
**INTER-AMERICAN COMMISSION ON HUMAN RIGHTS
RESOLUTION 6/2024**

Precautionary Measure No. 1028-23
Brenda Evers Andrew regarding the United States of America
February 26, 2024
Original: English

I. INTRODUCTION

1. On November 20, 2023, the Inter-American Commission on Human Rights (“the Inter-American Commission,” “the Commission” or “the IACHR”) received a request for precautionary measures filed by Sandra Babcock, John T. Carlson and Josh C. Toll (“the applicants” or “the requesting party”). The request urged the Commission to require that the United States of America (“the State” or “the United States”) adopt the necessary measures to protect the rights of Brenda Evers Andrew (“the proposed beneficiary”), who is currently facing the risk of imminent execution in the state of Oklahoma. This request is linked to petition P-1035-21, in which the applicant reported violations of Article II (right to equality before law), Article XVII (Right to recognition of juridical personality and civil rights), Article XVIII (Right to a fair trial), Article XXV (Right of protection from arbitrary arrest) and Article XXVI (right to due process of law) of the American Declaration of the Rights and Duties of Man (“the American Declaration” or “the Declaration”).

2. Pursuant to Article 25(5) of its Rule of Procedure, the Commission requested additional information from the applicants, who presented the response on December 4, 2023. Subsequently, the IACHR requested information from the State on December 19, 2023, and reiterated the request on January 4, 2024. The State submitted its observations on January 5, 2024.

3. Upon analyzing the submissions of fact and law offered by the parties, the Commission considers that the information presented shows *prima facie* that there is a serious and urgent risk of irreparable harm to Ms. Andrew’s rights to life and personal integrity in accordance with the Article 25 of its Rules of Procedure. Moreover, in the event that Ms. Andrew is executed before the Commission has the opportunity to examine the merits of the case, any eventual decision would be rendered moot, leading to irreparable harm. In consequence, the Commission requests that the United States of America: a) adopt the necessary measures to protect the life and personal integrity of Ms. Brenda Evers Andrew; and b) refrain from carrying out the death penalty on Ms. Brenda Evers Andrew until the IACHR has had the opportunity to reach a decision on her petition.

II. SUMMARY OF THE FACTS AND ALLEGATIONS PROVIDED BY THE APPLICANTS

A. Information provided by the applicants

4. The request stated that the proposed beneficiary is facing a risk of an imminent execution in the state of Oklahoma. According to the request, she has been held in death row, under solitary confinement, since late 2004. On June 21, 2007, her sentence was confirmed by Oklahoma Court of Criminal Appeals (“OCCA”). The applicants informed that they had exhausted all domestic remedies except for seeking a writ of certiorari before the U.S. Supreme Court. They believe under the current filing schedule she could receive a decision from the Supreme Court as early as March 2024. In case of a denial, the Oklahoma’s

Attorney General (“AG”) is to promptly seek an execution date from the Oklahoma Court of Criminal Appeals.

i. Allegations of the proposed beneficiary’s failed defense

5. The applicants informed that Ms. Andrew was convicted to death in September 2004 by jurors of the state of Oklahoma for the murder of her ex-husband. They alleged due process violations during Ms. Andrew’s trial. It was referred that the trial court erroneously allowed Ms. Andrew’s prosecutors to present impermissible, improper, and prejudicial evidence to the jury. In particular, the applicants addressed that the arguments presented by the prosecutors were based on a gender and discriminatory narrative. For example, they stated that prosecutors repeatedly introduced evidence of Ms. Andrew’s provocative clothing, flirtatious behavior, and past sexual relationships as evidence of moral depravity. In their closing argument, prosecutors waved her thong underwear in front of the jury, claiming that it was not the sort of undergarment a grieving widow would wear. It was stated that the jury issued the death sentence under “influence of passion, prejudice, and other arbitrary factors.” In this regard, the request informed that two of the five judges on court’s panel of Oklahoma Court of Criminal Appeals would have reversed her sentence due to impermissible evidence.

