAW General Recommendation 33 ¶ 26.
[147] *See X. and Y. v. Russian Federation*, CEDAW Committee, U.N. Doc. CEDAW/C/73/D/100/2016, ¶ 9.9 (2019) (finding that the State had relied on gendered stereotypes of women's subordination to their husbands to determine that the complainant had not experienced domestic violence).
[148] *See J.I. and E.A. v. Finland*, CEDAW Committee, U.N. Doc. CEDAW/C/69/D/103/2016, ¶ 8.6 (2018) (finding that the State's law enforcement officers had used stereotyped notions of parenting to place a child with their mother in a child custody dispute).
[149] *See X. v. Timor Leste*, ¶ 6.6.
[150] *See id.* ¶¶ 2.15, 6.5.
[151] *Id.*
[152] *Id.* ¶ 6.5.
[153] *Id. See also X. and Y. v. Russian Federation*, ¶ 9.9 (holding that States must "not only to take steps to eliminate direct and indirect discrimination and improve the de facto position of women, but also to modify and transform gender stereotypes and eliminate wrongful gender stereotyping, a root cause and a consequence of discrimination against women.").
[154] *S.T. v. Russian Federation*, CEDAW Committee, U.N. Doc. CEDAW/C/72/D/65/2014, ¶ 9.5 (2019).

has recommended that States "provide mandatory training for judges [and] lawyers . . . including prosecutors," on gender stereotyping and discrimination.[155]

iii. The United States discriminated against Ms. Andrew on account of her sex during her legal proceedings.

The United States subjected Brenda Andrew to a trial that focused primarily on her appearance, her sexuality, and her mothering, instead of her criminal liability. In doing so, the State violated her right to equality and non-discrimination. The prosecution used Ms. Andrew's gender, a protected characteristic under Article II of the American Declaration, to secure her death sentence when it relied on a number of gendered stereotypes throughout its presentation at trial. Judge Susan Bragg, the trial judge in Ms. Andrew's case, overruled almost every one of the defense counsel's objections to this discriminatory evidence. Indeed, Judge Bragg determined that Ms. Andrew's mothering was a proper subject for the jurors to consider.[156]

a. Testimony about Ms. Andrew's appearance and sexuality

The prosecution in Ms. Andrew's trial introduced a litany of evidence that typecast Ms. Andrew as a promiscuous, sexually deviant woman who was unworthy of life. Ms. Andrew's appearance featured prominently at her trial. Even though Ms. Andrew's clothing was entirely irrelevant to establishing the facts of the crime, the prosecution asked four separate witnesses to describe the clothing that Ms. Andrew wore on days years before the offense. [157] Witnesses were repeatedly asked to comment on Ms. Andrew's modesty or lack thereof. State prosecutors opened their direct examination of one witness with questions about Ms. Andrew's attire: "can you

[155] *E.A. v. Finland*, ¶ 10(b)(iv); *see X. and Y. v. Russian Federation*.
[156] During one of defense counsel's many evidentiary objections, Judge Bragg ruled that evidence of Ms. Andrew's mothering was admissible because her murder trial was "kinda" a "custody case." *See* Trial Tr. 2659, Ex. DD.
[157] On no occasion during the trial was Ms. Andrew's clothing or hair relevant during the trial. The testimony about her appearance was not necessary to establish her identity, for example. The only purpose of this evidence was to establish Ms. Andrew's deviance from societally accepted norms regarding women's modesty and chastity.

describe the way Ms. Andrew presented herself, please?"[158] When this witness did not give the prosecutors the answer they desired, they pressed the witness until he relented: "[Ms. Andrew's] dress was very tight, very short with a lot of cleavage she exposed."[159] Prosecutors encouraged another witness to offer his opinion about Ms. Andrew's fashion choices: "Ms. Andrew wasn't wearing attire that I would consider appropriate . . . She had on a leather—it was a leather outfit."[160] Prosecutors returned to the theme of clothing later in this witness's testimony, asking "When you arrived that day did you notice anything about her appearance?"[161] to which the witness eventually described Ms. Andrew's choice of clothing as "provocative."[162] Yet another witness testified about Ms. Andrew's "improper clothing."[163] The State asked a fourth witness to "describe the attire that [Ms. Andrew] would wear when she came into the store," to which the witness replied that she "dressed sexy" and wore "short skirts, low cut tops, just sexy outfits, provocative."[164]

Prosecutors also focused on Ms. Andrew's hair. The State extracted testimony from one witness who explained how Ms. Andrew "had rolled her hair and it was really, really big."[165] Another witness commented that Ms. Andrew had "very Gothic, long black hair."[166] A third witness, the babysitter who worked for Ms. Andrew and her family testified that Ms. Andrew's "hair was really messed up" when she had returned from the grocery store, suggesting that Ms. Andrew had not actually been shopping but had instead seen a lover.[167]

[158] Trial Tr. 320, Ex. E.
[159] *Id*. at 323
[160] Trial Tr. 343, Ex. EE.
[161] *Id*. at 348.
[162] Trial Tr. 356, Ex. FF.
[163] Trial Tr. 1112, Ex. GG.
[164] Trial Tr. 246, Ex. B.
[165] Trial Tr. 343, Ex. EE.
[166] Trial Tr. 323, Ex. E.
[167] Trial Tr. 347, Ex. EE.

Ms. Andrew's choice of clothing or pick of hairstyle in the years leading up to the offense was not in any way related to the State's theory regarding a garage shooting. Rather, as Judge Johnson recognized on direct appeal in her dissenting opinion, the repeated references to Ms. Andrew's hair and clothing were calculated to prompt jurors' disapproval.[168] Prosecutors went to great lengths to sexualize Ms. Andrew, and then used evidence of her sexuality to encourage jurors' condemnation of Ms. Andrew as a bad woman, who succumbed to base and immoral sexual impulses. The prosecution's strategy reached a crescendo in their penalty phase closing argument, during which the prosecutor paraded Ms. Andrew's thong underwear in front of the jury.[169] The underwear, according to the prosecutor, was proof of her lack of grief—and hence, her culpability—because it was contrary to societal expectations of what a "grieving widow" should wear.[170] The prosecutor then went further still, and called Ms. Andrew a "slut."[171] With the condemnation of Ms. Andrew's sexuality complete, the jury sentenced her to death.

The ostracization of women who do not conform to stereotypical notions of female chastity is not new. Social science researchers have long understood that when women are portrayed in a sexualized manner they will be associated with evil or bad behaviors.[172] Indeed, one scholar has commented that prosecutors will reference a woman's sexual history during trials to demonize her and highlight that she has violated societal expectations of female chastity and morality.[173] Such

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[168] *See* Andrew v. State, 164 P.3d 176, 206 ¶¶ 1–7 (Okla. Crim. App. 2007) (Johnson J., dissenting), Ex. A.
[169] Trial Tr. 4101, Ex. H.
[170] The prosecutor, while displaying Ms. Andrew's underwear, stated that it would not be "appropriate" attire in an "act of grief." *Id.*
[171] *Id.* at 4101, 4103; Trial Tr. 4125, Ex. D. "Slut" is a slur used to refer to a promiscuous woman. *See* Merriam Webster, 'Slut' https://www.merriam-webster.com/dictionary/slut (last accessed May 10, 2021) ("*disparaging* + *offensive*: a promiscuous person; someone who has many sexual partners—usually used of a woman.").
[172] Patricia Easteal et al., *How are Women Who Kill Portrayed in Newspaper Media? Connections with social values and the legal system*, 51 WOMEN'S STUD. INT'L F. 31 (2015); Elizabeth K. Carll, *News Portrayal of Violence and Women*, 46 AM. BEHAV. SCIENTIST 1601 (2003).
[173] *See, e.g.*, Rachael E. Collins, *'Beauty and bullets': A content analysis of female offenders and victims in four Canadian newspapers*, 1 J. SOC. 11 (2014).

was the narrative that State prosecutors spun in Ms. Andrew's case. Portraying female offenders as hypersexual serves as a powerful strategy that prosecutors can exploit to denigrate their adversary and render her blameworthy. As sociologist Patricia Esteal explains, these women are "doubly deviant . . . because they breach general social expectations as well as transgressing appropriate feminine behaviour."[174] As such, the sexualization of a female offender encourages jurors to view her "in opposition to the traditional characterization of her sex as gentle, nurturing and angelical. She is far closer to the 'whore', the 'bad' woman end of the scale, since her behaviour is deviating from the 'natural' feminine traits."[175] In this way, the prosecution urges jurors to pass off such a female offender as "evil" on the basis of characteristics that are unrelated to the offenses with which she is charged.

State prosecutors further encouraged the jury to sentence Ms. Andrew for transgressing sexual mores when they asked two men who had nothing to do with the crime to testify about their relationships with Ms. Andrews from years before. Among the prosecutor's first witnesses were two of Ms. Andrew's former sexual partners. The prosecutor spent three and a half hours over the first two days of trial with these witnesses, largely asking them to offer irrelevant but inflammatory details of their sexual relationships with Ms. Andrew for the jury.[176] One former partner, James Higgins, gave testimony about Ms. Andrew "coming on to [men]"[177] and recounted in detail the motels where he and Ms. Andrew had had sex in 1999, five years before the offense.[178] The State also led Mr. Higgins to recount other locations where he had slept with Ms. Andrew.[179] Mr.

[174] Easteal, *supra* note 172, at 31.
[175] *See id.*
[176] Trial Tr. 245–78; 392–417. James Higgins, for example, was the third witness called by the prosecution and his testimony immediately focused on Ms. Andrew's "sexy" and "provocative" attire, before moving on to their sexual relationship. *See* Trial Tr. 246, Ex. B; Norman Richard Nunley was another of Ms. Andrew's former sexual partners. The prosecution elicited similar testimony from Nunley, the State's sixth witness. Trial Tr. 392.
[177] Trial Tr. 278, Ex. HH.
[178] Trial Tr. 251, Ex. B.
[179] *Id.*

Higgins knew nothing about the crime. His relationship with Ms. Andrew was in no way connected to Robert Andrew's death. Even the prosecution conceded this. Rather, airing Ms. Andrew's affairs in explicit detail only served to contribute to the growing portrayal of her as a bad woman. Prosecutors exploited this irrelevant and damaging testimony in their closing arguments, drawing the jurors' attention to her "boyfriends," her "affairs," and the men "she's been having sex with."[180]

As noted above, it is well-established that women are vilified for their sexual autonomy, especially promiscuous acts. The CEDAW Committee has commented that "women are also disproportionately criminalized owing to their situation or status, such as . . . having been accused of adultery."[181] Adultery remains a crime reserved for women in many societies across the world.[182] In Oklahoma, where Ms. Andrew lived and where her jury was drawn, adultery is a felony crime.[183] But even where it is not a crime, women who have sex outside of marriage are judged more harshly than men.[184]

The jury's exposure to four weeks of irrelevant and lurid information about Ms. Andrew's sexual mores and promiscuity was inherently prejudicial. As the CEDAW Committee has noted, "stereotyping distorts perceptions and results in decisions based on preconceived beliefs and myths rather than relevant facts."[185] In Ms. Andrew's case, the State weaponized Ms. Andrew's sexuality to dilute its burden of proof and make it easier for the jury to convict and sentence her to death.

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[180] *See, e.g.*, Trial Tr. 3903, 4064, 4073, 4075, 4122, Ex. II.
[181] CEDAW General Recommendation 33, ¶ 48.
[182] OHCHR, *Adultery as a Criminal Offense Violates Women's Rights*, https://www.ohchr.org/Documents/Issues/Women/WG/AdulteryasaCriminalOffenceViolatesWomenHR.pdf (last accessed May 10, 2021).
[183] Okla. Stat. Ann. tit. 21, §§ 871, 872 (West).
[184] *See* UCLA Health, *Study Finds Cultural Differences in Attitudes Towards Infidelity, Jealousy* (2019) https://www.uclahealth.org/study-finds-cultural-differences-in-attitudes-toward-infidelity-jealousy; PR Newswire, *The Good Wife Study: Women Still Judged More Harshly For Adultery Than Men* (2019) https://www.uclahealth.org/study-finds-cultural-differences-in-attitudes-toward-infidelity-jealousy.
[185] CEDAW General Recommendations 33, ¶ 26 (emphasis added).

b. Stereotypes regarding Ms. Andrew's role as a mother

The State also produced evidence at trial that drew on gendered stereotypes about Ms. Andrew's mothering to secure her death sentence. As noted above, the stereotype of women as mothers and nurturers is pervasive and longstanding.[186] Presenting a woman as contrary to her "natural role" is, thus, particularly potent as a prosecutorial strategy to shape jurors' views of her.

Prosecutors in Ms. Andrew's case consistently elicited testimony throughout the three weeks of the State's case in chief that painted Ms. Andrew as an uncaring person who had failed as a mother. Though Ms. Andrew's ability to care for her children had no bearing on the crime with which she was charged, the prosecution continually asked witnesses for their opinion on Ms. Andrew's capabilities as a mother. State prosecutors asked, "does a good mother run off to Mexico with her children?"[187] to one witness, followed by "does a good mother invite her boyfriends over?"[188]. The State questioned another witness no fewer than nine times about what a "good mother" would do, and whether Ms. Andrew was such a "good mother":

> "Does a good mother take her children four days after their father has been murdered to Mexico? . . . Do you believe that a good mother would have her children make book reports from murder mystery novels? . . . Do you believe that a good mother would program their children to chant 'I want my mommy's family? . . . Do you believe that a good mother would kill their children's father? . . . Would a good mother not take their children to their father's funeral? Does a good mother manipulate [her daughter]? . . . Do you think [Ms. Andrew is] still a good mother?"[189]

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[186] *See* notes 134–137 and accompanying text.

