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**REPORT No. 462/21**

**CASE 12.505**

REPORT ON THE MERITS (PUBLICATION)

MARLIN GRAY  
UNITED STATES OF AMERICA

Approved electronically by the Commission on December 31, 2021.

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## I. INTRODUCTION

1. On April 26, 2004, the Inter-American Commission on Human Rights (hereinafter the “Commission” or the “IACHR”) received a petition<sup>1</sup> filed by Mr. David L. Sloss, assistant professor of law at Saint Louis University School of Law and Ms. Joanne M. Descher, from Devereux Murphy LLC (hereinafter “the Petitioners”) against the Government of the United States of America (hereinafter the “United States” or the “State”). The petition was presented on behalf of Marlin Gray (hereinafter “Mr. Gray”) who at the time of the petition was incarcerated on death row in the state of Missouri. Mr. Gray was executed on October 26, 2005.

2. The Commission approved its admissibility report No. 79/05 on October 24, 2005,<sup>2</sup> and notified the report to the parties, placing itself at their disposition to reach a friendly settlement. The parties were allocated the time periods provided for in the IACHR’s Rules of Procedure to present additional observations on the merits of the case. All of the information received by the IACHR was duly transmitted to the parties.

## II. POSITIONS OF THE PARTIES

### A. Petitioners

3. The Petitioners assert that there was a violation of Mr. Gray’s right to judicial protection as he was convicted of first-degree murder on an accomplice liability theory and on the basis of insufficient evidence; the Missouri Supreme Court made critical legal and factual errors when it heard Mr. Gray’s initial appeal; no other U.S. court corrected the errors made by the Missouri Supreme Court; and the Missouri Supreme Court refused to stay Mr. Gray’s execution without explanation or comment on legal arguments, while his case was pending before the Inter-American Commission.

4. The Petitioners claim that the Missouri Supreme Court’s account of “threats to kill made either by the defendant or in the defendant’s presence... [and] [d]efendant continued in the criminal enterprise after the threats to kill the victims were made,” and Mr. Gray as having a “role as a leader and enforcer of the group,”<sup>3</sup> were legally insufficient to support a conviction of first-degree murder. This, the Petitioners claim, is attributed to a lack of testimony by either of the participants to the rape or Mr. Cummins, the surviving victim; and further to the non-enforcement by Mr. Gray of his alleged threat to force Mr. Winfrey to participate in the rape.

5. The petition asserts that the Missouri Supreme Court “committed several significant legal and factual errors that undermine the validity of [its] conclusion [affirming a first-degree murder conviction].” The Petitioners claim that there were three crucial errors. First, they allege that the court attributed to Mr. Gray statements that he did not make regarding a discussion about whether Mr. Cummins should be killed. Second, Petitioners claim that the court drew impermissible inferences from Mr. Gray’s confession, making specific reference to the use of his statement that he “thought that Richardson ha[d] taken [Julie Kerry] to the end of the bridge, where he could take her by the river and maybe drown her or something,”<sup>4</sup> as sufficient evidence to permit inference of intent. Third, they argue that the court made an incorrect statement about Mr. Gray having a gun based on the testimony of Mr. Cummins who expressed that Mr. Gray “said he would shoot” him if he looked up.

6. The Petitioners submit that the Government’s response misrepresented the facts of the case; as none of the testimonies given spoke of Mr. Gray as a “ringleader” or “instigator,” however, this was the argument submitted to convict Mr. Gray of murder. On this argument, the Petitioners refer to the lead prosecutor’s submissions during the determination of guilt at trial, which tried to persuade the jury that Mr. Gray was the ringleader. With regards to the discussion on the killing of Mr. Cummins, the Petitioners assert however that the testimony of Mr. Cummins expressed that he, Mr. Cummins, was not able to identify the people who discussed whether

<sup>1</sup> On May 10, 2004, the IACHR granted precautionary measures on behalf of Marlin Gray pursuant to Article 25(1) of its Rules of Procedure and requested the United States to take the measures necessary to preserve his life and physical integrity so as not to hinder the processing of his case before the Inter-American system and reiterated the same via note of October 10, 2005.

<sup>2</sup> IACHR. Report No. 79/05. Petition P-396-04. Admissibility. Marlin Gray. United States. October 24, 2005.

<sup>3</sup> State v Gray, 887 S.W. 2d at 377.

<sup>4</sup> State v Gray, 887 S.W. 2d at 375.

he should be killed as his coat was pulled over his head. Regarding Mr. Gray's confession statement, the Petitioners claim that the inference that should have followed is that Mr. Gray did not know where or how Mr. Clemons and Mr. Richardson intended to kill the Kerry sisters and lastly, there was no other evidence apart from the testimony of Mr. Cummins on Mr. Gray's threatening statement, to support that Mr. Gray had a gun.

7. The Petitioners claim that, by applying the death penalty to an individual who did not personally kill anyone, and did not request or instruct others to commit murder, the State has then failed to restrict application of the death penalty to crimes of "exceptional gravity," and that subjecting Mr. Gray to capital punishment would violate the prohibition against arbitrary deprivation of life. The Petitioners argue that the individual circumstances of Mr. Gray and his crime do not satisfy the requirements of a crime of exceptional gravity essentially due to the insufficient nexus between Mr. Gray and the crimes for which he has been convicted and sentenced, and that he has been unable to obtain a judicial remedy within the United States for his circumstances.

8. The Petitioners further submit that the standard for what constitutes a crime of exceptional gravity under international law is different from the standard for what constitutes first-degree murder under Missouri law. It is claimed that under international law there is a determination which requires an evaluation of individual moral culpability; however with Missouri law, this determination hinges on whether the defendant made a decision to kill "after deliberation upon the matter,"<sup>5</sup> and not necessarily with the type of individual culpability required for crimes of exceptional gravity.

9. Finally, the Petitioners claim that although the US Supreme Court has traditionally embraced the principle that capital punishment should be reserved for crimes of exceptional gravity, jurisprudence from the Court has permitted the application of the death penalty to individuals who neither took life, attempted to take life, nor intended to take life. The Petitioners therefore argue that prevailing US jurisprudence is inconsistent with the requirements under the American Declaration and has prevented Mr. Gray from obtaining a judicial remedy despite several attempts to do so.

## **B. State**

10. In its response to the Petitioner's observations on the merits, the State reiterated its stance within its submission filed during the admissibility stage. This section is thus based on arguments within the State observations that refer to those made during the admissibility stage related to the merits.

11. The State argues that both the state and federal courts had reviewed and affirmed Mr. Gray's conviction and sentence pursuant to due process of law, and their findings legally and factually support the first-degree murder conviction and sentence of death. With regards to the Petitioner's assertions that the Missouri Supreme Court committed several significant legal and factual errors that undermine the validity of its conclusion in affirming a first-degree murder conviction; the State explains that Mr. Gray bore the burden of rebutting by clear and convincing evidence the presumption of correctness of any state court's factual determination; and Mr. Gray in the circumstances did not meet his burden of demonstrating any significant factual inaccuracies.

12. With regards to the claim that there was not sufficient evidence to convict of first-degree murder because Mr. Gray did not have the requisite intent to kill, the State relies on observations by the Missouri Supreme Court, which noted Mr. Gray's "role as a leader and enforcer in the group"<sup>6</sup> which permitted an inference of deliberation as required for first-degree murder. The State also relies on the ruling of the Eight Circuit Court which expressed that there "is ample evidence here of participation and deliberation to justify a verdict of guilty on charges of first-degree murder"<sup>7</sup> which was a reference of *Gray v Bowersox*, 281 F.3d at 753. Further reliance was made to Missouri law whereby "cool reflection for any length of time no matter how brief" constitutes the requisite deliberation to justify a verdict of guilty on charges of first-degree murder.

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<sup>5</sup> MO. REV. STAT. 565.020(1)

<sup>6</sup> *State v Gray*, 887 S.W. 2d at 377.

<sup>7</sup> State's third response submitted May 31, 2006.

