

10. **The Krebs Case, the Inter-American Commission on Human Rights, and U.S. Death Penalty Litigation**

By: David Sloss*

In recent years, the Inter-American Commission on Human Rights (IACHR, or Commission) has developed a body of jurisprudence on capital punishment that is very favorable for capital defendants. Unfortunately, death row prisoners in the United States who might wish to petition the IACHR for relief confront a procedural dilemma. The Commission's Rules of Procedure require petitioners to exhaust domestic remedies before submitting petitions to the Commission.¹ By the time a prisoner has exhausted domestic remedies, though, it may be too late for the Commission to intervene. In fact, since 1996 there have been nine cases in which the United States executed a death row prisoner within days or weeks after the Commission requested "precautionary measures" in an effort to delay a scheduled execution.²

In June 2002, we filed a petition with the IACHR on behalf of Rex Allan Krebs, a death row prisoner in California.³ Mr. Krebs was sentenced to death on May 11, 2001. As of this writing, there has been neither state appellate review nor federal habeas review of his case. Although Mr. Krebs has clearly not exhausted domestic remedies, we invoked one of the exceptions in the Commission's Rules in an effort to circumvent the exhaustion requirement. The Commission deemed the petition inadmissible because Mr. Krebs had not yet exhausted his domestic remedies. Thus, the *Krebs* case illustrates the dilemma confronting U.S. death penalty petitioners. If a petitioner files too early, he risks rejection on exhaustion

grounds. If a petitioner files too late, he may be executed before the Commission reaches the merits of the case.

This brief essay is divided into three parts. The first part provides background information on the IACHR's death penalty jurisprudence and the *Krebs* case. The second part summarizes the major substantive arguments that we advanced in the *Krebs* petition. The third part discusses the exhaustion issue in *Krebs*, and offers some tentative suggestions about how future petitioners might navigate the procedural dilemma that confronts U.S. death penalty petitioners.

I. **Background**

The IACHR's Death Penalty

Jurisprudence – The IACHR applies "a heightened level of scrutiny in deciding capital punishment cases." IACHR, Report No. 52/01, *Garza v. United States*, ¶ 70. This heightened level of scrutiny is justified by the fact that the right to life is the "supreme right of the human being," and the necessary prerequisite for the enjoyment of all other rights. Accordingly, the Commission "considers that it has an obligation to ensure that any deprivation of life that an OAS member state proposes to perpetrate through the death penalty complies strictly with the requirements of the applicable inter-American human rights instruments." *Id.*, ¶ 70. The Commission applies a heightened scrutiny test in all death penalty cases, regardless of whether the state concerned is a party to the American Convention on Human Rights. Thus, in deciding death penalty cases involving states, like the United States, that are not parties to the American Convention, the Commission borrows liberally from principles articulated in death penalty cases involving states that are parties to the Convention.⁴

The Commission's restrictive approach to the death penalty finds support in the jurisprudence of the Inter-American Court of Human Rights. The Court has stated that,

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although the American Convention does not abolish the death penalty, “the Convention imposes restrictions designed to delimit strictly its application and scope, in order to . . . bring about [the] gradual disappearance” of the death penalty. Inter-American Court of Human Rights, *Restrictions to the Death Penalty* (Arts. 4(2) and 4(4) of the American Convention on Human Rights), Advisory Opinion OC-3/83, ¶ 57, September 8, 1983, Inter-Am. Ct. H.R. (Ser. A) No. 3 (1983). Moreover, the Court has established three types of limitations that apply to OAS member states that have not abolished the death penalty. First, the imposition of capital punishment “is subject to certain procedural requirements whose compliance must be strictly observed and reviewed.” Second, the application of the death penalty is limited to the most serious crimes. Third, “certain considerations involving the person of the defendant, which may bar the imposition or application of the death penalty, must be taken into account.” *Id.*, ¶ 55.

Domestic Proceedings in the Krebs Case – On April 2, 2001, a jury convened by the Superior Court of the State of California found Rex Allan Krebs guilty of two murders. On May 11, 2001, the same jury determined that Mr. Krebs should be sentenced to death for his crimes. Before the trial even commenced, Mr. Krebs challenged the California death penalty statute on the grounds that it is inconsistent with U.S. treaty obligations under the International Covenant on Civil and Political Rights (the Covenant). The trial court refused to address the merits of Mr. Krebs’ international human rights defense. Mr. Krebs appealed that decision to an intermediate appellate court and to the California Supreme Court. He even filed a petition for certiorari with the U.S. Supreme Court. No domestic court in the United States was prepared to address the merits of Mr. Krebs’ Covenant-based defense.