[187] Trial Tr. 419, Ex. K.

[188] *Id.* at 420.

[189] Trial Tr. 4312–14, 4345, Ex. L. Later in the trial, the State followed this line of questioning with the same witness later with two more questions about what a "wonderful mother" and a "good mother" would do. Trial Tr. 4345–46. This particular line of questioning occurred on cross examination. When Ms. Andrew's defense counsel objected to this line of the questioning, the trial judge determined that they had "opened the door" to such testimony by claiming that Ms. Andrew was a "wonderful" mother to her children. *See id.* at 4311. The defense's presentation of Ms. Andrew as a good mother to her two children does not excuse the way the State weaponized gendered stereotypes about mothering to secure its death sentence. During the penalty phase of a capital trial, defense counsel is required to present mitigating evidence to demonstrate the defendant's community ties. Bringing in evidence of Ms. Andrew's relationship with her two small children was essential to the defense's mitigation case but by bringing this evidence in, defense counsel did not "open the door" to the State's gendered attacks grounded in stereotypes. Indeed, were it

Prosecutors also asked witnesses about the manner in which Ms. Andrew spoke to her children, eliciting testimony from one witness that "she was talking to her child in a loud and threatening voice,"[190] and about the books she gave them to read, since "a good mother [would not] give her child murder mysteries to read . . . . That is clearly indicative that she is not a good mother."[191]

The State's heavy-handed reliance on gendered stereotypes about motherhood and Ms. Andrew's transgressions of those stereotypes violates Article II of the American Declaration. Prosecutors drew upon traditional notions of women's roles in the society and in the family to condemn Ms. Andrew's behavior; the State called upon the jury to condemn Ms. Andrew on the basis of "preconceived beliefs and myths" about motherhood, "rather than relevant facts."[192] Contrary to the CEDAW Committee's requirements, Ms. Andrew was "penalized [for] not conforming to those stereotypes."[193] This made it easier for jurors to view her as abnormal, immoral, and to sentence her to death. Her deviation from her expected gender role made her disposable. Judge Arlene Johnson explained that the "effect" of this gendered testimony was "to trivialize the value of [Ms. Andrew's] life in the minds of the jurors."[194]

c. Testimony about Ms. Andrew's affect

Finally, Ms. Andrew's gender played a central part in her death sentence because the State relied on stereotypical ideas of femininity in persuading the jury to sentence her to death. The prosecution asked every witness they called from the scene of the crime to comment on Ms. Andrew's demeanor multiple times. In just over a day of testimony, Ms. Andrew's demeanor, including her flat affect and lack of tears, was brought up in the State's direct examinations no

permissible for the State to respond with stereotype-based attacks to all character-based mitigation evidence, defendants' rights to be free from discrimination during capital trials would be eviscerated.

[190] Trial Tr. 995, Ex. JJ.

[191] Trial Tr. 2345, 2349, Ex. N.

[192] CEDAW General Recommendations 33, ¶ 26.

[193] *Id.*

[194] Andrew v. State, 164 P.3d 176, 206 ¶ 7 (Okla. Crim. App. 2007) (Johnson J., dissenting), Ex. A.

fewer than fifteen times.[195] Over the course of Ms. Andrew's trial, witnesses spoke of Ms. Andrew's quiet demeanor after the offense a total of 24 times.

A prevalent stereotype of women is that they are highly emotional. Multiple studies have concluded that women have historically been portrayed as less rational, less disciplined, and less emotionally stable than men.[196] Women are thus expected to behave emotionally, and when they don't, they are regarded with suspicion. A woman's flat affect after a traumatic event runs counter to this stereotype–even though emotional numbing is a common response to trauma.[197] The State was not subtle in its attempts to play on gendered stereotypes. The prosecutor asked one witness to comment on whether Ms. Andrew's affect conformed with his expectations about how a woman should react to her husband's death, leading the witness to state: "I thought she was unusually calm. I thought that was odd . . . usually they're very emotional, very distraught . . . so normally you have to calm them down . . . but with her she was just unusually calm. It actually kinda bothered me."[198] The State played up Ms. Andrew's failure to display "proper" emotion to paint her as cold, calculating, and unwomanly, rendering her worthy of capital punishment: "until today she's never shed a tear. She never shed a tear until people started testifying about what she deserved and that's another reason why she deserves the death penalty."[199]

Despite the numerous opportunities to do so, the State has never acknowledged or remedied the gender-based discrimination Ms. Andrew suffered during her capital trial. At trial, Ms. Andrew's attorneys raised over 150 objections to the State's evidence regarding Ms. Andrew's

[195] Trial Tr. 1800–2285
[196] *See, e.g.*, P Chodoff, *Hysteria and Women*, 139 AM. J. PSYCHIATRY 545 (1982); Weare, *supra* note 137, at 337; Marissa Harrison et al., *Female Serial Killers in the United States: means, motives, and makings*, 26 J. FORENSIC PSYCHIATRY & PSYCHOL. 17 (2015).
[197] *See, e.g.*, Eve B. Carlson et al., *Dissociation in Posttraumatic Stress Disorder Part I: Definitions and Review of Research*, 4 PSY. TRAUMA: THEORY, RES., PRACTICE, & POL'Y 479 (2012).
[198] Trial Tr. 2030, Ex. W.
[199] Trial Tr. 4475, Ex. T.

appearance and her sexual relationships on the grounds that the testimony was overly prejudicial or irrelevant.[200] The trial judge overruled the great majority of these objections. Ms. Andrew's attorneys also moved for a mistrial over 60 times in response to the trial judge's biased evidentiary rulings, but those too were denied. The trial judge rarely provided an explanation for her admissibility rulings, but on one occasion rationalized allowing the extended testimony on Ms. Andrew's bad mothering by telling defense counsel "you opened the door as a wonderful mother."[201] On another occasion, the trial judge ruled that evidence of Ms. Andrew's mothering was admissible because her murder trial was "kinda" a "custody case."[202] And on a third occasion, the judge ruled that the State's evidence of Ms. Andrew's prior sexual history was admissible because "it relates to her ability to manipulate men."[203] The trial judge thus enabled the State to present testimony grounded in gendered stereotypes and even encouraged the State to continue discriminating against Ms. Andrew on account of her gender. On appeal, other judges recognized the harm of the trial judge's actions. Judge Johnson found that the inclusion of this evidence violated the Oklahoma Evidence Code, because prior bad acts are not admissible as proof of bad character.[204] The CEDAW Committee's words resonate with particular force here: "Often, judges adopt rigid standards about what they consider to be appropriate behaviour for women and penalize those who do not conform to those stereotypes."[205] The trial judge penalized Ms. Andrew for not conforming to expectations of appropriate behavior for women instead of remedying repeated discrimination from State prosecutors.

[200] The Oklahoma Evidence Code prohibits the admission of testimony that is irrelevant or that is prejudicial to the point of outweighing its probative value. Okla. Stat. Ann. Tit. 12, §§ 2401–03 (West).
[201] Trial Tr. 2347, Ex. N.
[202] Trial Tr. 2659, Ex. DD.
[203] Trial Tr. 2958, Ex. G.
[204] Andrew v. State, 164 P.3d 176, 206 ¶ 1 (Okla. Crim. App. 2007) (Johnson J., dissenting), Ex. A.
[205] CEDAW General Recommendations 33, ¶ 26 (emphasis added).

This Commission's jurisprudence, in line with international human rights norms, "does not require discrimination to be purposive, conscious or intentional to violate human rights."[206] Therefore, Ms. Andrew does not have to establish that the State purposefully sought to employ stereotypes to secure her death sentence in order to establish a violation of Article II, but rather that discrimination played a prominent role in her legal proceedings. The abundant evidence before the Commission establishes that the United States allowed Ms. Andrew's trial to be corrupted by a barrage of irrelevant evidence about how she deviated from stereotypical gender roles. The State treated Ms. Andrew differently because she did not live up the patriarchal gender roles ascribed to her. State prosecutors deliberately elicited this harmful evidence from witnesses because it had the predictable result of making it easier for jurors convict her and sentence her to death.

D. The State Violated Ms. Andrew's Right to an Impartial Tribunal Because Bias Rooted in Gendered Stereotypes Permeated Ms. Andrew's Trial.

This Commission has already acknowledged that violations of the right to equality can lead to violations of a petitioner's right to an impartial hearing.[207] As noted above, the Commission has adopted an objective standard to assess violations of the right to an impartial tribunal. Therefore, where a State violates the petitioner's right to equality in the context of a criminal trial, the State will also violate the petitioner's right to an impartial tribunal when the discrimination giving rise to the Article II violation presents "a real danger of bias affecting the mind of the relevant [decisionmaker]."[208] According to this standard, a petitioner does not have to establish discriminatory intent on the part of State actors in order to claim that bias tainted her trial. Rather, where a petitioner demonstrates the reasonable and objective appearance of bias created by State

[206] IACHR, *Police Violence Against Afro-descendants in the United States*, OEA/Ser.L/V/II, Doc. 156, ¶ 197 (Nov. 26, 2018).
[207] *Moreno Ramos* ¶ 68.
[208] *Saldaño* ¶186; *Moreno Ramos* ¶ 66.

actors, she can establish a violation of her rights to a fair and impartial hearing under Articles XVIII and XXVI of the American Declaration.[209]

There are a number of ways a petitioner can establish that bias affected the mind of the decisionmaker in her trial. First, the Commission will find that a State did not provide the petitioner with an impartial trial where the record reflects ample evidence of bias that the court did nothing to remedy. In *Andrews v. United States*, the Commission found that the defendant "did not receive an impartial hearing because there was a reasonable appearance of 'racial bias' by some members of the jury, and the trial court's failure to question the jury about this evidence tainted the trial and death sentence."[210] During Mr. Andrews' trial, a napkin with the words "Hang the Nigger's" (sic) was found amongst the jurors, but the trial judge denied defense counsel's requests for a mistrial and to question the jurors. Based on these facts, this Commission found the reasonable appearance of bias.[211]

Similarly, the Commission will find that a State did not provide the petitioner with an impartial trial where the trial prosecutor drew on prejudice to advance his arguments at trial. In *Moreno Ramos v. United States*, at the sentencing hearing, the prosecutor revealed that Mr. Moreno Ramos' was an undocumented immigrant from Mexico. The trial judge offered no limiting instruction or remedy. The Commission found there was a "real danger" and a "real possibility" that jurors had considered Mr. Moreno Ramos' nationality to his detriment, given the cultural prejudice against non-citizens in the United States. [212] As a result, State had violated his right to be tried by an impartial tribunal.

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[209] *See Andrews* ¶ 165. *Cf.* IACHR, *Police Violence Against Afro-descendants in the United States*, OEA/Ser.L/V/II, Doc. 156, ¶ 197 (Nov. 26, 2018) (finding that bias does not have to be "purposive, conscious or intentional to violate human rights.").
[210] *Andrews* ¶ 165.
[211] *Id.*
[212] *Moreno Ramos* ¶¶ 68–69.

As in *Andrews*, the prosecutors' actions—and the judge's failure to remedy them—gave rise to a "reasonable appearance of [gender] bias." The relentless typecasting of Ms. Andrew as a "bad wife, bad mother, and a bad woman"[213] establishes the appearance of bias this Commission requires: as explained *supra*, these stereotypes carry significant negative connotations, especially in deeply religious and traditional Oklahoma.[214] Indeed, Judge Johnson specifically noted that Ms. Andrew's trial was tainted with bias: "The jury was allowed to consider such evidence, with no limiting instruction, in violation of the fundamental rule that a defendant must be convicted, if at all, of the crime charged and not of being a bad woman. . . . [I cannot] find this jury was unaffected by that evidence in deciding whether this defendant should live or die."[215]

Ms. Andrew's trial record reflects abundant bias that the court did nothing to remedy. In *Andrews*, the Commission focused primarily on a racial slur that a juror wrote on a napkin to provide evidence of racial bias, and the Commission should again focus on language that the jury was exposed to here. The jury twice heard the prosecution refer to Ms. Andrew by the pejorative term "slut,"[216] and they also heard testimony calling her a "hoochie."[217] These slurs followed three

[213] Andrew v. State, 164 P.3d 176, 206 ¶¶ 1 (Okla. Crim. App. 2007) (Johnson J., dissenting), Ex. A.