13. The State affirms that a duly constituted jury imposed a sentence of death for the conviction, finding six statutory aggravating circumstances in each count of murder as a basis for considering capital punishment. It further argues that the U.S. courts properly considered the individual circumstances of Mr. Gray's crime, and his sentence is not arbitrary and was imposed in accordance with full due process protections. In particular, the State contends that the U.S. Courts have reviewed the issue of the gravity of Mr. Gray's crime extensively, and their findings legally and factually support the sentence of death.

14. With regard to the submission by the Petitioners that Mr. Gray did not commit a crime of "exceptional gravity" under international law, the State reiterated that the U.S. courts had reviewed the issue of gravity of Mr. Gray's crime extensively, and that their findings legally and factually support a sentence of death. The State disputes the submission claiming that the evidence presented amply supported Mr. Gray's conviction as an accomplice to first-degree murder, as defined under Missouri law. The State refers specifically to Missouri law under which the courts are guided, which states that:<sup>8</sup>

"Either before or during the commission of an offense with the purpose of promoting the commission of an offense, [a person] aids or agrees to aid or attempts to aid such other person in planning, committing or attempting to commit the offense."

15. Finally, the State argues that the Commission lacks the authority to request precautionary measures of States that have not ratified the American Convention, essentially because the provision governing such measures is contained in the Commissions' Rules rather than in its Statute.

### III. FINDINGS OF FACT

16. In application of Article 43(1) of its Rules of Procedure, the IACHR will examine the arguments and evidence provided by the Petitioners and the State. Likewise, the Commission will take into account publicly available information that may be relevant to the analysis and decision of the instant case.

#### A. Relevant legal framework and applicable case law

17. Chapter 565 of Title XXXVIII (crimes and punishment; peace officers and public defenders) of the state of Missouri Statutes establishes the following:

*565.002. Definitions.* — As used in this chapter, unless a different meaning is otherwise plainly required the following terms mean:

[...]

(5) "Deliberation", cool reflection for any length of time no matter how brief;

[...]

*565.020. First degree murder, penalty [...]*

1. A person commits the offense of murder in the first degree if he or she knowingly causes the death of another person after deliberation upon the matter.

2. The offense of murder in the first degree is a class A felony, and, if a person is eighteen years of age or older at the time of the offense, the punishment shall be either death or imprisonment for life without eligibility for probation or parole, or release except by act of the governor [...].

*565.032. Evidence to be considered in assessing punishment in first degree murder cases for which death penalty authorized.*

1. In all cases of murder in the first degree for which the death penalty is authorized, the judge in a jury-waived trial shall consider, or shall include in his or her instructions to the jury for it to consider:

(1) Whether a statutory aggravating circumstance or circumstances enumerated in subsection 2 of this section is established by the evidence beyond a reasonable doubt; and

<sup>8</sup> MO. REV. STAT. 562.041.

(2) If a statutory aggravating circumstance or circumstances is proven beyond a reasonable doubt, whether the evidence as a whole justifies a sentence of death or a sentence of life imprisonment without eligibility for probation, parole, or release except by act of the governor.

In determining the issues enumerated in subdivisions (1) and (2) of this subsection, the trier shall consider all evidence which it finds to be in aggravation or mitigation of punishment, including evidence received during the first stage of the trial and evidence supporting any of the statutory aggravating or mitigating circumstances set out in subsections 2 and 3 of this section. If the trier is a jury, it shall not be instructed upon any specific evidence which may be in aggravation or mitigation of punishment, but shall be instructed that each juror shall consider any evidence which he or she considers to be aggravating or mitigating.

2. Statutory aggravating circumstances for a murder in the first degree offense shall be limited to the following:

(1) The offense was committed by a person with a prior record of conviction for murder in the first degree, or the offense was committed by a person who has one or more serious assaultive criminal convictions;

(2) The murder in the first degree offense was committed while the offender was engaged in the commission or attempted commission of another unlawful homicide;

(3) The offender by his or her act of murder in the first degree knowingly created a great risk of death to more than one person by means of a weapon or device which would normally be hazardous to the lives of more than one person;

(4) The offender committed the offense of murder in the first degree for himself or herself or another, for the purpose of receiving money or any other thing of monetary value from the victim of the murder or another;

(5) The murder in the first degree was committed against a judicial officer, former judicial officer, prosecuting attorney or former prosecuting attorney, circuit attorney or former circuit attorney, assistant prosecuting attorney or former assistant prosecuting attorney, assistant circuit attorney or former assistant circuit attorney, peace officer or former peace officer, elected official or former elected official during or because of the exercise of his official duty;

(6) The offender caused or directed another to commit murder in the first degree or committed murder in the first degree as an agent or employee of another person;

(7) The murder in the first degree was outrageously or wantonly vile, horrible or inhuman in that it involved torture, or depravity of mind;

(8) The murder in the first degree was committed against any peace officer, or fireman while engaged in the performance of his or her official duty;

(9) The murder in the first degree was committed by a person in, or who has escaped from, the lawful custody of a peace officer or place of lawful confinement;

(10) The murder in the first degree was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest or custody in a place of lawful confinement, of himself or herself or another;

(11) The murder in the first degree was committed while the defendant was engaged in the perpetration or was aiding or encouraging another person to perpetrate or attempt to perpetrate a felony of any degree of rape, sodomy, burglary, robbery, kidnapping, or any felony offense in chapter 195 or 579;

(12) The murdered individual was a witness or potential witness in any past or pending investigation or past or pending prosecution, and was killed as a result of his or her status as a witness or potential witness;

(13) The murdered individual was an employee of an institution or facility of the department of corrections of this state or local correction agency and was killed in the course of performing his or her official duties, or the murdered individual was an inmate of such institution or facility;

(14) The murdered individual was killed as a result of the hijacking of an airplane, train, ship, bus or other public conveyance;

(15) The murder was committed for the purpose of concealing or attempting to conceal any felony offense defined in chapter 195 or 579;

(16) The murder was committed for the purpose of causing or attempting to cause a person to refrain from initiating or aiding in the prosecution of a felony offense defined in chapter 195 or 579;

(17) The murder was committed during the commission of an offense which is part of a pattern of criminal street gang activity as defined in section 578.421.

3. Statutory mitigating circumstances shall include the following:

- (1) The defendant has no significant history of prior criminal activity;
- (2) The murder in the first degree was committed while the defendant was under the influence of extreme mental or emotional disturbance;
- (3) The victim was a participant in the defendant's conduct or consented to the act;
- (4) The defendant was an accomplice in the murder in the first degree committed by another person and his or her participation was relatively minor;
- (5) The defendant acted under extreme duress or under the substantial domination of another person;
- (6) The capacity of the defendant to appreciate the criminality of his or her conduct or to conform his or her conduct to the requirements of law was substantially impaired;
- (7) The age of the defendant at the time of the offense.