In August 2001, three months after the

jury rendered its death sentence, officials notified Mr. Krebs’ trial attorney that he should expect a five year delay before the State would appoint counsel for Mr. Krebs’ initial appeal. Since Mr. Krebs cannot afford to hire his own attorney, he expects to spend five years on California’s death row, waiting for the State to appoint an attorney to represent him *in his initial appeal*. After the State appoints an attorney for his initial appeal, Mr. Krebs can reasonably anticipate that approximately ten more years of legal proceedings will be required before he has exhausted the remedies available under U.S. domestic law.

II. Substantive Arguments Presented to the Commission

This part summarizes the major substantive arguments that we presented to the Commission on behalf of Mr. Krebs.

The Right to an Individualized Sentencing Proceeding – The Commission has previously held that Articles 4, 5 and 8 of the American Convention “require individualized sentencing in implementing the death penalty.” IACHR, Report No. 38/00, *Baptiste v. Grenada*, ¶ 106. Specifically, the individual circumstances of an individual offender, including the character and record of the offender and subjective factors that might have influenced the offender’s conduct “*must be taken into account* by a court in determining whether the death penalty can and should be imposed.” *Id.*, ¶ 105. The same principle applies with equal force to the parallel provisions of the American Declaration, including the right to life under Article I, the right to a fair trial under Article XVIII, the right to humane treatment under Article XXV, and the right to due process under Article XXVI. *See* IACHR, Report No. 52/01, *Garza v. United States*, ¶ 89 (the American Convention “may be considered an authoritative expression of the fundamental principles set forth in the American

Declaration”).

During the sentencing phase of a capital murder trial, California’s death penalty statute permits the introduction of mitigating evidence pertaining to the individual circumstances of an individual offender. CAL. PENAL CODE § 190.3. At Mr. Krebs’ trial, the defense introduced substantial mitigating evidence, including evidence of horrific childhood abuse. Although the jury was permitted to hear this evidence, *the jury was not required to take this evidence into account*, because the relevant statute is exceptionally vague with respect to mitigating factors, and because the statute gives the jury discretion to disregard any such evidence it deems irrelevant.

During the voir dire process that preceded Mr. Krebs’ criminal trial, his attorneys challenged certain prospective jurors for cause on the grounds that they were unwilling to consider mitigating evidence pertaining to the individual circumstances of the defendant. The court, however, rejected these challenges on the grounds that California does not require jurors to consider such evidence. For example, prior to voir dire, juror # 187 answered “no” to the following written question: “Is there any type of information regarding a defendant’s background or character that would be important to you when choosing between life without parole and death (e.g., work record, childhood abuse, brutal parents, alcoholism, former good deeds, illnesses, etc.)?” During voir dire, defense counsel asked juror # 187: “If you’ve rendered the verdict . . . and you feel he’s guilty beyond a reasonable doubt, are you willing at that point to consider what the judge may have called other mitigation factors, which could be some of the things such as abuse, alcoholism, illness, or is that the type of information that you would not be willing to consider?” The juror responded: “No, I wouldn’t consider that.” Defense counsel challenged juror # 187 for cause, but the judge rejected the challenge on the grounds that California does not require jurors to consider this type of information as

mitigating evidence.

By refusing to exclude from the jury prospective jurors who professed their unwillingness to consider mitigating evidence pertaining to the character and record of the offender, California violated Mr. Krebs’ right to an individualized sentencing hearing under Articles I, XVIII, XXV and XXVI of the Declaration.

The Right to Life – The Commission has established that Article I of the American Declaration requires States to limit the death penalty to crimes of “exceptional gravity” prescribed by preexisting laws. IACHR, Report No. 57/96, *Andrews v. United States*, ¶ 177. The Commission’s jurisprudence on this matter draws upon the opinions of other international human rights bodies and several national courts. In particular, the Commission has suggested that the crime of “murder” is insufficiently “exceptional” to warrant imposition of the death penalty, absent the presence of some “aggravating factors.” IACHR, Report No. 38/00, *Baptiste v. Grenada*, ¶¶ 103-104.