6. The request also stated that Ms. Andrew’s attorney lacked preparation to set the stage for her eventual conviction and condemnation and failed to conduct mitigation investigation, allowing the prosecution’s gendered narrative to dominate her trial.

ii. Post-Conviction relief procedures filed by the proposed beneficiary

7. Having exhausted her state court remedies, Ms. Andrew filed a post-conviction petition for a writ of habeas corpus in federal district court in the Western District of Oklahoma. On September 9, 2015, the federal court denied her petition without holding an evidentiary hearing. Ms. Andrew appealed the decision to the Federal Court of Appeals for the Tenth Circuit on December 27, 2016. In this regard, the experts¹ that supported Ms. Andrew as *amici* argued that Andrew’s case is “an exceptional example of the Oklahoma County District Attorney’s office weaponizing gender bias to poison proceedings against a female defendant who had no prior criminal record, in a case that involved no allegation of torture or exceptional cruelty.”

8. On March 21, 2023, the Federal Court of Appeals for the Tenth Circuit affirmed Ms. Andrew’s conviction and sentence, and on August 25, 2023, the Tenth Circuit issued an order denying her petition for rehearing *en banc*. She has therefore exhausted all domestic remedies except for seeking a writ of certiorari before the U.S. Supreme Court. According to the applicants, the writ of certiorari is a discretionary review process that is granted in only 1% of all cases.

9. The applicants stated that Ms. Andrew intended to file a petition for writ of certiorari to the United States Supreme Court in January 2024. In this regard, it was stated that the Court will likely resolve her petition in March or April 2024. If the petition is denied, the practice of Oklahoma’s Attorney General (“AG”) is to promptly seek an execution date from the Oklahoma Court of Criminal Appeals. They added

¹ Sociology Professor Susan Sharp of the University of Oklahoma and the Oklahoma Appleseed Center for Law and Justice, Law Professor Valena Beety of Indiana University Maurer School of Law and Innocence Project Indiana, and Dr. Amanda Potts of Cardiff University.

that Oklahoma has the highest execution rate per capita in the United States,² and Oklahoma’s AG actively seeks execution dates for defendants on death row.

10. The applicants also indicated that petitions for clemency can be requested to the Oklahoma Pardon and Parole Board (PPB) and all favorable dispositions must be approved by Oklahoma Governor. In this regard, the applicants reported that only one death row inmate was pardoned on recommendation by the PPB. In fact, only five death-row clemency petitions have received the governor’s approval in Oklahoma in the past 46 years.

iii. Allegations concerning violations of the American Declaration

11. On July 9, 2021, while awaiting a decision, applicants filed a petition before the IACHR. In the petition, Ms. Andrew argued, first, that the United States violated her right to equality and non-discrimination pursuant to Article II of the American Declaration of the Rights and Duties of Man (“ADRDM”), 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, she argued that the United States violated her right to a fair trial under Article XXVI by barring several critical witnesses from testifying on her behalf. Third, Ms. Andrew argued that her lawyers provided ineffective assistance when they failed to investigate and present mitigating evidence, violating Articles XVIII and XXVI of the ADRDM. Fourth, she argued that by holding her 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, Ms. Andrew argued that the methods of execution employed by Oklahoma would subject her to cruel, infamous, or unusual punishment, in violation of Article XXVI.

iv. The proposed beneficiary’s current conditions of confinement

12. Regarding conditions of detention, the applicants stated that the proposed beneficiary has been held of death row for 19 years, with 18 of those spent in solitary confinement and in a twelve-foot-by-nine concrete cell, in a state which has repeatedly botched executions amounts to cruel, inhumane and degrading punishment and torture. Since she submitted her petition to this Commission in June 2021, Ms. Andrew’s conditions of confinement have remained unchanged.

13. Finally, the applicants requested precautionary measures in order to obtain stay of execution while the case is being reviewed by the IACHR.

B. Observations from the State

14. In its response, the State notified that the request for information concerning the request for precautionary measures was forwarded to the Attorney General of the State of Oklahoma on January 5, 2024. In addition, the State reaffirmed its position that the Commission lacks authority to require that States adopt precautionary measures, and as such, should the Commission adopt a precautionary measures resolution in this matter, the United States would take it under advisement and construe it as recommendatory.