18. Circumstances permitting inference that an accomplice deliberated upon murder include:

1. Where a statement or conduct by the accomplice or by a codefendant in the presence of the accomplice prior to the murder indicates a purpose to kill a human.<sup>9</sup>
2. Where there is evidence that the accomplice either participated in the homicide or continued in the criminal enterprise when it was apparent that a victim was to be killed.<sup>10</sup>

## **B. Factual background**

19. The facts described below were established by domestic courts.

20. On April 4, 1991, Julie and Robin Kerry (the Kerry sisters) and their cousin Thomas Cummins met Mr. Gray and his three friends, Clemons, Richardson and Winfrey. After some conversation the two groups separated. During this walk, Clemons suggested to his three companions that they rob Cummins and the Kerry sisters. Mr. Gray smiled, clapped his hands, and said, "yeah, I feel like hurting somebody." The two groups met, and Mr. Gray put his arm around Cummins and walked him ten to fifteen feet away. He told him, "This is a robbery. Get down on the ground." Mr. Gray told Cummins that if he looked up, he would kill or shoot him. At the same time the other three males grabbed the Kerry sisters and when the women screamed, one of the group said, "do you want to die?" and ordered them to stop screaming or he would "throw [them] off th[e] bridge." Clemons then raped Julie Kerry, Richardson raped Robin Kerry. While this occurred, Mr. Gray went back to where Cummins was lying on the ground and said, "I've never had the privilege of popping somebody...[I]f you put your head up or try to look, I'm going to pop you." Mr. Gray then told Winfrey to watch Cummins. Mr. Gray then raped Robin Kerry, while this rape occurred Richardson forced Julie Kerry into a manhole on the bridge deck. When Mr. Gray finished raping Robin Kerry, he went to Winfrey and asked where Richardson had gone, Winfrey pointed to the Missouri side of the river and Gray ran off in that direction. Clemons then forced Robin Kerry and Thomas Cummins into the manhole and told Winfrey to find Mr. Gray. Julie and Robin Kerry were then pushed into the river and Cummins was told to jump. Winfrey found Mr. Gray and were returning back to the bridge; Clemons and Richardson met them. Clemons said, "We threw them off. Let's go." The group then left the bridge. Clemons said, "They'll never make it to shore." Mr. Gray praised Richardson for being "brave" to push the Kerry sisters off the bridge."<sup>11</sup>

21. The Kerry sisters died and Thomas Cummins survived.

<sup>9</sup>State v. Isa, 850 S.W.2d 876, 882-83 (Mo. 1993); State v. Six, 805 S.W.2d 159, 165 (Mo. 1991); State v. Betts, 646 S.W.2d 94, 95 (Mo. 1983).

<sup>10</sup>State v. Roberts, 709 S.W.2d 857, 860 (Mo. 1986); State v. Lindsay, 507 S.W.2d 1, 2 (Mo. 1974).

<sup>11</sup>Gray v Bowersox 281 F.3d 749 (8<sup>th</sup> Cir. 2002).

### C. Trial and death sentence

22. On June 21, 1991, Mr. Gray was charged by indictment with two counts of first-degree murder, as well as other felonies.<sup>12</sup> On October 21, 1992, he was convicted of two counts of first-degree murder as an accomplice in the death of Julie and Robin Kerry. On October 23, 1992, the jury returned a verdict of death on each count on December 3, 1992, the St. Louis City Circuit Court sentenced Mr. Gray to death.<sup>13</sup>

23. As regards the elements of the offence present within Mr. Gray's criminal conduct, the court remarked the following:

[Mr. Gray] did not kill Julie and Robin Kerry himself. Instead, according to the state and the verdict of the jury, he participated in a major way with three other men [...] in robbing the two victims and their cousin, Thomas Cummins, and in raping the two women. Under Missouri law, a person may be guilty of first-degree murder (and therefore eligible for the death penalty) without being the actual killer. Participation in the planning and execution of felonies, here rape and robbery, however, is not sufficient in and of itself. It must also be shown that defendant's associates committed murder, that defendant cooperated with them, and that defendant, after deliberation, acted with them to cause the deaths [...] There must be some evidence that the defendant himself made a decision to kill the victims before the murder. [...] The sufficiency of the evidence to establish Gray's guilt of first-degree murder is not one of the issues before us."<sup>14</sup>

24. The evidence considered by the court in this regard was:

"Here there were threats to kill made either by the defendant or in the defendant's presence. In addition, the defendant at one point stated that he would shoot Cummins, indicating that he had ready access to a deadly weapon, even though no weapon was actually displayed or used to commit the homicides in this case. The jury was entitled to believe defendant had a gun. Defendant continued in the criminal enterprise after the threats to kill the victims were made. After the threats, he held Cummins at bay while the rapes were committed. Defendant participated in a discussion about whether Cummins should be killed, followed later by an attempt on Cummin's life and the two homicides. These facts, together with the defendant's statement that he felt like hurting somebody, his role as a leader and enforcer in the group, and his belief before leaving the bridge that Richardson had gone to drown Julie Kerry in the river, are sufficient evidence to permit an inference by the jury that defendant had a conscious purpose of committing the acts in which he engaged so that the victims would be killed and that the homicides occurred after he coolly deliberated on the deaths for some amount of time, however short."<sup>15</sup>

25. The Court, in making this judgement viewed the evidence "in a light most favorable to the verdict, affording the state all reasonable favorable inferences and ignoring contrary evidence and inferences"; referencing the case of *State v Grim* 854 S.W.2d 403, 405 (Mo. Banc 1993).<sup>16</sup>

26. Mr. Cummins accounted that after being told it was a robbery, he was instructed to lay down on the bridge and explained that his "head was towards the south side of the bridge", and upon hearing Julie Kerry scream, he "turned [his] head a little bit to the right just enough to see over that direction and I saw like sparks, like when you drop a cigarette on the concrete and sparks kind of fly out."<sup>17</sup> He further explained that with regards to the robbery "someone came up and sat on me, on my back, and asked me if I had any money." He testified that after being robbed of his money and watch, "[s]omeone else came over to me and he told me to get up... and he kind of held my head down so I couldn't look up". He added that "they laid me down on the bridge the second time" held his driver's license to his head and explained that they knew where he lived and if he told anyone, they were "going to come get [him]" and "the person said that he was going to let me live". His testimony immediately added that "[s]omeone came up to me and pulled my coat over my head while I was laying there and said he was going to kill me... I heard the first voice or another voice come up and say '[n]o, I told him he could live.'... the two proceeded to... converse back and forth about whether I was going to live or die." He

<sup>12</sup> Missouri Death Row. Capital Punishment in Missouri. Available at: [https://missourideathrow.com/2008/12/gray\\_marlin/](https://missourideathrow.com/2008/12/gray_marlin/)

<sup>13</sup> Missouri Death Row. Capital Punishment in Missouri. Available at: [https://missourideathrow.com/2008/12/gray\\_marlin/](https://missourideathrow.com/2008/12/gray_marlin/)

<sup>14</sup> *Gray v Bowersox* 281 F.3d 749 (8<sup>th</sup> Cir. 2002).

<sup>15</sup> *State v Gray* 887 S.W. 2d 369 (Mo. Banc 1994).

<sup>16</sup> *State v Gray* 887 S.W. 2d 369.

<sup>17</sup> Transcript of Thomas Patrick Cummins, surviving victim, during the Appeal to the Supreme Court of Missouri, Exhibit 1 of the Petitioner's submission of September 2, 2004.

concludes that “[t]hey made me get up again... and he told me to get down inside (an open manhole)”, he “heard a voice say to get up and get down”, he “saw a hand come out and push Julie from the bridge... and then the same hand pushed Robin” and then he “heard a voice that said ‘jump’” and he jumped. He accounted that there was no light underneath the decking of the bridge and he could not tell how many people were down on the platform.