[214] In Oklahoma, eighty percent of the population is Christian. *See* Pew Research Center, *State Study: Oklahoma*, https://www.pewforum.org/religious-landscape-study/state/oklahoma/ (last accessed May 10, 2021). The percentage of evangelical Christians in Oklahoma is almost twice the national average for the United States. *Id.* Two thirds of the population in Oklahoma say that religion plays a "very important" role in their lives and they live by religious teachings. *Id.* The backdrop of deep religiosity in Oklahoma matters because researchers have long documented that deeply Christian populations in the southern United States, especially evangelical groups, hold traditional views on gender roles for women. *See, e.g.*, Joy C. Charlton, *Revisiting Gender and Religion*, 57 REV. RELIGIOUS RES. 331 (2015); Barbara Hargrove et al., *Religion and the Changing Role of Women*, 480 ANNALS OF AM. ACADEMY POL. & SOC. SCI. 117 (1985). In these communities, there are strong expectations for women to act as homemakers, wives, and mothers. *See* Martha McMurry, *Religion and Women's Sex Role Traditionalism*, 11 SOCIOLOGICAL FOCUS 81, 82 (1978). Moreover, this cultural background is relevant under this Commission's jurisprudence: in *Moreno Ramos*, the Commission held that the background of cultural prejudice against foreign nationals in the United States was relevant to analyzing the effect of bias on the jury. *See Moreno Ramos* ¶¶ 68–69. Similarly, the cultural backdrop of Oklahoma should be considered in Ms. Andrew's case.

[215] Andrew v. State, 164 P.3d 176, 206 ¶¶ 1, 4 (Okla. Crim. App. 2007) (Johnson J., dissenting), Ex. A.

[216] Trial Tr. 4125, Ex. D.

[217] Trial Tr. 323, Ex. E. The term "hoochie" is a slur referring to "a sexually promiscuous young woman." Merriam Webster, 'Hoochie,' https://www.merriam-webster.com/dictionary/hoochie (last accessed April 6, 2021).

weeks of salacious testimony presented to the jury about Ms. Andrew's sex life, adulterous affairs, and her "cleavage" during the State's case in chief.[218]

Abundant social science research also demonstrates that prosecutors' use of stereotypes during a criminal trial taints jurors' assessments. Scholars of racial bias have explained that "theories and arguments based upon racial, ethnic and most other stereotypes are antithetical to and impermissible in a fair and impartial trial"[219] because stereotypes "play a powerful role in influencing decision-making."[220] In the context of a trial, jurors' decisions are affected when the prosecution exposes them to stereotyping because their "judgments are influenced by beliefs about the characteristics of people in a particular category."[221] As such, language steeped in stereotypes activates their implicit and explicit biases.[222] Moreover, researchers have shown that stereotypes are particularly likely to affect decision making when the decision maker is "not motivated to seek individuating information about members of stereotyped groups" and when the decision-maker is "under stress,"[223] as in jury deliberations.

Prosecutors' use of stereotypes is particularly likely to foster bias in a criminal trial because of their uniquely powerful role in the United States' adversarial system. As one scholar notes, stereotypical rhetoric "is problematic when used by anyone in a criminal trial, but it is particularly problematic given prosecutors' special role in the criminal justice system."[224] Jurors are also primed to be more receptive to prosecutors' arguments, including when they rest on stereotypes:

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[218] *See* Section (C)(3)(a), *supra*.
[219] Mary Nicol Bowman, *Confronting Racist Prosecutorial Rhetoric at Trial*, 71 CASE W. RES. 39, 40 (2020).
[220] *Id.* at 53.
[221] Jennifer S. Hunt, *Race, Ethnicity, and Culture in Jury Decision Making*, 11 ANN. REV. L. & SOC. SCI. 269, 275 (2015).
[222] Bowman, *supra* note 219, at 63–65.
[223] Mikah K. Thompson, *Bias on Trial: Toward an Open Discussion of Racial Stereotypes in the Courtroom*, 2018 MICH. ST. L. REV. 1243, 1249 (2018).
[224] Bowman, *supra* note 219, at 49 (noting that "the prosecutor's primary responsibility is to the administration of justice.").

recent research demonstrates that jurors' explicit and implicit biases tend to favor the prosecution in criminal trials.[225]

A prosecutor's marshalling of stereotypes can bias the jury at any point of the trial, but is especially likely to trigger juror biases at the beginning and end of the trial. Research shows that the first information the jurors hear is particularly important, as is the last thing they hear.[226] Prosecutors activate juror biases through "priming"—presenting information in ways that will trigger associations with other ideas.[227] When prosecutors open with evidence rooted in stereotypes, these stereotyped impressions shape jurors' understanding and memory of subsequent information throughout the trial.[228] As one researcher notes, "Once people have an impression or belief, they are inclined to pay less attention to subsequent information, particularly information that contradicts the impression."[229] Similarly, stereotypes in a prosecutor's closing statements are powerful triggers of bias because they present the lasting impression that jurors take with them into the deliberation room.[230]

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[225] *See id.*; Anna Roberts, *Asymmetry as Fairness: Reversing a Peremptory Trend*, 92 WASH. U. L. REV. 1503, 1529 (2015) (noting that explicit biases include widespread beliefs that "prosecutors are unimpeachable . . . and that the presumption of innocence is a fiction"; implicit biases "affect all of the main tasks that jurors are called on to perform").

[226] See, e.g., Craig Lee Montz, *Why Lawyers Continue to Cross the Line in Closing Argument: An Examination of Federal and State Cases*, 28 Ohio N.U. L. REV. 67, 73-74 (2001); John B. Mitchell, *Why Should the Prosecutor Get the Last Word?*, 27 AM. J. CRIM. L. 139, 146-56 (2000) (discussing various studies about the importance of closing argument in juror decision-making); Kathryn M. Stanchi, *The Power of Priming in Legal Advocacy: Using the Science of First Impressions to Persuade the Reader*, 89 OR. L. REV. 305, 346 (2010).

[227] Bowman, *supra* note 219, at 57. *See also* Mark Spottswood, *Ordering Proof: Beyond Adversarial and Inquisitorial Trial Structures*, 83 TENN. L. REV. 291, 293 (2015) (explaining that the order and context in which people encounter new information can play a crucial role in the way that information is understood and remembered).

[228] Justin D. Levinson, *Forgotten Racial Equality: Implicit Bias, Decisionmaking, and Misremembering*, 57 DUKE L.J. 345, 350 (2007); Stanchi, *supra* note 226, at 346.

[229] LINDA L. BERGER & KATHRYN M. STANCHI, LEGAL PERSUASION: A RHETORICAL APPROACH TO THE SCIENCE 118 (2018).

[230] Bowman, *supra* note 219, 62 (explaining the psychological phenomenon of the "recency effect," which explains that jurors will focus on the most recent information heard and thus "comments in closing arguments are likely to have outsized significance compared to comments in the middle of the trial."). *See also* Michael D. Cicchini, *Combating Prosecutorial Misconduct in Closing Arguments*, 70 OKLA. L. REV. 887, 909 (2018) (explaining that rebuttal closing arguments are particularly problematic because defense counsel has no opportunity to respond and contest potential stereotyping and discussing the need for trial courts to step in when improper arguments are made in rebuttal closing).

In Ms. Andrew's case, the State used stereotypes at both the start and end of trial to bias jurors. The State opened with testimony from Ms. Andrew's two former sexual partners describing her as a bad, promiscuous woman. These witnesses, whose testimony only concerned Ms. Andrew's sex life and appearance, came before police officers, crime scene specialists, and others who had information relevant to the offense itself.[231] In closing, the State called Ms. Andrew a "slut," repeatedly proclaimed that she was a bad mother, and paraded her thong underwear in the courtroom.

Critically, the court did nothing the remedy the bias inherent in the State's case in chief. Just as the defendant's counsel in *Andrews* appealed to the trial judge to address the appearance of bias among the jury, Ms. Andrew's attorneys repeatedly asked the trial judge to intervene and shield the jury from lurid and irrelevant testimony. As was the case in *Andrews*, Ms. Andrew's trial judge took no action, contrary to this Commission's mandate and to Oklahoma's own laws to protect criminal defendants from prejudice.

Rather, Ms. Andrew's trial judge perpetuated the State's bias by basing her own rulings on Ms. Andrew's appearance. In justifying a mid-trial decision that Ms. Andrew could no longer wear makeup at the defense table, the trial judge proclaimed that Ms. Andrew "[is] pretty and doesn't need makeup. . . . She's a pretty woman okay? She can't help that. And certainly, I'm sure even with pretty women makeup enhances their prettiness but she's pretty on her own."[232] Defense counsel's objections to the State's overly prejudicial testimony stood no chance when the trial judge herself grounded her rulings on Ms. Andrew's physical appearance. As a judge on the Canadian Supreme Court recently recognized, judges' use of discretion has played a significant

[231] *See* Trial Tr. 245–78; 392–417.
[232] Trial Tr. 1145, Ex. AA.

role in the institutionalization and perpetuation of gendered stereotypes,[233] and Judge Bragg's actions in Ms. Andrew's case aggressively make this point. As in *Moreno Ramos,* the State's actions give rise to a "real danger" that jurors based their life-or-death decision on the impermissible ground of Ms. Andrew's sex.

E. By Subjecting Ms. Andrew to Discriminatory Proceedings, Respondent State Violated Ms. Andrew's Right to Life under Article I of the American Declaration.

This Commission is bound to ensure that enforcement of the death penalty strictly abides by the requirements set forth in the American Declaration. Where the State employs discriminatory practices to secure a conviction and fails to uphold rigorous fair trial standards, the State imposes a penalty unlawfully.[234] As such, executing a person whom the State has deprived of her right to equality and to an impartial tribunal is a grave and deliberate violation of the right to life set forth in Article I of the American Declaration.[235]

Ms. Andrew was sentenced to death following a trial that relied on gender-based discrimination and bias to persuade the jury that she was deserving of death. In light of the violations of Ms. Andrew's rights under Articles II, XVIII, and XXVI of the American Declaration, executing her would constitute a grave violation of Ms. Andrew's right to life.

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[233] Speaking about rape cases, Justice L'Heureux-Dubé of the Canadian Supreme Court explained that "History demonstrates that it was discretion in trial judges that saturated the law in this area [rape cases] with stereotype[s]." R. v. Ewanchuk, [1999] 1 S.C.R. 330 ¶ 94 (Can., Supreme Court) (L'Heureux-Dubé J., concurring). The Justice further noted that "Myths and stereotypes are a form of bias because they impair the individual judge's ability to assess the facts in a particular case in an open-minded fashion. In fact, judging based on myths and stereotypes is entirely incompatible with keeping an open mind, because myths and stereotypes are based on irrational predisposition and generalization, rather than fact." *See id.* ¶ 92.

[234] *Rocha* ¶ 105.

[235] *Id.* ¶ 106.

II. THE STATE TRIAL JUDGE VIOLATED MS. ANDREW'S RIGHT TO A FAIR TRIAL BY BARRING SEVERAL WITNESSES FOR MINOR DISCOVERY-RELATED OFFENSES.

At Ms. Andrew's capital trial, the trial judge excluded the testimony of six critical defense witnesses at the request of the prosecution. The prosecution enjoyed an unfair advantage: it secured a conviction after thwarting any meaningful adversarial testing. As a result, Ms. Andrew was denied the opportunity to present a defense, depriving her of a fair trial. These exclusions undermine the reliability of the trial's outcome; as such, they constitute a violation of Article XXVI of the American Declaration.

The prosecution and judge blocked the defense's witnesses as a drastic, unjustified sanction for minor procedural infractions. Before a witness can be called to the stand, the party must provide a summary of the expected testimony in advance to the opposing side. The trial court cited to minor deficiencies in the defense's summaries and excluded six witnesses who would have offered favorable and material testimony that could have convinced the jury to spare Ms. Andrew from the death penalty.[236] On appeal, the Oklahoma Court of Criminal Appeals (OCCA) found that the trial judge had removed four of the six witnesses in error.[237] Nonetheless, because of unyielding standards of appellate review, her conviction and sentence remained in place.

In general, the preclusion of witnesses is a sanction of last resort, reserved for the most egregious notice violations.[238]

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[236] Each of the six witnesses were excluded because of minor deficiencies in their respective summary-of-testimony reports, prepared by the defense and disclosed to the prosecution.

[237] The OCCA majority agreed that four of the six witnesses were wrongly removed, a sanction too severe in light of the circumstances. The majority concluded, however, that the exclusions amounted to harmless error. Andrew, 164 P.3d at 197-98.

[238] *See e.g.*, *Taylor v. Illinois*, 484 U.S. 400, 413 (1988) (ruling that preclusion of a defense witness is permissible only if there was evidence of "willful" disregard for evidentiary rules that was "motivated by a desire to obtain a tactical advantage," or "to conceal a plan to present fabricated testimony"). "The reasons for restricting the use of the exclusion sanction to only the most extreme situations are even more compelling in the case of criminal defendants, where due process requires that a defendant be permitted to offer testimony of witnesses in his defense. Id. at n. 23.

A. The State Trial Judge's Exclusion of Six Witnesses Violated Article XXVI of the American Declaration.

i. The trial court excluded Police Officers Northcutt and Frost.

The trial judge prevented two Oklahoma City police officers from testifying on Ms. Andrew's behalf.[239] Their testimony would have undermined the prosecution's theory that Ms. Andrew planned and participated in the murder of her ex-husband, Rob Andrew.