² Adam Kemp, *Oklahoma Executes Phillip Hancock for a Double Murder Despite State Board Recommendation for Clemency*, PBS (Nov. 30, 2023), <https://www.pbs.org/newshour/nation/oklahoma-executes-phillip-hancock-for-a-double-murder-despite-state-board-recommendation-for-clemency#:~:text=Oklahoma%20has%20executed%20122%20people,per%20capita%20in%20the%20country>

III. ANALYSIS OF THE ELEMENTS OF SERIOUSNESS, URGENCY, AND IRREPARABLE HARM

15. The mechanism of precautionary measures is part of the Commission's function of overseeing compliance with the human rights obligations established in Article 106 of the Charter of the Organization of American States. These general oversight functions are established in Article 41 (b) of the American Convention on Human Rights, recognized also in Article 18 (b) of the Statute of the IACHR. The mechanism of precautionary measures is described in Article 25 of the Rules of Procedure of the Commission. According to this Article, the Commission grants precautionary measures in serious and urgent situations, in which such measures are necessary to prevent an irreparable harm to persons.

16. The Inter-American Commission and the Inter-American Court of Human Rights ("the Inter-American Court") have established repeatedly that precautionary and provisional measures have a dual nature, both protective and precautionary.³ Regarding the protective nature, these measures seek to avoid irreparable harm and protect the exercise of human rights.⁴ To do this, the IACHR shall assess the problem raised, the effectiveness of state actions to address the situation described, and how vulnerable the persons proposed as beneficiaries would be left in case the measures are not adopted. Regarding their precautionary nature, these measures have the purpose of preserving legal situations while under the consideration of the IACHR. Their precautionary nature aims at safeguarding the rights at risk until the petition pending before the inter-American system is resolved. Their object and purpose are to ensure the integrity and effectiveness of an eventual decision on the merits and, thus, avoid any further infringement of the rights at issue, a situation that may adversely affect the useful effect (*effet utile*) of the final decision. In this regard, precautionary or provisional measures enable the State concerned to comply with the final decision and, if necessary, to implement the ordered reparations.⁵ For the purpose of making a decision, and in accordance with Article 25(2) of its Rules of Procedure, the Commission considers that:

- a) "serious situation" refers to a grave impact that an action or omission can have on a protected right or on the eventual effect of a pending decision in a case or petition before the organs of the inter-American system;
- b) "urgent situation" refers to risk or threat that is imminent and can materialize, thus requiring immediate preventive or protective action; and
- c) "irreparable harm" refers to injury to rights which, due to their nature, would not be susceptible to reparation, restoration or adequate compensation.

17. In the analysis of the mentioned requisites, the Commission reiterates that the alleged acts that motivate a request for precautionary measures need not be proven beyond doubt; rather, the purpose of

³ See in this regard: I/A Court H.R. Matter of the Yare I and Yare II Capital Region Penitentiary Center. Request for Provisional Measures submitted by the IACHR regarding the Bolivarian Republic of Venezuela. Order of the Inter-American Court of Human Rights of March 30, 2006, considerandum 5; I/A Court H.R. Case of Carpio Nicolle et al. v. Guatemala. Provisional Measures. Order of July 6, 2009, considerandum 16.

⁴ See in this regard: I/A Court H.R. Matter of Capital El Rodeo I and El Rodeo II Judicial Confinement Center. Provisional Measures regarding Venezuela. Order of the Court of February 8, 2008, considerandum 8; I/A Court H.R. Case of Bámaca Velásquez. Provisional measures regarding Guatemala. Order of the Court of January 27, 2009, considerandum 45; I/A Court H.R. Matter of Fernández Ortega et al. Provisional measures regarding Mexico. Order of the Court of April 30, 2009, considerandum 5; I/A Court H.R. Matter of Milagro Sala. Request for Provisional Measures regarding Argentina. Order of the Inter-American Court of Human Rights of November 23, 2017, considerandum 5 [only in Spanish].