27. The lead prosecutor, (Nels Moss) submitted during the determination of guilt at trial, that Mr. Gray was the ringleader and guilty of murder. He communicated these assertions through his statements that Mr. Gray, “[h]e aided and encouraged in every way he could”, “was a big man among small men, among younger men. He was their leader”, “[i]t was his plan,” “the man in charge,” “[t]he man who knew how to manipulate these people.”<sup>18</sup> Further, he stated that “[t]his crime was cold, calculating, manipulative...[h]e can manipulate them. He can get them to do what he wants.”<sup>19</sup> His statements of Mr. Gray were that “there is no question here that under all the evidence he’s guilty of a form of felony murder second”, “[h]e is guilty of felony murder second, period, end of discussion”, “ he’s charged in everything with acting with another”, “[i]f you follow the trail, it leads directly to him”, “It was him.”<sup>20</sup> He also stated that Mr. Gray, “he made a choice to kill people that night on the bridge.”<sup>21</sup>

28. Mr. Gray filed a motion for post-conviction relief in the circuit court of St. Louis City which was denied on November 29, 1993.<sup>22</sup> Mr. Gray appealed his sentence and conviction which was reviewed by the Supreme Court of Missouri. In Mr. Gray’s direct appeal,<sup>23</sup> the Court recognized that to “establish deliberation element of first degree murder, there must be some evidence that defendant made decision to kill victims prior to murder”<sup>24</sup> and that Mr. Gray’s “participation in planning and execution of rape and robbery of murder victims was not sufficient to infer deliberation required for first-degree murder; first degree murder statute required deliberation of killing a person not merely deliberation of forcible rape and robbery.”<sup>25</sup>

29. The court nonetheless affirmed Mr. Gray’s murder conviction and death sentence and reasoned that “[e]vidence was sufficient to show defendant knowingly caused or acted with others to cause death of murder victims after deliberation.”<sup>26</sup> The court inferred Mr. Gray’s accessory liability for first-degree murder referencing case law which outlined circumstances permitting such inference, that being: 1) where there is a statement or conduct by defendant or statements or conduct by co-defendant prior to murder indicating purpose to kill a human;<sup>27</sup> 2) evidence that murder was committed by means of deadly weapon and that accomplice was aware that deadly weapon was to be used in commission of crime;<sup>28</sup> 3) evidence that the accessory either participated in homicide or continued in criminal enterprise when it was apparent that victim was to be killed.<sup>29</sup>

30. Further, the court reasoned that the death penalty was not disproportionate to murders committed in furtherance of brutal rape and robbery. In this regard, the Court considered that: the defendant made threats to kill, an example referenced was the threat to shoot the robbery victim; after making threats to kill the victims, the defendant continued in the criminal enterprise by holding the robbery victim at bay while rapes of other two victims were committed; the defendant participated in a discussion about whether the robbery victim

<sup>18</sup> Transcript of Nels Moss, lead prosecutor, during the conviction phase of trial, Exhibit A of the Petitioner’s submission of September 2, 2004.

<sup>19</sup> Transcript of Nels Moss, lead prosecutor, during the sentencing phase of trial, Exhibit B of the Petitioner’s submission of September 2, 2004.

<sup>20</sup> Transcript of Nels Moss, lead prosecutor, during the conviction phase of trial, Exhibit A of the Petitioner’s submission of September 2, 2004.

<sup>21</sup> Transcript of Nels Moss, lead prosecutor, during the sentencing phase of trial, Exhibit B of the Petitioner’s submission of September 2, 2004.

<sup>22</sup> Missouri Death Row. Capital Punishment in Missouri. Available at: [https://missourideathrow.com/2008/12/gray\\_marlin/](https://missourideathrow.com/2008/12/gray_marlin/)

<sup>23</sup> State v Gray 887 S.W. 2d 369 (Mo. Banc 1994).

<sup>24</sup> State v Gray 887 S.W. 2d 369.

<sup>25</sup> State v Gray 887 S.W. 2d 369.

<sup>26</sup> State v Gray 887 S.W. 2d 369.

<sup>27</sup> State v Isa 850 S.W.2d 876, 882-83 (Mo. Banc 1993).

<sup>28</sup> State v Turner 623 S.W.2D 4, 6-7 (Mo. Banc 1981).

<sup>29</sup> Lindsay 507 S.W.2d.

should be killed; further, that the defendant stated he felt like hurting someone, acted as a leader and enforcer in the group which perpetrated offenses; and stated his belief before leaving scene.<sup>30</sup>

31. The court also cited a number of cases in which the death penalty was assessed where the murder was committed to avoid arrest or detection and indicated that the motive of Mr. Gray and his cohorts was to escape capture and identification. It also pointed to the fact of multiple homicides or multiple attempts at homicide as being consistent with facts in cases where the death penalty has been imposed. Finally, the court reasoned that the evidence of the defendant's absence at the time of the actual killing was not dispositive of the question of proportionality. In this regard, the court established that the death penalty has been sustained where there was no evidence that the defendant was present at the time of the actual murder.<sup>31</sup>

32. On March 27, 1995, the United States Supreme Court denied certiorari review.<sup>32</sup>

#### **D. Post-conviction proceedings**

33. Mr. Gray filed a petition for a writ of habeas corpus relief in the District Court of Missouri, which was denied in an unpublished order on July 14, 2000.<sup>33</sup> The United States Court of Appeal upon review of the denial of Mr. Gray's habeas corpus petition affirmed the judgment of the District Court.<sup>34</sup> The court, however, recognized that the "[p]etitioner did not kill Julie and Robin Kerry himself. Instead, according to the state and the verdict of the jury, he participated in a major way with three other men [...] in robbing the two victims and their cousin, and in raping the two victims."<sup>35</sup>

34. On January 13, 2003, the Supreme Court declined discretionary review<sup>36</sup> and the State requested the Missouri Supreme Court to set an execution date, which was scheduled for October 26, 2005.<sup>37</sup>

35. Mr. Gray was executed on October 26, 2005, at 12:07 am by lethal injection.

36. With regard to the other three persons involved in the crime, Winfrey pleaded guilty to two counts of second degree murder and agreed to testify against the other three in exchange for a recommended 30-year sentence. He received the 30-year sentence in exchange for his cooperation and was paroled in 2007. The other two were tried separately.<sup>38</sup>

37. Richardson was convicted of one count of first-degree murder and one count of second-degree murder but in the penalty phase the jury could not agree on the sentence. Under Missouri law the judge then became the sentencer, and sentenced him to death.<sup>39</sup> In 2002, the Supreme Court of the United States determined in *Ring v. Arizona*, 536 U.S. 584, that a jury must find every fact that the legislature requires be found before death may be imposed. Since the jury in Richardson's case had not unanimously determined that he deserved the death penalty, he was re-sentenced to life imprisonment without parole.<sup>40</sup>

38. Clemons was found guilty of two counts of first-degree murder and the jury returned a verdict for the death penalty on both counts. In post-conviction, the district court found that he was entitled to a writ of habeas corpus vacating the death penalty because six people were unconstitutionally excluded from serving on the

<sup>30</sup> State v Gray 887 S.W. 2d 369.

<sup>31</sup> State v Gray 887 S.W. 2d 369.

<sup>32</sup> Gray v Missouri, 514 U.S. 1042 (1995)

<sup>33</sup> Missouri Death Row. Capital Punishment in Missouri. Available at: [https://missourideathrow.com/2008/12/gray\\_marlin/](https://missourideathrow.com/2008/12/gray_marlin/)

<sup>34</sup> Gray v Bowersox 281 F.3d 749 (8<sup>th</sup> Cir. 2002).

<sup>35</sup> Gray v Bowersox 281 F.3d 749 (8<sup>th</sup> Cir. 2002).

<sup>36</sup> Gray v Luebbbers, 537 U.S. 115 (2002)

<sup>37</sup> Missouri Death Row. Capital Punishment in Missouri. Available at: [https://missourideathrow.com/2008/12/gray\\_marlin/](https://missourideathrow.com/2008/12/gray_marlin/)

<sup>38</sup> *Clemmons v. Luebbbers*, 212 F. Supp.2d 1105 (E.D.Mo. 2002). Exhibit 5 of the State's submission of July 28, 2004; Daniel Winfrey v. Missouri Board of Probation and Parole et al. May 30, 2017. Available at: <https://caselaw.findlaw.com/mo-court-of-appeals/1862318.html>; The Seattle Times. Ex-Missouri death row inmate re-sentenced to life in prison. December 18, 2017; Belleville News-Democrat. Twenty-six years later, las of four Chain of Rocks Bridge killers pleads guilty. Available at: <https://www.bnd.com/news/local/crime/article190391684.html>

<sup>39</sup> *Clemmons v. Luebbbers*, 212 F. Supp.2d 1105 (E.D.Mo. 2002). Exhibit 5 of the State's submission of July 28, 2004.