Before trial, the court identified Officers Northcutt and Frost as potential witnesses for both the prosecution and the defense.[240] Officers Frost and Northcutt would have told the jury that Ms. Andrew asked the officers to conduct additional patrols of her house while off-duty just a few weeks before the shooting.[241] Officer Northcutt also knew that Ms. Andrew's divorce proceedings had taken an acrimonious turn. She had confided in the officer that she now feared her husband.[242] In addition to seeking additional surveillance of her home, Ms. Andrew asked Officer Northcutt "to particularly watch out . . . whenever Mr. Rob Andrew was coming around."[243]

Ms. Andrew intended to elicit this evidence to challenge the prosecution's allegation that she plotted her husband's death. As she argued to the trial court, her request was probative of her lack of intent: she would not have requested random, drive-by patrols of her home had she intended to kill her husband there. The surveillance would have increased the probability of her own detection and capture.[244]

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[239] Trial Tr. 3325-47.
[240] Officer Frost testified for the prosecution.
[241] Many Oklahoma City police officers earn extra money working for neighborhood-watch groups as private security guards.
[242] Officer Northcutt relayed this information to Officer Frost.
[243] Trial Tr. 3784, Ex. KK.
[244] *Id.* at 3786. The officers' testimony would have also corroborated Ms. Andrew's fear for personal safety. At trial, prosecutors argued that Ms. Andrew had retained her ex-husband's shotgun because she had intended to eventually use it to kill him. The testimony about her fear for her personal safety would have provided an innocent explanation for retaining the shotgun after her divorce.

The trial judge excluded Officers Northcutt and Frost on the ground that the defense failed to give the prosecution adequate notice of their testimony. But the trial judge never determined whether the defense's summaries of the officers' testimony reflected a deliberate strategy to gain advantage over the prosecution as opposed to mere negligence. When Ms. Andrew's lawyers asked whether "the Court . . . found that [they] violated the Discovery Code," the trial judge said, "I didn't say that."[245] Although a brief continuance would have been the typical remedy, neither the trial court nor the OCCA justified the preclusion or explained why a continuance or another sanction would be insufficient.[246]

The introduction of this evidence at trial could have caused a juror to hesitate to convict Ms. Andrew, as it is improbable Ms. Andrew would have facilitated her own detection and capture with her requests for additional surveillance.

2. The trial court excluded Police Officer Warren.

The trial judge also prevented a third Oklahoma City police officer from testifying, Officer Warren.[247] Officer Warren was one of the first responders at the shooting. He would have told jurors that he witnessed Ms. Andrew "kneeling at [the] side" of her husband when he first approached her at the scene of the crime. Ms. Andrew then asked Officer Warren "to help her husband," though it soon became clear that to her and those present that Rob Andrew was

[245] Trial Tr. 3385, Ex. MM. The OCCA's finding that the defense lawyers must have skimped on the disclosures in an "attempt to gain a tactical advantage" was unwarranted. *Id.* at 196. This finding of bad faith diverged from what the trial judge found. She attributed the deficiencies in the disclosures to a lack of preparation for trial. "[I]t's unfortunate that your team decided not to prepare," she told the defense lawyers, defending her decision to exclude the witnesses; *Id.* at 3390-3391. The OCCA's unsupported conclusion will now be considered by the U.S. Court of Appeals for the Tenth Circuit, which generally permits defense witnesses to be excluded only in the face of discovery violations that are "willful, blatant or calculated gamesmanship"; otherwise "alternative sanctions are adequate and appropriate." *Short v. Sirmons*, 472 F.3d 1177, 1188 (10th Cir. 2006).

[246] For instance, an instruction informing jurors they could draw negative inferences from the disclosures submitted by the defense.

[247] Trial Tr. 3808-91, Ex. LL.

deceased.[248] Officer Warren's testimony would have countered a key aspect of the prosecution's case: that Ms. Andrew acted indifferently, even coldly toward her husband on the night he was murdered. When Officer Frost testified for the prosecution, he said it was "kind of strange" that Ms. Andrew never asked about Rob Andrew's "welfare" and that she wasn't near him when Frost arrived on the scene.[249] Another officer echoed Officer Frost's comments, reinforcing the impression that Ms. Andrew was detached and unconcerned. "I thought she was unusually calm," said the second officer, puzzled. "It actually kinda bothered me. I was trying to figure out if this was somebody who was actually a victim because I wasn't seeing the usual signs."[250]

During closing arguments, the State capitalized on Brenda Andrew's insouciance. The lead prosecutor claimed the evidence proved she was not at her husband's side when police arrived and that her physical separation was the sign "of a coldblooded killer."[251] The prosecutor reminded jurors that Ms. Andrew expressed no concern or interest in her husband's well-being and later no sorrow at his death. "[S]he never says 'hey will you check on the status of my husband?' . . . Never asked that."[252] The prosecutor then encouraged the jurors to put themselves in the garage, witnessing the murder of their spouses. "You think a tear might well up in your eyes?" he asked.[253] Ms. Andrew is "not like you and me," his colleague told the jury. "She's different."[254]

Officer Warren would have corrected the State's mischaracterization of Ms. Andrew at closing argument. He would have explained that Andrew was at her husband's side and attempted to help him. With Officer Warren's testimony, the defense could have humanized Ms. Andrew,

[248] Trial Tr. 3779-82, Ex. NN.
[249] Frost was unaware that Officer Warren, whom the jury never heard, had just asked Andrew to step away from her husband's body. Trial Tr. 1795, 1828, Ex. OO
[250] Trial Tr. 2030, Ex. W.
[251] Trial Tr. 4098, Ex. PP.
[252] Trial Tr. 4070, Ex. QQ.
[253] *Id*.
[254] Trial Tr. 4493, Ex. V.

convincing the jury to spare her life. The OCCA ruled that trial judge's decision to bar Officer Warren was an abuse of discretion because his police report "spell[ed] out his expected testimony."[255]

3. The trial court excluded Jail Officer Tyra.

The trial judge refused to permit Officer Donna Tyra to testify. Tyra worked at the county jail where Ms. Andrew was detained before trial. The prosecution objected to Officer Tyra's testimony on lack-of-notice grounds. Additionally, the trial judge *sua sponte* objected to her testimony because the defense had listed the officer as a penalty stage witness rather than a guilt stage witness.[256]

The defense explained that Officer Tyra would rebut a claim Teresa Sullivan, an inmate housed at the Oklahoma County jail, made earlier in Ms. Andrew's trial.[257] Ms. Sullivan testified that during her short-lived confinement on the protective-custody unit, Ms. Andrew—notwithstanding her segregation from the other inmates—confessed her crime to Ms. Sullivan, including one of its aggravating factors. Ms. Sullivan claimed these conversations took place during a series of private, revelatory, and soul-baring conversations between the two inmates. Had the court allowed her to testify, Officer Tyra would have explained that jail rules and the physical configuration of the jail prevented inmates from engaging in such private conversations. She would have specifically said that "Brenda Andrew did not talk to Ms. Sullivan," nor did she "pass notes to Ms. Sullivan."[258]

[255] *Andrew*, 164 P.3d at 197.
[256] Trial Tr. 3480-81, Ex. RR.
[257] *Id*. at 3479-80.
[258] Trial Tr. 3776-77, Ex. SS.

Had the trial judge allowed Officer Tyra to testify about the impediments to private conversations among inmates in the segregation pod, whose very purpose and design is to render such contact impossible, a juror could have reasonably concluded Ms. Sullivan fabricated Ms. Andrew's confession. Additionally, a hesitant juror could have drawn succor from Officer Tyra's unqualified assertion that Ms. Sullivan was not telling the truth when she maintained that she exchanged confidential communications with Ms. Andrew. The jurors never heard a discordant report from a credible law-enforcement witness, who would have told them that the conversations did not and could not have taken place.

4. The trial court excluded two other witnesses: Lisa Gisler and Carol Shadid.

The trial judge also excluded two additional witnesses,[259] both neighbors who lived adjacent to Ms. Andrew and who were at their separate homes when Rob Andrew was killed. The defense called them to testify to counter the prosecution's accusation that Ms. Andrew "staged" the gunshot wound to her arm.

On the night of the shooting of Rob Andrew, shortly after 6 PM, Lisa Gisler and Carol Shadid heard screams and the sound of gunfire coming from the nearby Andrew garage. Gisler and Shadid would have told jurors that a very brief time separated the first gun shot from the final shot. Their testimony was critical to Ms. Andrew's defense because it undermined the prosecution's theory that Ms. Andrew had staged the shot to her arm. Gisler and Shadid heard three shots in rapid succession. Gisler could not detect the sound of distinct shots. She heard just one loud noise, suggesting the shots were fired near simultaneously. Her account ruled out the possibility that Ms. Andrew collaborated with the shooter and positioned herself strategically to

[259] Trial Tr. 3369-79, Ex. SS.

obtain a superficial wound to her arm. But these witnesses were precluded from testifying. Even the OCCA agreed that preclusion "was too harsh a sanction," and found the trial court had abused its discretion here.[260] The prosecution had notice of their testimony because "[t]heir statements were contained in police reports that were in the custody of the State." Their testimony would have "corroborate[d] her [Ms. Andrew's] story of the events and rebut[ted] the staging theory espoused by the State."[261]

At closing argument, the prosecution profited from the absence of any shots-in-rapid-succession evidence. Denying that Ms. Andrew tried to run away from the shooter, the State's lawyer told the jury that "[Ms. Andrew] had to stand still long enough for Pavatt to shoot her and to be sure she wasn't seriously wounded."[262] "They were very careful," the prosecutor assured, noting that ballistics experts agreed that Andrew could not have shot herself. "There had to be cooperation between the two of them in order to pull it off . . . . She had to stand there and hold her arm in a certain position in order for that shot to go in the right place."[263] The prosecutor further extended the time needed to discharge the three shots inside the garage, reminding jurors that the shotgun fired at Rob Andrew had to be reloaded between its two shots.[264]

In testifying to the compressed time between the first and last shots, Ms. Gisler and Ms. Shadid would have weakened the prosecution's theory of staging, a view contingent on a lapse of time greater than that contained in the statements of the two neighbors. Had the jurors heard and accepted Ms. Gisler and Ms Shadid's testimony, it would have been difficult for them to

[260] *Andrew*, 164 P.3d at 197.
[261] *Id.*
[262] Trial Tr. 3895, Ex. UU.
[263] Trial Tr. 3880, Ex. VV; Trial Tr. 3905, Ex. WW.
[264] Trial Tr. 3881-82, Ex. VV.

understand how the assailant could have fired two shots at Rob Andrew, reloaded, then waited while Pavatt prepared to fire a second gun at Ms. Andrew.

Besides weakening the staging theory, the neighbors would have strengthened the defense's claim that two separate shooters entered the garage, one shooting Ms. Andrew with a handgun while the other near-simultaneously fired the shotgun at Rob Andrew. The defense could have only argued this hypothesis had Gisler and Shadid been allowed to testify, adequately accounting for the narrow window of time during which the two women described the shootings as unfolding. Their testimony could have sparked doubt about the prosecution's theory of the shootings, a theory insulated from critique due to the trial judge's refusal to permit the jurors to hear a contradicting account.

Ms. Andrew was left defenseless at her capital trial. By excluding six witnesses for frivolous notice violations, the court rendered Ms. Andrew powerless, robbing her of the opportunity to rebut the prosecution's claims. Had the court permitted the excluded witnesses to present their testimony, the jury could have spared Ms. Andrew's life. These exclusions undermined the reliability of the trial's outcome; as such, they constitute a violation of Article XXVI of the American Declaration.

III. MS. ANDREW'S DEFENSE COUNSEL PROVIDED AN INCOMPETENT DEFENSE.

Ms. Andrew's legal representation fell far below international standards. At her capital trial, her lawyers knew almost nothing about her—they never investigated nor presented any mitigating evidence to help provide context for the murder of Rob Andrew.[265] As a result, they

[265] The crime for which Ms. Andrew was prosecuted bears none of the hallmarks of typical capital cases prosecuted in the United States. Ms. Andrew was not convicted of committing an aggravated crime: Rob Andrew was the only victim in this case; he died instantly; and there were no signs that he endured torture or any other harm before his death. Furthermore, Ms. Andrew called 911 to report the murder after it occurred. Ms. Andrew also had no prior

allowed the prosecution's misogynistic, inflammatory portrayal of Ms. Andrew to be the jury's only exposure to Ms. Andrew's personal history and background. Although there were intimations that Ms. Andrew may have experienced domestic violence,[266] the defense neglected to interview any person capable of shedding light on Ms. Andrew's background, including Ms. Andrew herself. The defense squandered several opportunities to humanize Ms. Andrew and convince the jury to spare her life.[267] As such, the defense's failure constituted a violation of Articles XVIII and XXVI of the American Declaration.

A. The Defense's Failure to Conduct a Mitigation Investigation or Present Mitigating Evidence Violated Articles XVIII and XXVI of the American Declaration.

A State may only impose the death penalty after a defendant, through her attorney, has the opportunity to present mitigating evidence. The Commission has held that the defense's prompt investigation and presentation of mitigating evidence is critical to a fair trial in capital cases.[268] When determining the adequacy of legal representation, the Commission has considered whether a reasonable investigation would have revealed potentially relevant mitigating evidence. Failure to investigate and present such evidence "[deprives the petitioner] of the benefit of the jury's consideration of potentially significant information in determining his punishment."[269] Thus, the

convictions or arrests. Instead to obtain its death sentence, the prosecution relied on sexist tropes to convict Ms. Andrew. The defense failed to combat the prosecution's characterization.