⁵ See in this regard: I/A Court H.R. Matter of Capital El Rodeo I and El Rodeo II Judicial Confinement Center. Provisional Measures regarding Venezuela. Order of the Court of February 8, 2008, considerandum 7; I/A Court H.R. Matter of "El Nacional" and "Así es la Noticia" newspapers. Provisional Measures regarding Venezuela. Order of the Court of November 25, 2008, considerandum 23 [only in Spanish]; I/A Court H.R. Matter of Luis Uzcátegui. Provisional Measures regarding Venezuela. Order of the Court of January 27, 2009, considerandum 19.

the assessment of the information provided should be to determine *prima facie* if a serious and urgent situation exists.⁶

18. As a preliminary observation, the Commission deems it necessary to highlight that, according to its mandate, it is not called upon to make any determinations on the criminal responsibility of persons in relation to their alleged commission of crimes or infractions. Additionally, through the mechanism of precautionary measures, it is not in its mandate to determine whether the State has incurred violations to the American Declaration as a result of the alleged events. In this sense, the Commission reiterates that, with respect to the procedures of precautionary measures, it is only called to analyze whether the proposed beneficiary is in a serious and urgent situation presenting a risk of irreparable harm, in accordance with what is established in Article 25 of the Rules of Procedure. With respect to petition P-1035-21, in which alleged violations to the American Declaration were reported, the Commission recalls that the analysis of these allegations will be carried out in conformity with the specific dispositions related to the Petition and Case System and with the pertinent provisions of the Statute and the Rules of Procedure.

19. Additionally, the Inter-American Commission recalls that the death penalty has been subject to strict scrutiny within the inter-American human rights system.⁷ While most OAS Member States have abolished the death penalty, a significant minority still hold on to this form of punishment.⁸ With regards to the States that maintain the death penalty, there are a series of restrictions and limitations established in regional human rights instruments that States are bound to comply with in accordance with international law.⁹ These restrictions and limitations are based on the broad recognition of the right to life as the supreme human right and as the *sine qua non* of the enjoyment of all other rights, thus requiring greater scrutiny to ensure that any deprivation of life resulting from the application of the death penalty complies strictly with the requirements of the applicable inter-American human rights instruments, including the American Declaration.¹⁰ In this sense, the Commission has underlined that the right to due process plays an essential role in guaranteeing the protection of the rights of persons who have been sentenced to death. To protect due process guarantees, States have the obligation to ensure the exercise of the right to a fair trial, the strictest compliance with the right to defense, and the right to equality and non-discrimination.¹¹ In this sense, the Commission highlights that it has granted several precautionary measures to individuals on death row, considering both the precautionary and protective dimensions of the precautionary measures' mechanism.¹²

⁶ See in this regard: I/A Court H.R. Matter of Residents of the Communities of the Miskitu Indigenous People of the North Caribbean Coast Region regarding Nicaragua. Extension of Provisional Measures. Order of the Inter-American Court of Human Rights of August 23, 2018, considerandum 13; I/A Court H.R. Matter of the children and adolescents deprived of their liberty in the "Complexo do Tatuapé" of the Fundação CASA. Request for extension of precautionary measures. Provisional Measures regarding Brazil. Order of the Inter-American Court of Human Rights of July 4, 2006, considerandum 23.

⁷ IACHR. Press Release No. 248/20. The IACHR stresses its call for the abolition of the death penalty in the Americas on the World Day Against the Death Penalty. October 9, 2020.

⁸ IACHR. The Death Penalty in the Inter-American Human Rights System: From Restrictions to Abolition. OAS/Ser.L/V/II., Doc. 68, December 31, 2011, paras. 12 & 138; IACHR. Press Release No. 248/20. The IACHR stresses its call for the abolition of the death penalty in the Americas on the World Day Against the Death Penalty. October 9, 2020.

⁹ IACHR. The Death Penalty in the Inter-American Human Rights System: From Restrictions to Abolition. OAS/Ser.L/V/II., Doc. 68, December 31, 2011, paras. 138-39.