<sup>40</sup> State's submission of July 28, 2004, p. 5.

jury that sentenced him to death. At the time of the State's submission, an appeal of this decision was pending in the U.S. Court of Appeals for the Eighth Circuit.<sup>41</sup> According to public information, in 2015 the Missouri Supreme Court vacated the conviction after finding that prosecutors suppressed evidence and in 2017 he pleaded guilty and was sentenced to five consecutive life sentences under a plea agreement. He could be eligible for parole in November, 2020.<sup>42</sup>

#### IV. ANALYSIS OF LAW

##### A. Preliminary considerations

39. Before embarking on its analysis of the merits in the case of Marlin Gray (Executed), the Inter-American Commission considers it relevant to reiterate its previous rulings regarding the heightened scrutiny to be used in cases involving the death penalty. The right to life has received broad recognition as the supreme human right and as a *sine qua non* for the enjoyment of all other rights.

40. That gives rise to the particular importance of the IACHR's obligation to ensure that any deprivation of life may arise from the enforcement of the death penalty strictly abides by the requirements set forth in the applicable instruments of the Inter-American Human Rights System, including the American Declaration.<sup>43</sup> That "heightened scrutiny test is consistent with the restrictive approach adopted by other international human rights bodies in cases involving the imposition of the death penalty,<sup>44</sup> and it has been set out and applied by the Inter-American Commission in previous capital cases brought before it.<sup>45</sup>

41. As the Inter-American Commission has explained, this standard of review is the necessary consequence of the specific penalty at issue and the right to a fair trial and all attendant due process guarantees:<sup>46</sup>

"due in part to its irrevocable and irreversible nature, the death penalty is a form of punishment that differs in substance as well as in degree in comparison with other means of punishment, and therefore warrants a particularly stringent need for reliability in determining whether a person is responsible for a crime that carries a penalty of death."<sup>47</sup>

42. The Inter-American Commission will therefore review the petitioner's allegations in the present case with a heightened level of scrutiny, to ensure in particular that the rights to life, due process, and to a fair trial as prescribed under the American Declaration have been respected by the State. With regard to the legal status of the American Declaration, the IACHR reiterates that:

<sup>41</sup> Clemmons v. Luebbbers, 212 F. Supp.2d 1105 (E.D.Mo. 2002). Exhibit 5 of the State's submission of July 28, 2004.

<sup>42</sup> The Seattle Times. Ex-Missouri death row inmate re-sentenced to life in prison. December 18, 2017. Available at: <https://www.seattletimes.com/nation-world/ex-missouri-death-row-inmate-re-sentenced-to-life-in-prison/>; Daily News. Killer who raped sisters and pushed them off bridge could be released in two years despite initial death sentence. September 25, 2018. Available at: <http://www.nydailynews.com/news/crime/ny-news-clemons-sisters-parole-20180925-story.html>

<sup>43</sup> See, in this respect, IACHR, The death penalty in the Inter-American System of Human Rights: From restrictions to abolition, OEA/Ser.L/V/II.Doc. 68, December 31, 2011.

<sup>44</sup> See, for example: I/A Court H. R., Advisory Opinion OC-16/99 (October 1, 1999), *The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law*, para. 136 (finding that "because execution of the death penalty is irreversible, the strictest and most rigorous enforcement of judicial guarantees is required of the State so that those guarantees are not violated and a human life is not arbitrarily taken as a result"); United Nations Human Rights Committee, *Baboheram-Adhin et al. v. Suriname*, Communications Nos. 148-154/1983, adopted on April 4, 1985, para. 14.3 (observing that "the law must strictly control and limit the circumstances in which a person may be deprived of his life by the authorities of a State"); *Report of the United Nations Special Rapporteur on Extrajudicial Executions*, Bacre Waly Ndiaye, submitted pursuant to Commission on Human Rights Resolution 1994/82, Question of the Violation of Human Rights and Fundamental Freedoms in any part of the World, with particular reference to Colonial and Other Dependent Countries and Territories, UN Doc.E/CN.4/1995/61 (December 14, 1994) ("the Ndiaye Report"), para. 378 (emphasizing that in capital cases, it is the application of the standards of fair trial to each and every case that needs to be ensured and, in case of indications to the contrary, verified, in accordance with the obligation under international law to conduct exhaustive and impartial investigations into all allegations of violation of the right to life).

<sup>45</sup> IACHR, Report No. 11/15, Case 12.833, Merits (Publication), Felix Rocha Diaz, United States, March 23, 2015, para. 54; Report No. 44/14, Case 12.873, Merits (Publication), Edgar Tamayo Arias, United States, July 17, 2014, para. 127; Report No. 57/96, Andrews, United States, IACHR Annual Report 1997, para. 170-171.

<sup>46</sup> IACHR, The death penalty in the Inter-American System of Human Rights: From restrictions to abolition, OEA/Ser.L/V/II.Doc. 68, December 31, 2011, para. 41.

<sup>47</sup> IACHR, Report No. 78/07, Case 12.265, Merits (Publication), Chad Roger Goodman, The Bahamas, October 15, 2007, para. 34.

"[t]he American Declaration is, for the Member States not parties to the American Convention, the source of international obligations related to the OAS Charter. The Charter of the Organization gave the IACHR the principal function of promoting the observance and protection of human rights in the Member States. Article 106 of the OAS Charter does not, however, list or define those rights. The General Assembly of the OAS at its Ninth Regular Period of Sessions, held in La Paz, Bolivia, in October, 1979, agreed that those rights are those enunciated and defined in the American Declaration. Therefore, the American Declaration crystallizes the fundamental principles recognized by the American States. The OAS General Assembly has also repeatedly recognized that the American Declaration is a source of international obligations for the member states of the OAS."<sup>48</sup>

## B. Right to life<sup>49</sup> and the imposition of the death penalty only for the most serious crimes

### 1. General considerations

43. The Commission has stressed that the right to life is a prerequisite for the enjoyment of all other human rights and, because execution of the death penalty is irreversible, the strictest and most rigorous enforcement of judicial guarantees is required of the State so that those guarantees are not violated and a human life is not arbitrarily taken as a result. The importance of the right to life is reflected in its inclusion in all major international human rights instruments.<sup>50</sup>

44. The Commission has previously held that Article I of the American Declaration, while not precluding the death penalty altogether, prohibits its application when doing so would result in an arbitrary deprivation of life. The Commission has also held that several deficiencies may render an execution arbitrary contrary to Article I of the Declaration, including a failure on the part of a State to limit the death penalty to crimes of exceptional gravity prescribed by pre-existing law.<sup>51</sup>

45. Article 4 of the American Convention, in establishing the right to life, imposes restrictions that apply to the different types of crimes punishable by the death penalty; limiting the imposition of the death penalty to the most serious of crimes indicates that it was designed to be applied in truly exceptional circumstances only.<sup>52</sup> According to inter-American jurisprudence:

The intentional and illicit deprivation of another's life (intentional or premeditated murder, in the broad sense) can and must be recognised and addressed in criminal law under various categories (criminal classes) that correspond with the wide range of gravity of the surrounding facts, taking into account the different facets that can come into play: a special relationship between the offender and the victim, motives for the behaviour, the circumstances under which the crime is committed, the means employed by the offender, etc. This approach allows for a graduated assessment of the gravity of the offence, so that it will bear an appropriate relation to the graduated levels of gravity of the applicable punishment.<sup>53</sup>

46. Similarly, in international law, the legal foundation for executions is provided by the International Convention on Civil and Political Rights, which specifies that the "sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime."<sup>54</sup>

<sup>48</sup> IACHR, Report No. 44/14, Case 12,873, Report on Merits (Publication), Edgar Tamayo Arias, United States, July 17, 2014, para. 214.

<sup>49</sup> Article I of the American Declaration provides: "Every human being has the right to life, liberty and the security of his person."

<sup>50</sup> IACHR, Report No. 121/18, Case 10.573. Merits (Publication). Jose Isabel Salas Galindo and others. United States. October 5, 2018, para. 337. See also, *mutatis mutandi*, I/A Court H.R., *The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law*. Advisory Opinion OC-16/99 of October 1, 1999. Series A No. 16, para. 136.