[266] Trial. Tr. 1822, Ex. BB.

[267] "The responsibility of the lawyer is to walk a mile in the shoes of the client, to see who he is, to get to know his family and the people who care about him, and then to present that information to the jury in a way that can be taken into account in deciding whether the client is so beyond redemption that he should be eliminated from the human community." *Battenfield v. Gibson*, 236 F.3d 1215 (10th Cir. 2001)(citing approvingly to Stephen B. Bright, *Advocate in Residence: The Death Penalty As the Answer to Crime: Costly, Counterproductive and Corrupting*, 36 SANTA CLARA L. REV. 1069, 1085-86 (1996)).

[268] *See* Feliz *Rocha Diaz v. United States*, Case 12.833, Inter-Am. Comm'n H.R., Report No. 11/15, OEA/Ser.L/V/II.154, doc. 5, ¶ 73 (2015); *See* Medellín, Ramírez Cárdenas & Leal García v. United States, Case 12.644, Inter-Am. Comm'n H.R., Report No. 90/09, OEA/Ser.L/V/II.135, doc. 37 at ¶ 134 (2009).

[269] *Roberto Moreno Ramos v. Untied States*, Case 12.430, Inter-Am. Comm'n H.R., Report No. 1/05, OEA/Ser.L./V/II.124, ¶ 54 (2005).

Commission has routinely found that the failure to present such mitigating evidence amounts to a violation of Articles XVIII and XXVI of the American Declaration.[270] This Commission has found that defense counsel's failure to present testimony about the defendant's "upbringing and social history" is especially prejudicial.[271] Failure to produce available and relevant testimony about the defendant's character and history also constitutes a deprivation of the petitioner's right to present mitigating evidence.[272]

Mrs. Andrew's trial lawyers also failed to comply with their own professional standards of care. The American Bar Association Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases requires defense teams to conduct exhaustive and unprecedented investigation into personal and family history in preparation for the penalty phase of a capital case.[33] No one has ever looked in Ms. Andrew's history—her lawyers never retained a mitigation specialist, nor did they interview jurors or any of Ms. Andrew's family members.

Ms. Andrew's lawyers failed to pursue leads that would have yielded mitigating evidence, as the record reveals suggestions that Ms. Andrew may have been a victim of domestic violence. Ms. Andrew informed authorities that her husband had mistreated her in the past, but the defense never investigated these claims. Detective Robert Frost testified that when he asked Ms. Andrew whether Rob Andrew had "ever hit her during their marriage," and Ms. Andrew replied, "he hasn't hit [me] since the kids had been born."[273] The defense never asked Detective Frost about Ms. Andrew's statements during cross-examination[274], nor did they follow up with Ms. Andrew or any

[270] *Rocha* ¶ 78; Edgar Tamayo Arias v. United States, Case 12.873, Inter-Am. Comm'n H.R., Report No. 44/14, OEA/Ser.L/V/II.151, doc. 9 at ¶ 151 (2014) (finding defense counsel "failed to develop and present potentially mitigating evidence"); *Medellín* ¶ 142.
[271] *See, e.g., Rocha* ¶ ¶ 21-27, 71; *Tamayo* ¶ ¶ 97-102, 145.
[272] *Tamayo* ¶ 145.
[273] Trial Tr. 1822, Ex. BB.
[274] *See* Trial. Tr. Vol. 8, p.1851–1888.

other person who may have witnessed the abuse.[275] Given the prevalence of gender-based violence in the cases of women sentenced to death, Ms. Andrew's statements to authorities should have prompted the defense to conduct a mitigation investigation.

At least 50 percent of the women who had been sentenced to death in the United States have been victims of childhood abuse, partner abuse, or both.[276] A considerable body of literature has recognized the relationship between trauma, child abuse and "subsequent . . . criminal acts."[277] A female defendant's chronic and prolonged exposure to violence can evolve into a "dysfunctional routine" that she perpetuates "in family and community contexts." [278] Trauma can also impair an woman's cognitive functioning, which contributes to poor impulse control, the development of psychological disorders, and aggressive behavior.[279] In other words, when representing a woman accused of a crime, defense lawyers must understand that their client's past victimization bears directly on her legal and moral culpability. Evidence of a woman's history of abuse can provide critical context for jurors in a woman's capital trial, and the law requires jurors to weigh such evidence during sentencing. Therefore, to effectively represent their clients, capital defense

[275] This was not the only one of Ms. Andrew's statements the defense disregarded; Ms. Andrew also informed Detective Roland Garrett that her ex-husband "had been mean to her," but Ms. Andrew hesitated to provide Detective Garrett with more information. Trial. Tr. 2562, Ex. CC. The defense also did not ask Detective Garrett about these statements during cross-examination.

[276] AMERICAN CIVIL LIBERTIES UNION, THE FORGOTTEN POPULATION: A LOOK AT DEATH ROW IN THE UNITED STATES THROUGH THE EXPERIENCES OF WOMEN 1(Dec. 2004), available at http://www.aclu.org/FilesPDFs/womenondeathrow.pdf. The ACLU found that "30% of women on death row reported that spouses or partners had regularly battered them, 11% claimed that they had been severely beaten as children, and 14% claimed that they have been abused both as children and adults. Thus, 55% of women on Death Row said they had suffered regular, ongoing abuse."; *See* Death Penalty Information Center, Podcast: Women and the Death Penalty with Professor Mary Atwell, min. 15:00, https://deathpenaltyinfo.org/podcast/audio/discussions/discussions-e6.mp3, Mar. 24, 2017.

[277] Vittoria Ardino, *Offending Behaviour: the Role of Trauma and PTSD*, EUROPEAN J. OF PSYCHOTRAUMATOLOGY Vol. 3(2012).

[278] *Id.*

[279] *See* Ardino, *supra* note 277; U.N. Office of the High Commissioner for Human Rights, Death penalty disproportionately affects the poor, U.N. rights experts warn, http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=22208&LangID=E, Oct. 10, 2017.

lawyers must determine whether a woman has suffered from gender-based trauma or abuse—mitigation investigations and social histories allow lawyers to uncover this evidence.[280]

In addition to Ms. Andrew's concerning statements to Detective Frost, the high probability that a woman facing the death penalty has experienced gender-based violence—proven by available data—should have prompted the defense to pursue a mitigation investigation. But the defense neglected to do so. As such, the prosecution's misogynistic, disparaging portrayal of Ms. Andrew was the only reference to Ms. Andrew's gender that stood before the jury. The prosecution painted Ms. Andrew as a "bad woman"; to the jury, she may have been nothing more, as the defense never combatted the prosecution's narrative.

Mitigating evidence would have cultivated the jury's empathy and provided context for Ms. Andrew's conduct. A deeper exploration of Ms. Andrew's personal history and characteristics may have revealed the source of Ms. Andrew's behavior and demeanor. In the absence of such background, the prosecution systematically weaponized her appearance to secure a death sentence.[281] The prosecution controlled the narrative about Ms. Andrew, her sexuality, her behavior, her role in the family. Had her lawyers conducted an investigation into her life, they could have challenged the prosecutors' vilification of Ms. Andrew. It is well established that when the defense presents jurors with an in-depth life history, they are less likely to sentence the defendant to death.[282] A thorough account of Ms. Andrew's life would have humanized her, and would have given the jury the chance to grant her the benefit doubt and honor her presumption of innocence.

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[280] *See*, *e.g.*, Michelle E. Barnett, Stanley L. Brodsky, & Cali Manning Davis, *When Mitigation Evidence Makes a Difference: Effects of Psychological Mitigating Evidence on Sentencing Decisions in Capital Trials*, 751 BEHAV. SCI. L 770 (2004) (explaining that "mock jurors who were presented with vignettes containing various types of biopsychosocial mitigating evidence gave a greater proportion of life sentences than when no mitigating evidence was presented in vignettes.").

[281] *See* Claim I of this Petition, Subsection C.

[282] *See* Barnett, Brodsky & Davis, *supra* note 280.

Here, it was crucial for the defense to have presented mitigating evidence—not only because such evidence is integral to providing a woman facing the death penalty with a fair and adequate defense—but also because the prosecution's primary strategy was to dehumanize Ms. Andrew. Jurors rely on a defendant's social history when they make sentencing decisions. By failing to paint a fuller picture of Ms. Andrew, the defense deprived the jury of an opportunity to spare Ms. Andrew's life.

B. Ms. Andrew's Lawyers Provided Ineffective Assistance When They Failed to Advise Her To Surrender To Mexican Authorities.

Three days after Ms. Andrew entered Mexico on November 29, 2001, the Oklahoma County District Court issued a warrant for her arrest. Ms. Andrew remained in Mexico from November of 2001 to February of 2002. During that time, she exchanged over 100 phone calls with the person who would eventually serve as lead counsel at her capital trial, Gregory McCracken; yet, not once during any of these calls did Mr. McCracken inform Ms. Andrew about the Protocol to Extradition with Mexico Treaty ("Treaty"),[283] which gives the Mexican government the right to "to demand assurances that the death penalty will not be imposed, or, if it is imposed, will not be executed."[284]

Mexico consistently invokes its right to refuse extradition unless the United States provides assurances that it will not impose the death penalty, pursuant to Article 8 of the Treaty.[285] If the Mexican government denies extradition, Mexico will prosecute the fugitive under its own laws, "usually resulting in modest penalties."[286] Given the terms of the Treaty, Mr. McCracken should

[283] Protocol to Extradition With Mexico Treaty, Mx.-U.S., May 4, 1978, Senate Treaty Doc. 105–46.
[284] *Id.*
[285] Protocol to Extradition With Mexico Treaty, Mx.-U.S., May 4, 1978, Senate Treaty Doc. 105–46. James Michael Olivero, *The Imposition of the Death Penalty on Mexican Nationals in the United States and the Cultural, Legal and Political Context*, Laws 2013, 2, 33–50; doi:10.3390/laws2010033 (2013). "In 2004, the state of California estimated that 360 persons wanted for murder and serious crimes had not been extradited from Mexico."
[286] *Id.* In October 2001, the Mexican Supreme Court ruled that life imprisonment violated Mexico's constitution.

have advised Ms. Andrew to surrender to Mexican authorities to spare herself from facing the death penalty. Instead, Mr. McCracken offered Ms. Andrew's return to Oklahoma on the condition the prosecution drop or reduce the charges against her.[287] Had Ms. Andrew been in Mexican custody, Mr. McCracken's bargaining position would have been strengthened considerably, yet Mr. McCracken never assisted Mexican authorities in finding Ms. Andrew. In the absence of sound legal advice, Ms. Andrew returned to the United States and surrendered to United States authorities, a decision that cost her a chance to live.[288]

IV. BY HOLDING BRENDA ANDREW IN PROLONGED SOLITARY AS SHE AWAITS HER EXECUTION, THE UNITED STATES HAS SUBJECTED HER TO CRUEL, INFAMOUS AND UNUSUAL PUNISHMENT AND INHUMANE TREATMENT IN VIOLATION OF ARTICLES XXVI AND XXV OF THE AMERICAN DECLARATION.

Brenda Andrew's conditions of confinement violate international law. Over seventeen years on death row in a state with an atrocious history of botched executions amounts to cruel, inhumane and degrading punishment. By forcing Ms. Andrew to endure sixteen of those seventeen years in solitary confinement, the United States has subjected her to torture in violation of international law.

While international human rights law does not require prisoners to show the impact of solitary confinement to establish the illegality of prolonged solitary, it is worth briefly describing Ms. Andrew's conditions. For sixteen years, Ms. Andrew was kept in a twelve by nine concrete cell. For sixteen years, Ms. Andrew's only contact with other inmates was a ten-minute haircut every three months. For sixteen years, Ms. Andrew almost never saw the sun. Despite the wealth

[287] *See* Application for Post-Conviction Relief, Andrew v. State, No. PCD-2005-16, 17 (Okla. Crim. App. 2007).
[288] Judge Chapel believed his colleagues acted prematurely when they denied Ms. Andrew's motion. *See* Andrew v. State, No. PCD 2005-176, 3 (Okla. Crim. App. 2008) (Chapel, dissenting) ("I think we need more information. An evidentiary hearing to develop the record as to what Mexico's policy was at the time Andrew was in Mexico, what her trial counsel and appellate counsel did or didn't do, and why, with respect to the extradition treaty, along with briefs fully developing the legal and ethical issues would help me in deciding the issues.").

of empirical studies on the effect of sensory deprivation, no one truly knows what sixteen years in solitary confinement does to a human being. This kind of cruelty is not subject to scientific testing.