¹⁰ IACHR. Report No. 210/20. Case 13.361. Admissibility and Merits (Publication). Julius Omar Robinson (United States of America), August 12, 2020, para. 55; IACHR. Report No. 200/20. Case 13.356. Admissibility and Merits (Publication). Nelson Ivan Serrano Saenz (United States of America), August 3, 2020, paras. 44-45; IACHR. Report No. 211/20. Case 13.570. Admissibility and Merits (Publication). Lezmond C. Mitchell (United States of America), August 24, 2020, paras. 72-73

¹¹ IACHR. The Death Penalty in the Inter-American Human Rights System: From Restrictions to Abolition. OAS/Ser.L/V/II., Doc. 68, December 31, 2011, para. 141.

¹² See, in this regard: IACHR. Resolution 39/2023. Precautionary Measure No. 303-23. Richard Moore regarding the United States of America. July 4, 2023; IACHR. Resolution 22/2023. Precautionary Measure No. 176-23. Michael Tisius regarding the United

20. Taking this into account, the IACHR will proceed to analyze the procedural requirements about Ms. Andrew with regard to the precautionary dimension.

21. In the instant matter, the Commission considers that the requirement of seriousness has been fulfilled. The Commission observes that in accordance with Petition 1035-21 presented by the applicant, the legal proceedings which led to Ms. Andrew's death sentence allegedly did not comply with her rights to a fair trial and due process of law. In this regard, the applicants alleged that her trial was loaded by gender-based stereotypes and discriminatory narrative.¹³ It was stated that the jury issued the death sentence under "influence of passion, prejudice, and other arbitrary factors." In this regard, the request informed that two of the five judges on court's panel of Oklahoma Court of Criminal Appeals would have reversed her sentence due to impermissible evidence. In addition, the applicants stated that Ms. Andrew's lawyers provided ineffective assistance when they failed to investigate and present mitigating evidence. Given the aforementioned, the applicants indicated violations of Article II (right to equality before law), Article XVII (Right to recognition of juridical personality and civil rights), Article XVIII (Right to a fair trial), Article XXV (Right of protection from arbitrary arrest), and Article XXVI (right to due process of law) of the American Declaration of the Rights and Duties of Man ("the American Declaration" or "the Declaration").

22. In this respect, while the imposition of the death penalty is not prohibited *per se* in the American Declaration, the Commission has recognized systematically that the possibility of an execution in such circumstances is sufficiently serious to permit the granting of precautionary measures to the effect of safeguarding a decision on the merits of the petition filed.¹⁴

23. In view of these aspects, and without prejudice to the petition presented, the Commission concludes that the rights of Ms. Andrew are *prima facie* in a situation presenting a risk, due to the possibility of executing the death penalty and its subsequent effects included in the petition that is currently under analysis by the Commission. Likewise, the Commission still notes the allegations concerning the conditions of detention of the proposed beneficiary because of the death penalty sentence. In this regard, it has been alleged that she has spent 19 years on death row, and 18 years in solitary confinement in a twelve-by-nine foot concrete cell. In this regard, the Commission notes that, although it does not have additional elements to assess her conditions of detention, it believes that it is reasonable to consider that this situation is likely to have an impact on her health.

States of America. April 16, 2023; IACHR. Resolution 95/2020. Precautionary Measure No. 1080-20. Christa Pike regarding the United States of America. December 11, 2020; IACHR. Resolution 91/2020. Precautionary Measure No. 1048-20. Lisa Montgomery regarding the United States of America. December 1, 2020; IACHR. Resolution 77/2018. Precautionary Measure No. 82-18. Ramiro Ibarra Rubí regarding the United States of America. October 1, 2018; IACHR. Resolution 32/2018. Precautionary Measure No. 334-18. Charles Don Flores regarding the United States of America. May 5, 2018 (available only in Spanish); IACHR. Resolution 41/2017. Precautionary Measure No. 736-17. Rubén Ramírez Cárdenas regarding the United States of America. October 18, 2017; IACHR. Resolution 21/2017. Precautionary Measure No. 250-17. Lezmond Mitchell regarding the United States of America. July 2, 2017; IACHR. Resolution 14/2017. Precautionary Measure No. 241-17. Matter of Víctor Hugo Saldaño regarding the United States of America. May 26, 2017; IACHR. Resolution 9/2017. Precautionary Measure No. 156-17. William Charles Morva regarding the United States of America. March 16, 2017.