<sup>51</sup> Case 12,243, Report 52/01, Juan Raul Garza v. United States, Annual Report of the IACHR 2000, paras. 89-91; Case 57/96, Report N° 57/96, William Andrews v. United States, Annual Report of the IACHR 1997, para. 177.

<sup>52</sup> I/A Court H.R., Advisory Opinion OC3/83 of September 8, 1983, Restrictions to the Death Penalty. (Articles 4(2) and 4(4) of the American Convention on Human Rights), (Ser. A) No. 3 (1983), para. 54.

<sup>53</sup> I/A Court H.R., Case of Hilaire, Constantine and Benjamin et al. v. Trinidad and Tobago. Merits, Reparations and Costs. Judgment of June 21, 2002. Series C No. 94, par. 102; I/A Court H.R., Case of Boyce et al. v. Barbados. Preliminary Objection, Merits, Reparations and Costs. Judgment of November 20, 2007. Series C No. 169, para. 53; and I/A Court H.R., Case of DaCosta Cadogan v. Barbados. Preliminary Objections, Merits, Reparations, and Costs. Judgment of September 24, 2009. Series C No. 204, para. 50.

<sup>54</sup> Article 6, paragraph 2, UN General Assembly, International Convention on Civil and Political Rights, 16 December 1966, United Nations, Treaty Series, vol.999, p.171

47. The United National Special Rapporteur on extrajudicial, summary or arbitrary executions narrowed the interpretation of “most serious crimes”, restricting it to a parameter of “cases where it can be shown that there was an intention to kill, which resulted in the loss of life.”<sup>55</sup> The United Nations Office of the High Commissioner on Human Rights has also reasoned that “capital punishment may be imposed only for the most serious crimes, it being understood that their scope should not go beyond intentional crimes with lethal or other extremely grave consequences.”<sup>56</sup> The United Nations Human Rights Committee, on the interpretation of “other extremely grave consequences” reasoned that it “must be read restrictively to mean that the death penalty should be a quite exceptional measure.”<sup>57</sup>

48. A review of pertinent international human rights jurisprudence indicates that compliance with the condition limiting capital punishment to only the most serious crimes necessitates consideration of the individual circumstances of the offender and his or her offense in order to determine whether the death penalty is a permissible punishment in each individual case.<sup>58</sup> Factors pertinent to determining whether the crime is one of exceptional gravity have been held to include the relationship between the offender and the victim, the criminal history of the offender and the victim, motives for the behavior, the extent and intensity of the harm caused, the circumstances under which the crime is committed, and the means employed by the offender.<sup>59</sup>

49. Finally, the IACHR has established that the right to judicial guarantees gives rise to the duty to give reason for judicial decisions. This is the explanation of the reasoned justification that allows the court to render judgment on the merits of a case. This duty is linked to the correct administration of justice, which protects the right of individuals to be tried for the reasons provided by law, and gives credibility to judicial decisions within the framework of a democratic society. In this regard, the reasoning must show that the claims brought by the defense and the prosecution have been duly considered and that the evidence has been analyzed. Likewise, when the decision is appealable, the reasoning provides the parties with the possibility of objecting to a decision and obtaining a new examination of the matter before higher courts.<sup>60</sup>

## 2. Analysis of the case

50. According to domestic decisions, on the day of the events that resulted in the conviction, Marlin Gray and three of his friends met Mr. Cummins and the Kerry sisters. Mr. Gray robbed Mr. Cummins and raped one of the sisters, and then Richardson, Mr. Gray’s friend, pushed the sisters into the river and told Mr. Cummins to jump. Mr. Gray, a first time offender, was sentenced to death on two counts of first-degree murder and other felonies. The conviction and sentence were affirmed by the courts in direct appeal and in post-conviction.

51. The Commission reiterates that it is not competent to review judgments handed down by domestic courts acting within their spheres of competence and with due judicial guarantees. In principle, that is because the IACHR does not have the authority to superimpose its own interpretations on the assessment of facts made by national courts. The fourth instance formula, however, does not preclude the Commission from considering a case in which the petitioner’s allegations entail a possible violation of any of the rights set forth in the Declaration. This authority is heightened in cases involving imposition of the death penalty, given its irreversibility.<sup>61</sup> Therefore, the IACHR must ensure that any deprivation of life resulting from imposition of the death penalty complies with the requirements of the American Declaration.<sup>62</sup>

<sup>55</sup> Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, UN Doc. A/HRC/4/20, 29 January 2007, paragraphs 39-53 and 65.

<sup>56</sup> “Safeguards guaranteeing protection of the rights of those facing the death penalty”, United Nations Economic and Social Council resolution 1984/50 of 25 May 1984.

<sup>57</sup> *Carpo v The Philippines* Schabas n. 2, pp. 106-111.

<sup>58</sup> I/A Court H.R., *Hilaire, Constantine and Benjamin et al.* Case, Judgment of June 21, 2002, Series C No. 94, para. 102; I/A Court H.R., *Raxacacó Reyes* case, Judgment of September 15, 2005, Series C No. 133, paras. 79-82; UNHRC, Communication No. 390/1990, *Lubuto (Zambia)*, UN Doc. CCRP/C/55/D/390/1990 (November 17, 1995).

<sup>59</sup> I/A Court H.R., *Hilaire Case*, Judgment of June 21, 2002, Series C No. 94, paras. 102-108; I/A Court H.R., *Raxacacó Reyes* case, Judgment of September 15, 2005, Series C No. 133, para. 81; UNHRC, Communication No. 390/1990, *Lubuto (Zambia)*, UN Doc. CCRP/C/55/D/390/1990 (November 17, 1995), para. 7.2.

<sup>60</sup> IACHR. Report No. 99/17. Case No. 11.782. Admissibility and Merits. Miguel Angel Rodriguez Revolorio, Miguel Angel Lopez Calo and Anibal Archilla Perez. Guatemala. September 5, 2017, para. 123.

<sup>61</sup> IACHR, Report No. 71/18, Case 12.958. Merits. Russel Bucklew. United States. May 10, 2018, para. 93.

<sup>62</sup> IACHR, Report No. 53/13, Case 12.864, Merits (Publication), Iván Teleguz, United States, July 15, 2013, para. 129.

52. The Commission will now determine whether in Mr. Gray's case the death penalty was applied in accordance with the inter-American and international standards referred to above, in particular, if it was applied to a crime of exceptional gravity prescribed by pre-existing law.

53. According to Missouri's law, a person commits the offense of murder in the first-degree if he or she knowingly causes the death of another person "after deliberation upon the matter." The law defines deliberation as cool reflection "for any length of time no matter how brief." Also, under Missouri law, a person may be guilty of first-degree murder without being the actual killer. According to applicable case law, there are certain circumstances permitting inference that an accomplice deliberated upon murder. Such inference takes place, *inter alia*, when a statement or conduct by a codefendant in the presence of the accomplice prior to the murder indicates a purpose to kill a human, and where there is evidence that the accomplice continued in the criminal enterprise when it was apparent that a victim was to be killed. Under Missouri law, first-degree murder is eligible for the death penalty.

54. In the instant case, the jury convicted Mr. Gray of two counts of first-degree murder as an accomplice in the death of Julie and Robin Kerry. Regarding the elements of the offenses, the courts remarked that Mr. Gray participated in the planning and execution of rape and robbery, his associates committed murder, and he acted with them to cause the death. Therefore, the information on the record shows that Mr. Gray was convicted of first-degree murder based on pre-existing law. Further, the IACHR has no elements to conclude that Missouri's law, in and of itself, is contrary to the American Declaration or inter-American human rights standards.