A. Prolonged Solitary Confinement Constitutes Torture.

In 2015, the United Nations adopted the revised Standard Minimum Rules for the Treatment of Prisoners (The Nelson Mandela Rules) to provide a minimum threshold of acceptable treatment of prisoners consistent with international law.[289] In addition to condemning both prolonged and indefinite solitary confinement as examples of torture or cruel, inhuman or degrading punishment, the Rules define solitary confinement:

> [S]olitary confinement shall refer to the confinement of prisoners for 22 hours or more a day without meaningful human contact. Prolonged solitary confinement shall refer to solitary confinement for a time period in excess of 15 consecutive days.[290]

The Rules go on to note that solitary confinement should only ever be used "in exceptional cases as a last resort, for as short a time as possible…It shall not be imposed by virtue of a prisoner's sentence."[291] Yet in Ms. Andrew's case, her solitary confinement was imposed *only* because of the sentence she received. The motive for her solitary confinement, as well as its duration, violate these standards.

i. *International human rights tribunals and experts agree that these conditions constitute torture.*

The United States' treatment of Ms. Andrew is nothing short of torture. This Commission has already recognized that twenty years of solitary confinement on death row constitutes "a form of torture."[292] In its *Saldaño* decision, this Commission noted that the sixteen years Victor Saldaño spent in solitary, in a confinement comparable to Ms. Andrew's, inflicted a "severe and

[289] G.A. Res. 70/174, the Nelson Mandela Rules (Dec. 17, 2015).
[290] *Id.* Rule 44 at 17/33
[291] *Id.* Rule 45 at 17/33.
[292] *Victor Saldaño v. United States*, Case 12.254, Inter-Am.Comm'n H.R., Report No. 24/17, OEA/Ser.L/V/161, doc. 31 ¶ 252 (2017).

irreparable detriment" upon both his "personal integrity," and "especially, his mental health."[293] Indeed, Ms. Andrew's case presents a strikingly similar set of facts, having spent sixteen years in solitary confinement awaiting death like Victor Saldaño.[294]

The jurisprudence of the European Court on Human Rights is consistent with this approach. In *Ilașcu and Others v. Moldova and Russia*, four Moldovan political activists were convicted of murder; Mr. Ilașcu was sentenced to death and held in solitary confinement for eight years.[295] The applicants claimed, among other things, that their treatment was in violation of Article 3 of the European Convention.[296] In evaluating whether the "severity" of the applicants' treatment violated Article 3, the Court conducted a case-specific analysis into the duration of the treatment, the physical and mental effects it had on the victims, and the specific traits of the victims themselves.[297] The Court attended to the specific psychological harm inherent in a prolonged period whilst awaiting death.[298] Further, the Court reiterated its position that "complete sensory isolation, coupled with total social isolation can destroy the personality and constitutes a form of inhuman treatment which cannot be justified by the requirements of security or any other reason."[299]

The Court ultimately found that Mr. Ilașcu had been subjected to torture in contravention of Article 3 of the European Convention.[300] In making this decision, it specifically noted the

[293] *Id.*
[294] *See id.* at ¶ 249.
[295] *See generally Ilașcu and Others v. Moldova and Russia*, App. No. 48787/99 (July 8, 2004), https://hudoc.echr.coe.int/fre#{%22itemid%22:[%22001-61886%22]}.
[296] *Id.* at ¶ 419. Article 3 of the European Convention provides that: "No one shall be subjected to torture or to inhuman ordegrading treatment or punishment."
[297] *Id.* at ¶ 427.
[298] *Id.* at 430 (citing *Soering v. the United Kingdom*, App. No. 14038/88, ¶ 104, (July 7, 1989), https://hudoc.echr.coe.int/fre#{%22itemid%22:[%22001-57619%22]}.
[299] *Id.* at ¶ 432.
[300] *Id.* at ¶ 440

suffering Mr. Ilaşcu endured whilst awaiting death in extreme solitary confinement.[301] The conditions of his confinement were particularly severe; he was unable to contact his lawyer or receive visits from his family, and he was only able shower once a month.[302] The Court's decision underscored the psychological consequences of solitary under "the constant shadow of death," always "in fear of execution."[303] Ultimately the Court found that the combination of his death sentence and the conditions of his confinement met the standard for torture as prohibited under the European Convention.[304]

The Special Rapporteur on torture and other cruel, inhuman or degrading treatment adopted this view of solitary confinement in his interim report to the General Assembly in 2011. He noted the specific violations at issue in prolonged solitary confinement:

> Given its severe adverse health effects, the use of solitary confinement itself can amount to acts prohibited by article 7 of the International Covenant on Civil and Political Rights, torture as defined in article 1 of the Convention against Torture, or cruel, inhuman or degrading punishment as defined in article 16 of the Convention.[305]

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[301] *Id.* at ¶¶ 435-36.
[302] *Id.* at ¶ 438.
[303] *Id.* at ¶¶ 435–36.
[304] *Id.* at ¶ 440. Of the remaining three applicants, the Court found that Mr. Ivanţoc had been subject to torture, and Mr. Leşco andMr. Petrov-Popa had both had been subject to cruel, inhuman or degrading treatment. *See id.* at ¶¶ 447, 452. The Court noted that Mr. Ivanţoc was subject to solitary confinement from 1993 through to the Court's judgment while under a sentence of death in an unheated, badly ventilated cell. *Id.* at ¶¶ 444-45. The Court found that this constituted torture. *Id.* at ¶ 447. Regarding Mr. Leşco and Mr. Petrov-Popa, only Mr. Petrov-Popa was detained in solitary confinement for the eleven years preceding the Court's decision. *Id.* at ¶ 451. This, coupled with the additional abuses such as being denied food, discretionary visits from families, and medical assistance, constituted cruel, inhuman or degrading treatment. *See id.* at ¶¶ 450-54.
[305] U.N. SECRETARY-GENERAL, INTERIM REPORT OF THE SPECIAL RAPPORTEUR OF THE HUMAN RIGHTS COUNCIL ON TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT, U.N. Doc. A/66/28, ¶ 70 (2011). The Special Rapporteur's approach is consistent with the conclusions of the Human Rights Committee, which noted in General Comment No. 20 that prolonged solitary confinement of a detainee may amount to acts prohibited by article 7. General Comment No. 20 (1992) on Art. 7 of the International Covenant on Civil and Political Rights, on the Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment, U.N. Doc. HRI/GEN/1/Rev.9, ¶ 6 (Human Rights Committee, Mar. 10, 1992).

In evaluating whether prolonged solitary confinement constitutes torture,[306] the Special Rapporteur recommends a case specific analysis, attentive to the "purpose of the application of solitary confinement, the conditions, length and effects of the treatment and, of course, the subjective conditions of each victim that make him or her more or less vulnerable to those effects."[307]In noting the length of solitary confinement that would amount to torture, the Special Rapporteur noted that "any imposition beyond 15 days constitutes torture or cruel, inhuman or degrading treatment or punishment, depending on the circumstances."[308]

In comparing Ms. Andrew's confinement to the treatment at issue in *Saldaño* and *Ilaşcu* and determining whether her treatment constitutes torture, two facts are dispositive: (1) Ms. Andrew spent sixteen years in solitary confinement, a period of time that violates all international standards,[309] and is *per se* cruel, inhuman or degrading treatment; and (2) Ms. Andrew has spent the entirety of her confinement awaiting death, an aggravating factor that carries its own psychological harm and exacerbates the severity of solitary confinement.

The duration of a person's solitary confinement is relevant when considering whether their treatment constitutes torture because of the profound harm innate to prolonged solitary confinement. The longer an inmate remains in solitary, the greater their exposure to its harmful effects. Dr. Grassian has detailed the plethora of harmful effects resulting from solitary

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[306] The definition of torture itself comes from Article 1 of the Convention Against Torture, a treaty the United States has ratified.

> For the purposes of this Convention, the term "torture" means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him ora third person information or a confession, punishing him for an act he or a third person has committed…

Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art 1, Apr. 18, 1988, 1465 U.N.T.S. 85 (entered into force June 26, 1987).

[307] U.N. SECRETARY-GENERAL, INTERIM REPORT OF THE SPECIAL RAPPORTEUR at ¶ 71.

[308] *Id.* at ¶ 76.

[309] As this Commission has noted, "[i]n no instance should the solitary confinement of an individual last longer than thirty days." INTER-AM. COMM'N ON HUM. RTS.H.R., REPORT ON THE HUMAN RIGHTS OF PERSONS DEPRIVED OF LIBERTY IN THE AMERICAS, OEA/Ser.L/V/II. Doc 64, ¶ 411 (2011).

confinement.[310] As a threshold matter, he notes that although the psychological harm caused by solitary will vary based on the stability of the affected person, "all of the individuals will still experience a degree of stupor, difficulties with thinking and concentration, obsessional thinking, agitation, irritability, and difficulty tolerating external stimuli."[311] He enumerated the specific psychological symptoms that inmates may experience: hyperresponsivity to external stimuli; perceptual distortions, illusions, and hallucinations; panic attacks; difficulties with thinking, concentration, and memory; intrusive obsessional thoughts about violence; overt paranoia; and problems with impulse control.[312] Subjecting someone to solitary confinement means placing them in an environment that exposes them to these horrifying psychological harms. As Dr. Grassian notes, a greater exposure risks a "permanent" effect.[313]

Separate from the detrimental effects of solitary confinement, courts use the term "death row phenomenon" to describe the anxiety, dread, fear, and psychological anguish that often accompanies long-term incarceration on death row.[314] The term gives expression to the unique mental distress triggered when a person has been sentenced to death and awaits her execution. Ms. Andrew's psychological anguish is aggravated by Oklahoma's history of botched executions and the subsequent moratorium on executions due to the State's failures. Although death row phenomenon itself is not a medical diagnosis, the underlying symptoms may be detected through a clinical assessment.

[310] Stuart Grassian, *Psychiatric Effects of Solitary Confinement*, 22 WASH. UNIV. J.L. &PUB. POL'Y 325 (2006).
[311] *Id.* at 332.
[312] *Id.* at 335–36.
[313] See *id.*at 332.
[314] *See* Note, *Mental Suffering Under Sentence of Death: A Cruel and Unusual Punishment*, 57 IOWA L. REV. 814, 814 (1972).

This Commission itself has recognized death row phenomenon and the profound harm that comes when people are forced to wait for years for their own execution.[315] Indeed, this Commission has noted that four years of solitary confinement on death row is already too long, and amounts to inhumane treatment.[316] In *Bucklew*, the Commission canvassed international caselaw on death row phenomenon to ground its conclusion that twenty years on death row is facially inhumane, and amounts to cruel, infamous, or unusual punishment.[317] Significantly, in *Bucklew*, *Robinson*, and *Saldaño*, the Commission emphasized that prolonged time on death row is conclusive evidence of a violation of the American Declaration.

> The Commission notes that the very fact of spending 20 years on death row is, by any account, excessive and inhuman, and is aggravated by the prolonged expectation that the death sentence could be executed.[318]

ii. The United States' treatment of Ms. Andrew violates its obligations under numerous treaties and jus cogens norms prohibiting torture.

As the Inter-American Court has noted, "[t]he absolute prohibition of torture, in all its

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[315] *See* INTER-AM. COMM'NON HUM. RTS., THE DEATH PENALTY IN THE INTER-AMERICAN RIGHTS SYSTEM: FROM RESTRICTIONS TO ABOLITION, REPORT ON THE HUMAN RIGHTS OF PERSONS DEPRIVED OF LIBERTY IN THE AMERICAS, OEA/Ser. L/V/II, doc. 68 ¶ 136 (2011); *see also, Julius Omar Robinson v. United States*, Case 13.361, Inter-Am. Comm'n H.R., Report No. 210/20, OEA/Ser. L/V/II, doc. 224 ¶¶ 115–18 (2020).

[316] *Aitken v. Jamaica*, Case 12.275, Inter-Am Comm'n H.R., Report No. 58/02, OEA/Ser.L/V/II.117, doc. 1 rev. 1 ¶¶ 133–34 (2002).

[317] *Russell Bucklew v. United States*, Case 12.958, Inter-Am. Comm'n H.R., Report No. 71/18, OEA/Ser. L/V/II.168, doc 81 ¶ 91 (2018); The Commission recognized the *Soering v. United Kingdom* decision by the European Court of Human Rights wherein the court noted the "anguish" caused by living in the "ever-present shadow of death." citing *Soering v. the United Kingdom*, App. No. 14038/88, ¶ 106, (July 7, 1989), https://hudoc.echr.coe.int/fre#{%22itemid%22:[%22001-57619%22]}. Likewise, the Commission relied on *Pratt & Morgan*, where the Judicial Committee of the Privy Council noted that a lengthy delay between sentencing and execution constitutes "inhuman punishment." Indeed, the Privy Council noted that "in any case in which execution is to take place more than five years after sentence there will be strong grounds for believing that the delay is such as to constitute 'inhuman or degrading punishment or other treatment.'" *Pratt and Morgan v. Jamaica*, U.N. Doc. Supp. No. 40 (A/44/40) ¶ 77 (1989).

[318] *Robinson*, Case 13.361 at ¶ 118; *see also Bucklew*, Case 12.958 at ¶ 91 ("The very fact of spending 20 years on death row is, by any account, excessive and inhuman."); *Victor Saldaño v. United States*, Case 12.254, Inter-Am. Comm'n H.R., Report No. 24/17, OEA/Ser.L/V/161, doc. 31 ¶ 252(2017) ("holding Victor Saldaño on death row for more than 20 years in solitary confinement has constituted a form of torture"); *Nelson Serrano v. United States*, Case 13.356, Inter-Am. Comm'n H.R., Report No. 200/20, OEA/Ser.L/V/II, doc. 214 at ¶ 70 (2020) ("the very fact of spending 17 years on death row is, by any account, excessive and inhuman.").

forms, is now part of international *jus cogens*."[319] The International Court of Justice has also recognized that the prohibition against torture is a peremptory norm.[320] In addition to the *jus cogens* obligation, torture presumptively violates the right to humane treatment under Article XXV and the right to be free from cruel, infamous or unusual punishment under Article XXVI of the American Declaration on the Rights and Duties of Man.