¹³ As examples, the petitioners stated that prosecutors repeatedly introduced evidence of Ms. Andrew's provocative clothing, flirtatious behavior, and past sexual relationships as evidence of moral depravity. In their closing argument, prosecutors waved her thong underwear in front of the jury, claiming that it was not the sort of undergarment a grieving widow would wear (see paragraph 5 and 6).

¹⁴ IACHR. Case of Víctor Hugo Saldaño regarding the United States (PM-241-17), Resolution 14/17 from May 26; Case of Williams Charles Morva, regarding the United States (PM-156-17), Resolution 9/2017 from March 16, 2017; Case of José Trinidad Loza Ventura regarding the United States (PM-304-15), Resolution 32/2015 from September 29, 2015; Case of Samuel Moreland regarding the United States (PM-37-14), Resolution 32/2014; Case of John Winfield regarding the United States (MC-204-14), Resolution 16/2014 from June 6, 2014; Case of Russell Bucklew and Charles Warmer regarding the United States (PM-177-14), Resolution 14/2014 from May 20, 2014. All the decisions available at <http://www.oas.org/es/cidh/decisiones/cautelares.asp>

24. Regarding the requirement of urgency, the Commission observes that, from a precautionary perspective, the applicants highlight that all domestic remedies were exhausted. Also, the applicant stated that is likely to be scheduled for execution in March or April 2024. Even with a writ to certiorari that is to be presented before the U.S. Supreme Court as well the request of clemency to the governor of Oklahoma, both have low possibility to succeed. In view of the aforementioned, and before the imminent possibility that the death penalty is applied, the Commission considers that it is pertinent to adopt precautionary measures in order to examine the presented petition.

25. The Commission considers that the requirement of irreparable harm has been fulfilled, insofar as the potential impact on the rights to life and personal integrity of proposed beneficiary constitutes the maximum situation of irreparability. From a precautionary perspective, the Commission considers that if Ms. Andrew is executed before the Commission has had the opportunity to evaluate petition P-1035-21, the final decision would be rendered moot, since the situation of irreparable harm would already have materialized.

26. Finally, the Commission takes note of the alleged lack of due process related to a gender-based narrative. Rather, it requires an analysis of the merits to determine possible violations of the American Convention and other applicable instruments, which the IACHR will be able to do through petition P-1035-21.

IV. BENEFICIARY

27. The Commission considers as beneficiary of these precautionary measures Brenda Evers Andrew, who is duly identified in this procedure.

V. DECISION

28. The Inter-American Commission on Human Rights concludes that this matter meets *prima facie* the requirements of seriousness, urgency and irreparable harm contained in Article 25 of its Rules of Procedure. Consequently, the IACHR requests that the United States of America:

- a) adopt the necessary measures to protect the life and personal integrity of Brenda Evers Andrew; and
- b) refrain from carrying out the death penalty on Brenda Evers Andrew until the IACHR has had the opportunity to reach a decision on her petition.

29. The Commission requests that the Government of the United States inform, within a period of 15 days from the date of notification of this resolution, regarding the adoption of the precautionary measures consulted and agreed upon, and to update this information periodically.

30. The Commission resolves that, in accordance with Article 25(8) of its Rules of Procedure, the granting and adoption of this precautionary measure does not constitute a determination on the merits of the case, but rather seeks to comply with its objectives of protecting rights at risk.

31. The Commission instructs its Executive Secretariat to notify the United States of America and the applicants of this resolution.



32. Approved on February 26, 2024, by Roberta Clarke, President; Edgar Stuardo Ralón Orellana, First Vice-President; José Luis Caballero Ochoa; Arif Bulkan; Andrea Pochak; and Gloria Monique de Mees, members of the IACHR.

Tania Reneaum Panszi
Executive Secretary