55. After finding Mr. Gray guilty of two counts of first-degree murder, the jury returned a verdict of death and the St. Louis City Circuit Court sentenced him to the death penalty. According to the information provided by the State, not contested by Petitioners, the jury found six statutory aggravating circumstances in each count of murder as a basis for considering capital punishment. There is no information on the file indicating which of the aggravating circumstances established in Missouri statutes were specifically considered by the jury. However, the decisions issued in direct appeal and post-conviction show that there was evidence of threats to kill made either by Mr. Gray or in his presence, that he continued in the criminal enterprise after those threats, and that he participated in a discussion about whether Mr. Cummins should be killed, followed by an attempt on Mr. Cummins' life and the two homicides. This evidence, together with Mr. Gray's role in the group, and his belief before leaving the bridge that his associate had gone to drown Julie Kerry in the river, were considered sufficient by the courts to permit an inference by the jury that Mr. Gray had a conscious purpose of committing the acts in which he engaged so that the victims would be killed.

56. As indicated above, compliance with the condition limiting capital punishment to only the most serious crimes necessitates consideration of the individual circumstances of the offender and his or her offense in order to determine whether the death penalty is a permissible punishment in each individual case. According to inter-American standards, domestic courts should conduct a graduated assessment of the gravity of the offense based on certain elements such as the motives for the behavior, the circumstances under which the crime is committed, and the means employed by the offender, so that it will bear an appropriate relation to the graduated levels of gravity of the applicable punishment.

57. The information available shows that the jury evaluated the individual culpability of Mr. Gray based on statutory aggravating and mitigating circumstances, and imposed the death penalty after considering all evidence which it found to be in aggravation or mitigation of punishment. The jury and domestic courts considered Mr. Gray's individual circumstances such as the fact that he was the oldest in the group (he was 24 at the time whereas Winfrey was 15 years old, Richardson was 16, and Clemmons 19). They also considered the circumstances of the offense, such as the multiple homicides, the fact that it involved rape, and that it was committed to escape capture and identification. The IACHR further notes that all judicial decisions were dully reasoned in accordance with applicable inter-American human rights standards.

58. Based on the above-mentioned considerations and on the information on the record, the IACHR has not enough elements to conclude that domestic courts violated Article I of the American Declaration by establishing that the acts committed by Mr. Gray were a serious crime and by imposing the penalty after a graduated

assessment of the gravity of the offense and consideration of the individual circumstances of the offender and his offense.

**C. The deprivation of liberty on death row and the right of protection against cruel, infamous or unusual punishment<sup>63</sup>**

59. In both international human rights law and comparative law, the issue of long term deprivation of liberty on death row, known as the “death row phenomenon,” has been developed for decades, in light of the prohibition of cruel, inhuman or degrading punishment in Constitutions and in multiple international treaties, including the American Declaration.

60. In the case of *Russel Bucklew v. United States*, the IACHR, based on a number of developments described below, including the regional and United Nations systems, found that prolonged deprivation of liberty on death row is excessive and inhuman.<sup>64</sup>

61. The Commission takes note of the concept of the *death row phenomenon* of the United Nations Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment that:

(...) it consists of a combination of circumstances that produce severe mental trauma and physical deterioration in prisoners under sentence of death.<sup>65</sup> Those circumstances include the lengthy and anxiety-ridden wait for uncertain outcomes, isolation, drastically reduced human contact and even the physical conditions in which some inmates are held. Death row conditions are often worse than those for the rest of the prison population, and prisoners on death row are denied many basic human necessities.<sup>66</sup>

62. In the case of *Soering vs. The United Kingdom*, the European Court of Human Rights, in its interpretation of the norm banning cruel, inhuman, and unusual punishment and in reference to the death penalty, found that the “death row phenomenon” is a cruel, inhuman and degrading treatment, and is characterized by a prolonged period of detention while awaiting execution, during which prisoners sentenced to death suffer severe mental anxiety, extreme psychological tension and trauma.<sup>67</sup> The court further recognized that some element of delay between imposition and execution of the sentence and the experience of severe stress in conditions necessary for strict incarceration are inevitable and considered elements like, the very long period of time spent on death row in such extreme conditions, with the ever present and mounting anguish of awaiting execution of the death penalty, which brought the delay into the realm of exposed real risk of treatment going beyond the threshold set by Article 3.<sup>68</sup>

63. Furthermore, in a comparative law context, the Commission notes that the Privy Council of the British House of Lords considered in 1993 on the issue of the *death row phenomenon* in the *Pratt and Morgan v. Jamaica* case, that:

In their Lordships' view a State that wishes to retain capital punishment must accept the responsibility of ensuring that execution follows as swiftly as practicable after sentence, allowing a reasonable time for appeal and consideration of reprieve. It is part of the human condition that a condemned man will take every opportunity to

<sup>63</sup> Article XXV of the American Declaration provides: “[...] Every individual who has been deprived of his liberty has the right [...] to humane treatment during the time he is in custody.”

Article XXVI of the American Declaration provides: “[...] Every person accused of an offense has the right [...] not to receive cruel, infamous or unusual punishment.”

<sup>64</sup> IACHR, Report No. 71/18, Case 12.958. Merits. *Russel Bucklew. United States*, May 10, 2018, paras. 86-90. In this report the Commission has cited a number of developments in the inter-American and other protections systems, including the regional and United Nations systems.

<sup>65</sup> United Nations. Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment. 9 August 2012. A/67/279, para 42. Citing: Patrick Hudson, “Does the death row phenomenon violate a prisoner’s rights under international law?,” *European Journal of International Law*, vol. 11, No. 4 (2000), pp. 834-837.

<sup>66</sup> United Nations. Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment. 9 August 2012. A/67/279. para 42.

<sup>67</sup> European Court of Human Rights, *Soering v. United Kingdom*. Judgment of July 7, 1989. Series A, Vol. 161. Likewise, the Supreme Court of the United States of America recognized that the time spent awaiting the execution of a death sentence destroys the human spirit and constitutes psychological torture that often leads to insanity (*Furman v. Georgia*, 408 U.S. 238, 287-288 (197)).

<sup>68</sup> ECtHR. Case of *Soering v. The United Kingdom*. Report No. 14038/88. Judgment, July 7, 1989. para. 111.

save his life through use of the appellate procedure. If the appellate procedure enables the prisoner to prolong the appellate hearings over a period of years, the fault is to be attributed to the appellate system that permits such delay and not to the prisoner who takes advantage of it. Appellate procedures that echo down the years are not compatible with capital punishment. The death row phenomenon must not become established as a part of our jurisprudence.

(...)

These considerations lead their Lordships to the conclusion 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".<sup>69</sup>

64. As established in this report, Mr. Gray was sentenced to death on December 3, 1992, and was thereafter executed on October 26, 2005, at 12:07am. Mr. Gray was therefore on death row for over fourteen (14) years. The Commission notes that the very fact of spending 14 years on death row is, by any account, excessive and inhuman, and was aggravated by the prolonged expectation that the death sentence would be executed. Therefore, the Commission considers the time spent by Marlin Gray while on death row constituted a violation of his right to human treatment and his right not to receive cruel, infamous or unusual punishment, set forth in Articles XXV and XXVI of the American Declaration.

#### **D. Right to petition<sup>70</sup> and right to life<sup>71</sup>**

65. The State has argued that the Commission lacks the authority to request precautionary measures of States that have not ratified the American Convention essentially because the provision governing such measures is contained in the Commissions' Rules rather than in its Statute.

66. In this connection, the Commission recalls that in its decision in the case of Juan Raul Garza v. United States, the Commission held that in capital cases, the failure of an OAS member State to preserve a condemned prisoner's life pending review by the Commission of his or her complaint undermines the efficacy of the Commission's process, deprives condemned persons of their right to petition in the inter-American human rights system, and results in serious and irreparable harm to those individuals, and accordingly is inconsistent with the State's human rights obligations.<sup>72</sup>

67. The Commission premised these obligations on a finding that OAS member States, by creating the Commission and mandating it through the OAS Charter and the Commission's Statute to promote the observance and protection of human rights of the American peoples, have implicitly undertaken to implement measures of this nature where they are essential to preserving the Commission's mandate.<sup>73</sup> The Commission found support for this determination in its own jurisprudence as well as the findings of other regional and international adjudicative bodies, including the UN Human Rights Committee, the European Court of Human Rights and the International Court of Justice.<sup>74</sup> In the Commission's view, this jurisprudence articulates a principle common to the functioning of international adjudicative systems according to which member States must implement interim or precautionary measures where doing so is necessary to preserve the very purposes for which the systems were created and to prevent irreparable harm to the parties whose interests are determined through those processes.