Moreover, the United States has additional substantive obligations to refrain from the treatment at issue in Ms. Andrew's case. This treatment violates Article V of the American Convention on Human Rights.[321] Furthermore, this treatment also violates Article 1 of the Convention against Torture, and Article 7 of the International Covenant on Civil and Political Rights, both of which have been ratified by the United States.

iii. At a minimum, the United States has violated Ms. Andrew's right to humane treatment.

If this Commission is unable to find that Ms. Andrew's prolonged solitary confinement constitutes torture, it should at least find that her treatment violates her right to humane treatment under Article XXV of the American Declaration and her right to be free of cruel, infamous or unusual punishment. As this Commission has explicitly recognized, seventeen years on death row is "excessive and inhuman" and amounts to a *per se* violation of Articles XXV and XXVI of the American Declaration.[322]

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[319] *Cantoral-Benavides v. Peru*, Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 69, ¶ 92 (Aug. 18, 2000).
[320] *Questions Relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Judgment, 2012 I.C.J. 139, ¶ 99 (July 20).

[321] The United States has signed but has not ratified the American Convention on Human Rights. Nonetheless, it is stillobligated to not defeat the object and purpose of the treaty under Article 18 of the Vienna Convention on the Law of Treaties. Vienna Convention on the Law of Treaties, art. 18, Apr. 24, 1970, 1155 U.N.T.S. 331 (*entered into force* Jan. 27, 1980). Subjecting an inmate to torture would violate the object and purpose of the American Convention.

[322] *Nelson Serrano v. United States*, Case 13.356, Inter-Am. Comm'n H.R., Report No. 200/20, OEA/Ser.L/V/II, doc. 214 at 70 (2020).

Furthermore, the Inter-American Court has repeatedly recognized that prolonged solitary confinement is an example of cruel, inhuman and degrading treatment.

> [P]rolonged isolation and deprivation of communication are in themselves cruel and inhuman treatment, harmful to the psychological and moral integrity of the person and a violation of the right of any detainee to respect for [her] inherent dignity as a human being.[323]

The Court reached this conclusion by noting the grave harm inherent in prolonged solitary confinement, noting that it "produces moral and psychological suffering in the detainee, placing [her] in a particularly vulnerable position."[324]

V. THE METHODS OF EXECUTION EMPLOYED BY OKLAHOMA WOULD SUBJECT MS. ANDREW TO CRUEL, INFAMOUS, OR UNUSUAL PUNISHMENT, IN VIOLATION OF ARTICLE XXVI.

Ms. Andrew is at great risk of execution by untested methods that carry a high risk of severe anguish and agony in violation of Article XXVI's prohibition against cruel, infamous, or unusual punishment. As the State of Oklahoma prepares to resume executions, it is not yet clear how Oklahoma intends to execute Ms. Andrew. The primary method of execution in Oklahoma is lethal injection. The State also permits execution by nitrogen hypoxia, electrocution, and firing squad.[325] Lethal injection in Oklahoma has three chemical options: pentobarbital, sodium pentothal, or a cocktail of midazolam, vecuronium bromide and potassium chloride.[326] Although Oklahoma has four possible methods of execution, the State has only developed procedures for

[323] *See Bámaca Velásquez v. Guatemala*, Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No, 70, ¶ 150(Nov. 24, 2000); *Maritza Urrutia v. Guatemala*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 103, ¶ 87 (Nov. 27, 2003).
[324] *Maritza Urrutia* at ¶ 87
[325] Okla. Stat. Ann. Tit. 22 § 1014
[326] Oklahoma Department of Correction, *Execution of Inmates Sentenced to Death* OP-040301 Attachment D (20 Feb. 2020), https://oklahoma.gov/content/dam/ok/en/doc/documents/policy/section-04/040301ad.pdf.

execution by lethal injection. Oklahoma has botched three of the last four executions, all of which were conducted using lethal injection and prompted a six-year execution hiatus.

A. Ms. Andrew Has Not Received Sufficient Notice or Information About Any of the Possible Methods of Execution.

States have "an enhanced obligation to ensure that the person sentenced to death has access to all the relevant information regarding the manner in which he or she is going to die."[327] Death-sentenced individuals "must have the opportunity to challenge every aspect of the execution procedure and such information is necessary to file a challenge."[328] Such a challenge is not exclusively limited to only conviction and post- conviction proceedings.[329] Notice is required so that individuals are able to ensure that their execution does not run afoul of "the right to be executed in a manner devoid of cruel and unusual suffering."[330] Here, Oklahoma's lethal injection protocol gives the Director of the Oklahoma Department of Corrections unfettered discretion, allowing changes to the protocol, including the drugs to be used, until ten days before the execution.[331] Oklahoma's procedure of notifying Ms. Andrew of the chemicals intended to be used in her execution less than two weeks in advance deprives her of her right to meaningfully challenge the manner in which she will be executed. Although the State has announced plans to use midazolam, vecuronium bromide and potassium chloride for future executions, this public declaration does not constrain the Director's legal authority to alter the method of execution.[332]

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[327] *Julius Omar Robinson v. United States*, Case 13.361, Inter-Am. Comm'n H.R., Report No. 210/20, OEA/SER.L/V/II, doc. 224 ¶ 109 (2020).
[328] *Id.* at ¶ 110.
[329] *Id.*
[330] *Id.*
[331] Oklahoma Department of Correction, *Execution of Inmates Sentenced to Death* OP-040301 Attachment D, D.1 (20 Feb. 2020), https://oklahoma.gov/content/dam/ok/en/doc/documents/policy/section-04/040301ad.pdf.
[332] Darla Shelden, *Oklahoma to Resume State Killings After Acquiring Same Lethal Injection Drugs Used in Botched Executions*, THE CITY SENTINEL (Feb. 13, 2020), https://www.city-sentinel.com/2020/02/oklahoma-to-resume-state-killings-after-acquiring-same-lethal-injection-drugs-used-in-botched-executions/.

B. The United States Bears the Burden of Showing that Its Method of Execution Will Not Cause Excessive and Avoidable Pain and Suffering.

The United States Supreme Court has held that prisoners bear the burden of demonstrating the unconstitutionality of a particular method of execution. In *Glossip v. Gross*, the Court held that the prisoner must establish "that any risk of harm [from the challenged execution protocol] was *substantial* when compared to a known and available alternative method of execution."[333] Thus, a prisoner not only must establish the risk of substantial harm caused by a particular execution method, but also that a less harmful method of execution exists.

The United States' approach is at odds with international human rights standards relating to the application of the death penalty[334] and unfairly burdens the prisoner. International law mandates States "to ensure that the method of execution does not constitute cruel, infamous or unusual punishment."[335] No method of execution that Oklahoma is prepared to use avoids a risk of severe pain, agony, and suffering. As a practical matter, the State is better positioned than the prisoner to prove that a particular method of execution causes minimal suffering because the State has all of the relevant information at its disposal. There is an asymmetry in information between Oklahoma and Ms. Andrew. Oklahoma's execution protocol does not state how it will accommodate Ms. Andrew or the public's right to obtain information concerning the execution. Moreover, the State has had years even to develop its lethal injection protocol, whereas Ms. Andrew will have a scant ten days to try to obtain information regarding the origin of the drugs,

[333] *Glossip v. Gross*, 135 S. Ct.2726, 2738 (2020) (emphasis added).
[334] It is well settled that in capital prosecutions, the burden remains with the prosecution throughout the culpability and sentencing phase. It is never up to the defense to prove that death is not the appropriate sentence. Rather, the prosecution must prove beyond reasonable doubt the existence of any aggravating factors in the case and must negate beyond reasonable doubt any mitigating factors relied on by the prisoner. *See, e.g., S. v. Makwanyane and Another* 1995 (3) SA 391 (CC) at 46; *Moise v. The Queen* (unreported), Crim. App. No. 8 of 2003, Eastern Caribbean Court of Appeal, at 17; *Pipersburgh v R.***,** [2008] UKPC 11, at 32.
[335] *Robinson*, Case 13.361, at ¶ 110; *Lezmond C. Mitchell v. United States*, Case 13.570, Inter-Am. Comm'n H.R., Report No. 211/20, OEA/Ser.L/V/II doc. 224, ¶ 128 (2020).

the exact composition of the drugs Oklahoma intends to use and the risk they will cause her severe pain and suffering.

As a matter of international law and common sense, the state of Oklahoma should therefore bear the burden of proving that whatever method it ultimately uses to execute Ms. Andrew will not cause her cruel, infamous, or unusual punishment under Article XXVI of the American Declaration. Absent such a showing, Ms. Andrew is entitled to the presumption that whatever method Oklahoma ultimately uses will violate her right to be free from cruel and infamous punishment.

C. An Unnecessary Risk of Pain is Inherent in All of Oklahoma's Available Methods of Execution.

All of Oklahoma's intended methods of execution will subject Ms. Andrew to cruel and infamous punishment. Oklahoma has made it clear it intends to resume executions using lethal injection,[336] and has shown no progress towards developing procedures for an alternate method of execution. Our claim therefore focuses on the risks associated with lethal injection as Oklahoma has only developed an execution protocol for lethal injections.

i. Lethal injection

All three of Oklahoma's lethal injection methods present an unnecessary risk of pain and suffering. First, pentobarbital, which the United States has used in recent executions, may cause pain before death if a bad batch of the drug is administered.[337] It is also unclear where Oklahoma would obtain the drug, if it would be imported or if it is compounded or manufactured. The Federal

[336] Nolan Clay, *Oklahoma to Resume Lethal Injection Executions*, THE OKLAHOMAN (14 Feb. 2020), https://www.oklahoman.com/article/5654893/oklahoma-officials-to-give-update-on-executions.
[337] Josiah Bates, *Why the Justice Department's Plan to Use a Single Drug for Lethal Injections is Controversial*, TIME (29 July 2019), https://time.com/5636513/pentobarbital-executions-justice-department/.

Drug Administration[338] does not verify the safety, effectiveness, or quality of compounded drugs.[339] As a result, the market for compounded drugs is largely unregulated. The risks associated with their use are unknown until they are actually put to use.[340] "The problem with using untested drug combinations invented by loosely regulated compound pharmacies or by a state doctor's guesswork is that the state cannot prove that they won't [inflict too much pain]."[341] Compounded drugs are often contaminated with tiny particles, which cause the drug to react in unexpected ways.[342] For example, one expert has noted that lethal injection with a contaminated, compounded form of pentobarbital may cause the prisoner to "feel as though [her veins are] being scraped with sandpaper as [s]he dies."[343] Pentobarbital is especially risky in its compounded form because there is no "published scientific description of, or formula for, the process of compounding pentobarbital for use in executions."[344]

In January 2014, Oklahoma used the drug pentobarbital to execute Michael Lee Wilson. His last words were "I feel my whole body on fire."[345] Wesley Purkey, executed by the United States in 2020, may have felt "extreme pain" while immobilized but conscious after receiving a

[338] The Food and Drug Administration is a governmental agency that is responsible regulating the production, efficacy, and security of pharmaceutical drugs. This regulation process includes authorizing drug use for specific purposes.
[339] *Compounding and the FDA: Questions and Answers*, (21 Jun. 2018), https://www.fda.gov/drugs/human-drug-compounding/compounding-and-fda-questions-and-answers.
[340] Timothy Bella, *New lethal-injection drugs raise new health, oversight questions*, ALJAZEERA (14 Oct. 2013), http://america.aljazeera.com/watch/shows/america-tonight/america-tonight-blog/2013/10/14/new-lethal-injectiondrugsraisenewhealthoversightquestions.html; German Lopez and Max Fisher, *Why it took Arizona nearly 2 hours to execute a prisoner*, VOX, July 23, 2014, http://www.vox.com/2014/7/23/5931633/arizona-death-penalty-execution-joseph-wood.
[341] Lopez & Fisher, *supra* note 109.
[342] Molly Redden, *New Lethal Injections Could Cause Extreme Pain, Make Deaths "Drag On" for Hours*, MOTHER JONES (7 Nov. 2013) http://www.motherjones.com/politics/2013/11/ohio-lethal-injection-cocktail-execution-drugs.
[343] *Id*.
[344] Report from James H. Ruble, R.Ph., Pharm.D., J.D. to Bobbie L. Stratton on Whitaker v. Livingston, No. 4:13-cv-02901 (S.D. Tex. Apr. 24, 2013), ECF No. 64-1, Exhibit XX; Affidavit of Larry D. Sasich ¶ 11, Campbell v. Livingston, No. 4:14-cv-01241 (S.D. Tex, May 6, 2014), ECF No. 1-4, Exhibit YY.
[345] Charlotte Alter, *Oklahoma Convict Who Felt "Body Burning" Executed With Controversial Drug*, TIME (10 Jan, 2014), https://nation.time.com/2014/01/10/oklahoma-convict-who-felt-body-burning-executed-with-controversial-drug/.

dose of pentobarbital.[346] An autopsy after the execution showed fluid quickly filled his lungs and entered his airway, likely causing the sensation of drowning. Flash pulmonary edema, what happened to Mr. Purkey, can only occur when someone is alive, making it a virtual medical certainty that execution by pentobarbital will cause excruciating suffering and make the person feel like they are drowning.