Although California law defines murder broadly, its death penalty law, by its terms, does not extend to all cases of murder. California law assigns to the sentencing authority the discretion to impose the death penalty only if the criminal defendant is convicted of murder with one or more of the enumerated “special circumstances.” See CAL. PENAL CODE § 190.2(a)(1)-(21). The breadth of the “special circumstances” categories, however, fails to narrow the class of death eligible offenses to crimes of exceptional gravity. The “special circumstances” alleged by the state in *Krebs* illustrate the defects of California’s death penalty scheme.

In *Krebs*, the state alleged two “special circumstances” to warrant application of the death penalty: (1) the “felony murder” special circumstance; and (2) the “multiple murders” special circumstance. First, the prosecution alleged that Mr. Krebs killed two persons in the

course of committing the felonies of rape and kidnapping. These allegations, if proven beyond a reasonable doubt, render his crimes death-eligible under California law, *despite the fact that the evidence at petitioner's trial demonstrated that one of the charged murders was unintentional*. Under California law, any person who kills "in the commission of, or attempted commission of, or the immediate flight after committing or attempting to commit" any of twelve listed felonies is not only guilty of first degree murder but is also automatically death-eligible, irrespective of the defendant's mental state. Moreover, the California felony murder rule is itself exceedingly broad. For example, the felony murder rule applies to the most common felonies, including rape, robbery and burglary. And, most importantly, the felony murder rule applies to altogether accidental and unforeseeable deaths. It is clear that the felony murder "special circumstance" fails to limit application of the death penalty to crimes of exceptional gravity.

Second, the prosecution alleged the "multiple murders" special circumstance. That is, the state argued that the death penalty was warranted in *Krebs* because the defendant had committed multiple murders. We acknowledge that the "multiple murders" factor generally serves to limit application of the death penalty to crimes of exceptional gravity. Indeed, the Commission's jurisprudence supports this argument.⁵ However, California's broad definition of first-degree murder renders the "multiple murders" special circumstance unacceptably broad. As previously discussed, one of the murders in this case was unintentional. The state could nevertheless classify this killing as a "first degree murder" under either of two theories: felony murder (the deficiencies of which are analyzed above) or "implied malice" murder. In California law, any unlawful killing of a human being with "malice aforethought" is murder. CAL. PENAL CODE § 187. "Malice" may be express or

implied. "Express malice" murder requires an intent to kill, while "implied malice" murder requires only an intent to do some act, the natural consequences of which are dangerous to human life. *See, e.g.,* *People v. Silva* (2001), 106 Cal.Rptr.2d 93. Therefore, a defendant acting with implied malice is guilty of first-degree murder even if defendant lacks the intent to kill. CAL. PENAL CODE § 189; *see also* *People v. Diaz* (1992), 11 Cal.Rptr.2d 353. This broad definition of first-degree murder in California law invalidates an otherwise acceptable narrowing circumstance. In particular, the "multiple murders" special circumstance adequately limits the class of death-eligible offenses only if the defendant has committed two or more intentional killings.

By failing to limit application of the death penalty to the "most serious crimes," California violated Mr. Krebs' right to life under Article I of the Declaration.

The Right to a Judicial Remedy –

Prior to commencement of his trial, Mr. Krebs moved to preclude application of the death penalty on the grounds that imposition of capital punishment would violate his right under article 6 of the International Covenant on Civil and Political Rights "not to be arbitrarily deprived of his life." In response, the prosecution argued that the court need not address the merits of Mr. Krebs' Covenant-based defense because the Covenant was not binding on the State of California. The court agreed with the prosecution and refused to address the merits of Mr. Krebs' Covenant defense. The California Superior Court's refusal to reach the merits of Mr. Krebs' human rights defense violated his right to a judicial remedy under Articles XVIII, XXIV and XXVI of the American Declaration.

Article XVIII of the American Declaration promises that "the courts will protect [an individual] from acts of authority that, to his prejudice, violate any fundamental constitutional rights." The explicit duty for courts to protect individuals from acts that

violate their fundamental rights requires, at a minimum, that courts prevent threatened violations whenever they have the power to do so. Mr. Krebs explicitly requested the California Superior Court to protect him from a capital sentence that would violate his right under the Covenant “not to be arbitrarily deprived of his life.” Although the California Superior Court clearly had the power to protect Mr. Krebs from the impending human rights violation, it refused to do so. The court’s refusal to protect Mr. Krebs from the arbitrary deprivation of life constituted a violation of the United States’ obligation under Article XVIII of the Declaration to “protect him from acts of authority that, to his prejudice, violate any fundamental constitutional rights.”