<sup>69</sup> Pratt and Morgan v. The Attorney General for Jamaica and another (Jamaica) [1993] UKPC 1 (2nd November, 1993), paragraphs 73, 74, 75, and 84.

<sup>70</sup> Article XXIV of the American Declaration provides: "Every person has the right to submit respectful petitions to any competent authority, for reasons of either general or private interest, and the right to obtain a prompt decision thereon."

<sup>71</sup> Article I of the American Declaration provides: "Every human being has the right to life, liberty and the security of his person."

<sup>72</sup> Case 12.243, Report 52/01, Juan Raul Garza v. United States, Annual Report of the IACHR 2000, para. 117. See similarly; IACHR, Fifth Report on the Situation of Human Rights in Guatemala, Doc. OEA/Ser.L/V/II.111 doc.21 rev. (6 April 2001), paras. 71, 72.

<sup>73</sup> Case 12.243, Report 52/01, Juan Raul Garza v. United States, Annual Report of the IACHR 2000, para. 117. See similarly; IACHR, Fifth Report on the Situation of Human Rights in Guatemala, Doc. OEA/Ser.L/V/II.111 doc.21 rev. (6 April 2001), paras. 71, 72.

<sup>74</sup> Case 12.243, Report 52/01, Juan Raul Garza v. United States, Annual Report of the IACHR 2000, para. 117. See similarly; IACHR, Fifth Report on the Situation of Human Rights in Guatemala, Doc. OEA/Ser.L/V/II.111 doc.21 rev. (6 April 2001), paras. 71, 72., citing International Court of Justice, Case Concerning the Vienna Convention on Consular Relations (Germany v. United States of America), Request for the Indication of Provisional Measures, Order of 3 March 1999, I.C.J. General List, N° 104, paras. 22-28; United Nations Human Rights Committee, Dante Piandiong and others v. The Philippines, Communication N° 869/1999, U.N. Doc. CCPR/C/70/D/869.1999 (19 October 1999), paras. 5.1-5.4; Eur. Court H.R., *Affaire Mamatkulov et Abdurasulovic c. Turkey*, Reqs. Nos. 46827/99, 46951/99 (6 February 2003), paras. 104-107.

68. Upon considering the State's observations, the Commission finds no grounds for varying its previous findings on this issue. It remains the Commission's view that in circumstances such as the present, the authority of its precautionary measures is derived from the State's fundamental human rights commitments as a State Party to the OAS Charter and therefore that the State is subject to an international legal obligation to preserve Mr. Gray's life pending the examination of his complaint by the Commission.

69. The State's denial of a stay of execution in the face of a precautionary measure by the Commission in order to evaluate any human rights breaches and its failure to preserve a condemned prisoner's life pending the completion of the proceedings, including implementation of the Commission's final recommendations, undermines the efficacy of the Commission's process, deprives condemned persons of their right to petition, and results in serious and irreparable harm to those individuals. An execution under those circumstances obstructs the Commission's or Court's ability to effectively investigate and issue determinations on capital cases.

70. Both the Commission and the Inter-American Court have indicated that the execution of a person under precautionary or provisional measures respectively, constitutes an aggravated violation of the right to life. As noted in this report, the right to life is widely recognized as the supreme right of the human being. The Inter-American Court has similarly confirmed that "[b]ecause execution of the death penalty is irreversible, the strictest and most rigorous enforcement of judicial guarantees is required of the State so that those guarantees are not violated and a human life not arbitrarily taken as a result."<sup>75</sup>

71. The Commission has consistently and emphatically condemned the practice by certain States of executing persons sentenced to death in violation of precautionary measures issued by it, including in instances where the Commission had before it a pending petition presenting allegations of due process or other violations in the prosecution that produced the sentence.

72. The execution of the death sentence against Mr. Gray represents a failure on the part of the State to implement the precautionary measure. By permitting Mr. Gray's execution to proceed in these circumstances, the Commission considers that the United States violated Articles I and XXIV of the American Declaration and failed to act in accordance with its fundamental human rights obligations as a member of the Organization of American States.

## **V. REPORT No. 241/19 AND INFORMATION ABOUT COMPLIANCE**

73. On December 6, 2019, the Commission approved Report No. 241/19 on the merits of the instant case, which encompasses paragraphs 1 to 72 supra, and issued the following recommendations to the State:

1. Provide reparations to the family of Marlin Gray as a consequence of the violations established in this report, including the payment of pecuniary compensation.
2. Ensure compliance with the precautionary measures granted by the IACHR for persons facing the death penalty.
3. Given the violations of the American Declaration the IACHR has established in the present case and in others involving application of the death penalty, the Inter-American Commission also recommends to the United States that it adopt a moratorium on executions of persons sentenced to death.<sup>76</sup>

74. On February 20, 2020 the IACHR transmitted the report to the State with a time period of two months to inform the Commission on the measures taken to comply with its recommendations. To date, the Commission has not received any response from the United States regarding report No. 241/19.

<sup>75</sup> I/A Court H.R., *The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law*. Advisory Opinion OC-16/99 of October 1, 1999. Series A No. 16, para. 136.

<sup>76</sup> See in this regard, IACHR, *The death penalty in the Inter-American Human Rights System: From restrictions to abolition*, OEA/Ser.L/V/II.Doc 68, December 31, 2011.

## VI. ACTIONS SUBSEQUENT TO REPORT No. 327/21

75. On November 19, 2021, the Commission approved Final Merits Report No. 327/21, which encompasses paragraphs 1 to 74 *supra*, and issued its final conclusions and recommendations to the State. On November 30, 2021, the Commission transmitted the report to the State and the petitioners with a time period of three weeks to inform the Inter-American Commission on the measures taken to comply with its recommendations. To date, the IACHR has not received any response from the United States or the petitioners regarding Report No. 327/21.

## VII. FINAL CONCLUSIONS AND RECOMMENDATIONS

76. On the basis of determinations of fact and law, the Inter-American Commission concludes that the State is responsible for the violation of Articles I (life), XXIV (petition), XXV (protection from arbitrary detention) and XXVI (due process of law) of the American Declaration.

### THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS REITERATES THAT THE UNITED STATES OF AMERICA,

1. Provide reparations to the family of Marlin Gray as a consequence of the violations established in this report, including the payment of pecuniary compensation.
2. Ensure compliance with the precautionary measures granted by the IACHR for persons facing the death penalty.
3. Given the violations of the American Declaration the IACHR has established in the present case and in others involving application of the death penalty, the Inter-American Commission also recommends to the United States that it adopt a moratorium on executions of persons sentenced to death.<sup>77</sup>

## VIII. PUBLICATION

77. In light of the above and in accordance with Article 47.3 of its Rules of Procedure, the IACHR decides to make this report public, and to include it in its Annual Report to the General Assembly of the Organization of American States. The Inter-American Commission, according to the norms contained in the instruments which govern its mandate, will continue evaluating the measures adopted by the United States with respect to the above recommendations until it determines there has been full compliance.

Approved by the Inter-American Commission on Human Rights on the 31st day of December 2021. (Signed): Antonia Urrejola Noguera, President; Julissa Mantilla Falcón, First Vice President; Flávia Piovesan, Second Vice President; Margarette May Macaulay, Esmeralda E. Arosemena Bernal de Troitiño, Joel Hernández García and Edgar Stuardo Ralón Orellana, Commissioners.

<sup>77</sup> See in this regard, IACHR, The death penalty in the Inter-American Human Rights System: From restrictions to abolition, OEA/Ser.L/V/II.Doc 68, December 31, 2011.