Second, sodium pentothal, also known as sodium thiopental, has been shown to also cause pulmonary edema. In a study of over 200 autopsy of persons executed, researchers found evidence of pulmonary edema in 84 percent of cases.[347] Furthermore, the sole manufacturer of sodium thiopental has ceased manufacturing the drug since 2011 because of its use in executions.[348] This leaves serious concerns over where and how Oklahoma would obtain the drug for use in executions.

Finally, the cocktail of midazolam, vecuronium bromide and potassium chloride has a history of botched executions in Oklahoma. The midazolam is intended to sedate the individual while the vecuronium bromide paralyzes the muscles and the potassium chloride stops the heart.[349] Without effective sedation, vecuronium bromide and potassium chloride cause "agonizing suffering and pain."[350] Midazolam is a sedative and not a paralytic like the first drug used in other three-drug lethal injection protocols. Midazolam supposedly ensures the individual does not feel pain. In fact, none of midazolam's properties shield an individual from pain.

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[346] Michael Tarm, *Lawyers: Autopsy Suggests Inmate Suffered During Execution*, APNEWS (21 Aug. 2020), https://apnews.com/article/3df6980ccbcd7505e035b8bee4c6f2a9.
[347] Equal Justice Initiative, *Lethal Injections Cause Suffocation and Severe Pain, Autopsies Show*, EQUAL JUSTICE INITIATIVE (22 Sep. 2020), https://eji.org/news/lethal-injections-cause-suffocation-and-severe-pain-autopsies-show/.
[348] Chris McGreal, *Lethal Injection Drug Production Ends in the US*, GUARDIAN (23 Jan. 2011), https://www.theguardian.com/world/2011/jan/23/lethal-injection-sodium-thiopental-hospira.
[349] Ben Bryant, *Life and Death Row: How the lethal injection kills*, BBC (5 Mar. 2018), https://www.bbc.co.uk/bbcthree/article/cd49a818-5645-4a94-832e-d22860804779.
[350] Erik Echolm, *One Execution Botched, Oklahoma Delays the Next*, N.Y. TIMES (29 Apr. 2014), https://www.nytimes.com/2014/04/30/us/oklahoma-executions.html.

Midazolam renders individuals unconscious but was not manufactured with the purpose of making them insensate to the pain from the other drugs. Midazolam is also not approved by the Food and Drug Administration for use as a general anesthetic.

Because of concerns that midazolam does not render someone unconscious and the resulting agony from being sensate during the remaining protocol, many states have moved away from using midazolam.[351] Research has suggested that lethal injection involving midazolam causes excruciating pain. Autopsies conducted on individuals executed using lethal injection showed that 87 percent of individuals executed with midazolam experienced pulmonary edema during the execution.[352] Pulmonary edema, as described above, can create intense feelings of fear and panic. Medical witnesses describe pulmonary edema as "painful, both physically and emotionally, inducing a sense of drowning and the attendant panic and terror, much as would occur with the torture tactic known as waterboarding."[353] Evidence from some of the autopsies showed "bloody froth that oozed from the lungs during the autopsy—evidence that the buildup had been sudden, severe, and harrowing."[354]

Protocols involving midazolam have caused many recent botched executions across the United States, including in Oklahoma.[355] At least seven recent executions involved unanticipated problems or side effects because of midazolam-based three drug protocols.[356] Kenneth Williams, executed in Arkansas in 2017, violently convulsed six times during his execution after only being

[351] Kent Faulk, *The weak sedative behind botched executions*, AL.COM (updated 13 Jan. 2019), https://www.al.com/news/birmingham/2017/02/midazolam_from_colonoscopies_t.html.
[352] Noah Caldwell, *Gasping For Air: Autopsies Reveal Troubling Effects of Lethal Injection*, NPR (21 Sep. 2020), https://www.npr.org/2020/09/21/793177589/gasping-for-air-autopsies-reveal-troubling-effects-of-lethal-injection.
[353] *Id*.
[354] Liliana Segura, *Ohio's Governor Stopped an Execution Over Fears it Would Feel Like Waterboarding*, THE INTERCEPT (7 Feb. 2019), https://theintercept.com/2019/02/07/death-penalty-lethal-injection-midazolam-ohio/.
[355] See the descriptions of the executions of Mr. Warner and Mr. Lockett above.
[356] Clayton Lockett, Robert Van Hook, Billy Ray Irick, Joseph Wood, Kenneth Williams, Dennis McGuire, and Ronald Smith all experienced botched executions using midazolam based lethal injection protocols.

administered midazolam.[357] Robert Van Hook, executed in Ohio in 2018, gasped and wheezed throughout his execution loudly enough "to be heard from the witness room."[358] Billy Ray Irick, executed in Tennessee in 2018, showed signs of pulmonary edema throughout his execution, choking and straining against his restraints.[359] Medical experts confirmed that he "was aware and sensate during his execution and would have experienced the feeling of choking, drowning in his own fluids, suffocating, being buried alive, and the burning sensation caused by the injection of the potassium chloride."[360] Because of midazolam, Williams, Van Hook, and Irick were all able to feel the excruciating pain of what was happening to them.

ii. Nitrogen hypoxia

Nitrogen hypoxia, or death by poison gas, has never before been used for execution. There is a little scientific research on the use of nitrogen to kill humans and most of the information known comes from industrial accidents and suicides.[361] Oklahoma itself has yet to provide a protocol or method for how they will conduct execution by nitrogen hypoxia. It is still unclear how Oklahoma will obtain the gas, how it will force a person to inhale it, what should happen if they hold their breath or resist, and how to ensure others are safe from the toxic fumes.[362] Only two

[357] Phil McCausland, *Arkansas Execution of Kenneth Williams 'Horrifying': Lawyer*, NBC NEWS (27 Apr. 2017), https://www.nbcnews.com/storyline/lethal-injection/arkansas-executes-kenneth-williams-4th-lethal-injection-week-n752086.
[358] Liliana Segura, *Ohio's Governor Stopped an Execution Over Fears it Would Feel Like Waterboarding*, THE INTERCEPT (7 Feb. 2019), https://theintercept.com/2019/02/07/death-penalty-lethal-injection-midazolam-ohio/.
[359] *Tennessee Executes Billy Ray Irick in First Execution Since 2009*, DEATH PENALTY INFORMATION CENTER (10 Aug. 2018), https://deathpenaltyinfo.org/news/tennessee-executes-billy-ray-irick-in-first-execution-since-2009.
[360] *Medical Expert: Billy Ray Irick Tortured to Death in Tennessee Execution*, DEATH PENALTY INFORMATION CENTER (14 Sep 2018), https://deathpenaltyinfo.org/news/medical-expert-billy-ray-irick-tortured-to-death-in- tennessee-execution.
[361] Lauren Gill, *Using Nitrogen Gas for Executions is Untested and Poorly Understood. Three States Plan to do it Anyway*, APPEAL (25 Oct. 2019), https://theappeal.org/using-nitrogen-gas-for-executions-is-untested-and-poorly-understood-three-states-plan-to-do-it-anyway/.
[362] Ben Botkin, *How Nitrogen Executions Could Go Wrong*, OKLAHOMA WATCH (17 July 2018), https://oklahomawatch.org/2018/07/17/puzzle-of-nitrogen-execution-could-present-issues-for-state/.

other states, Mississippi and Alabama, allow for nitrogen executions and neither have developed a protocol for how to conduct the execution.

Death might not occur quickly when nitrogen gas is diluted, for example if the mask is not tightly sealed to the person's face, oxygen can get in. There is also the possibility of an individual holding their breath for minutes and prolonging the execution. The complete lack of precedent for execution by nitrogen hypoxia makes uncertainty inevitable should Oklahoma choose to be the first state to carry out an execution this way. Oklahoma has not developed a plan to use nitrogen hypoxia even six years after first approving its use in executions.

iii. Electrocution

Electrocution also presents a significant risk of severe pain, agony, and suffering. In fact, the majority of states in the United States have either abolished electrocution as an execution method or rely on it infrequently for this reason. Oklahoma has not executed anyone by electrocution in the modern era (since 1976).

Some have likened electrocution to being "burned alive and mutilated."[363] Electrocution can heat an individual to a temperature of 200 degrees. Skin is burned and blistered, sometimes falling off the body before the execution is complete.[364] This has caused legs and arms to catch on fire during executions.[365] The heat can also cause an individual's body to swell so much that the eyeballs pop out or melt during the execution.[366] The current has also caused people to vomit blood and to become incontinent.[367]

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[363] Nidhi Subbaraman & Chris McDaniel, *Here's The Horrifying History of The Electric Chair That Might Soon Kill An Inmate In Tennessee*, BUZZFEED NEWS (12 Oct. 2018), https://www.buzzfeednews.com/article/nidhisubbaraman/electric-chair-tennessee-edmund-zagorski.
[364] *Dawson v. State*, 554 S.E.2d 137, 141 (Ga. 2001).
[365] *Executions gone wrong*, TORONTO SUN (30 Apr. 2014), https://torontosun.com/2014/04/30/executions-gone-wrong.
[366] *Glassv. Louisiana*, 471 U.S. 1080, 1087 (1985) (Brennan, J., dissenting).
[367] *Id.*

Electrocution can "repetitively activate the brain, causing the perception of excruciating pain and a sense of extreme horror."[368] There is a high risk that individuals can regain consciousness, despite electrocution protocols stating that the first jolt of electricity shuts down consciousness.[369] There is also a strong likelihood that individuals will be conscious enough to experience the feelings of being burned alive.[370]

While botched electrocutions occur at a lower rate than botched lethal injections, they still occur.[371] Jesse Joseph Tafero, executed in 1990, had six-inch flames erupt from his head during his electrocution and required three administrations of electricity for his heart to stop beating.[372] A crown of foot high flames flared up during Pedro Medina's execution in 1997, accompanied by thick smoke that gagged witnesses in the adjoining room.[373] During Allen Lee Davis' execution in 1999, blood poured out of Davis' mouth and oozed from his chest through the leather chest strap fastening him to the chair before he was pronounced dead.[374]

iv. Firing Squad

Oklahoma has never executed anyone by firing squad. Only four states in the United States allow execution by firing squad.[375] In any event, Oklahoma has never developed plans or protocols for conducting executions by firing squad.

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[368] *Dawson*, 554 S.E.2d at 141.
[369] *State v. Mata*, 745 N.W.2d 229, 271–72 (Neb. 2008).
[370] Grace Wyler, *Tennessee Is Bringing Back the Electric Chair*, VICE (25 May 2014), https://www.vice.com/en/article/jmbjvk/how-you-die-in-an-electric-chair.
[371] Botched executions "involv[e] unanticipated problems or delays that caused, at least arguably, unnecessary agony for the prisoner or that reflect gross incompetence of the executioner." *Botched Executions*, DEATH PENALTY INFORMATION CENTER (last visited 16 Nov. 2020), https://deathpenaltyinfo.org/executions/botched-executions.
[372] Cynthia Barnett, Tafero Meets Grisly Fate in Chair, GAINESVILLE SUN, May 5, 1990, at 1; Cynthia Barnett, A Sterile Scene Turns Grotesque, GAINESVILLE SUN, May 5, 1990, at 1; Bruce Ritchie, Flames, Smoke Mar Execution of Murderer, FLORIDA TIMES-UNION (Jacksonville), May 5, 1990, at 1; Bruce Ritchie, Report on Flawed Execution Cites Human Error, FLORIDA TIMES-UNION (Jacksonville), May 9, 1990, at B1.
[373] Doug Martin, Flames Erupt from Killer's Headpiece, GAINESVILLE SUN, March 26, 1997, at 1.
[374] Davis Execution Gruesome, GAINESVILLE SUN, July 8, 1999, at 1A.
[375] Jeffrey Collins, *South Carolina Senate Adds Firing Squad to Execution Methods*, APNEWS (2 Mar. 2021), https://apnews.com/article/columbia-bills-executions-south-carolina-prisons-d2109813b075045377aae18e25b2fef5.

Based on the above, the Commission should find that the United States has violated Ms. Andrew's right to be free from cruel and infamous punishment. The uncertain nature of Oklahoma's execution procedures along with the lack of adequate notice violates Article XXVI of the ADRDM. Furthermore, the United States, and not Ms. Andrew, should bear the burden of demonstrating that whatever method of execution it intends to employ causes the least possible physical and mental suffering. Absent such a showing, the Commission should find that Oklahoma's method of execution causes cruel and infamous punishment in violation of Article XXVI.

CONCLUSION

Ms. Andrew respectfully requests that this Commission find that the United States has violated her rights under the American Declaration. She further requests that the Commission set forth specific remedies to which she is entitled, including a new trial and sentencing hearing in accordance with her rights to life, equality, due process, a fair trial, and humane treatment under the ADRDM.

Respectfully submitted,

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