Article XXVI of the American Declaration provides: “Every person accused of an offense has the right . . . to be tried by courts previously established in accordance with pre-existing laws.” The United States ratified the Covenant in 1992. Upon ratification, the Covenant became the “Law of the Land” under the Supremacy Clause. Thus, in May 2000, when Mr. Krebs raised a Covenant-based defense before the California trial court, Article 6 of the Covenant was a “pre-existing law” within the meaning of Article XXVI of the Declaration. The California court’s refusal to apply Article 6 to Mr. Krebs’ case violated his right under Article XXVI “to be tried . . . in accordance with pre-existing laws.”

Article XXIV of the American Declaration states: Every person has the right to submit respectful petitions . . . and the right to obtain a prompt decision thereon. The individual right under Article XXIV to obtain a prompt decision necessarily entails a right to obtain a prompt decision *on the merits*. The contrary view – that Article XXIV permits states to decide claims without regard to the merits – is patently absurd.

The Commission’s decision in *Carranza v. Argentina* supports the view that Article XXIV requires a decision *on the merits*.

In *Carranza*, the petitioner was a lower court judge in the Superior Court of Justice of the Province of Chubut. IACHR, Report No. 30/97, *Carranza v. Argentina*. He sought the “nullification of a decree issued by the previous military government of Argentina that had ordered his removal” from the bench. *Id.* The Argentine domestic court refused to address the merits of petitioner’s claim, ruling that his claim raised a non-justiciable political question. The Commission held that the Argentine court’s failure to decide the merits of petitioner’s claim violated Article 25 of the Convention, because Article 25 requires that “the intervening body must *reach a reasoned conclusion on the claim’s merits*, establishing the appropriateness or inappropriateness of the legal claim that precisely gives rise to the judicial recourse.” *Id.* ¶ 71.

The *Krebs* case is indistinguishable from *Carranza*. In *Krebs*, as in *Carranza*, the domestic court refused to decide the merits of petitioner’s allegation. The Argentine court in *Carranza* invoked the political question doctrine to justify its refusal to decide the merits of the claim. In *Krebs*, the California Superior Court invoked the doctrine of non-self-executing treaties to justify its refusal to decide the merits of petitioner’s defense. As one distinguished commentator has noted, “the self-executing/non-self-executing distinction [in the treaty context] has come to serve the functions that are served in the statutory and constitutional contexts” by the political question doctrine.⁶

Granted, the Commission decided *Carranza* on the basis of the American Convention, whereas the *Krebs* petition arises under the Declaration. Even so, the Declaration and Convention, in their Preambles, protect the same essential rights because “the essential rights of man are not derived from one’s being a national of a certain state, but are based upon attributes of the human personality.” The Convention, per *Carranza*, requires the court to

“reach a reasoned conclusion on the claim’s merits.”⁷ Since the Declaration protects the same essential rights as the Convention, it follows that the Declaration also requires the court to reach a reasoned decision on the merits. In *Krebs*, the California Superior Court’s refusal to reach a reasoned decision on the merits of Mr. Krebs’ human rights defense violated Article XXIV of the Declaration.

III. Exhaustion of Domestic Remedies

Although Mr. Krebs has not exhausted all available domestic remedies, we argued that his petition was admissible because his meaningful access to those remedies is subject to an “unwarranted delay.”

The issue of exhaustion of domestic remedies is governed by Article 31 of the Commission’s Rules of Procedure. Article 31(1) of the Rules provides: “In order to decide on the admissibility of a matter, the Commission shall verify whether the remedies of the domestic legal system have been pursued and exhausted in accordance with the generally recognized principles of international law.” Article 31(2)(c) provides that the exhaustion requirement shall not apply when “there has been unwarranted delay in rendering a final judgment under the aforementioned remedies.” We argued that the unwarranted delay exception recognized in Article 31(2)(c) applied to the *Krebs* case.

Under California and U.S. law, Mr. Krebs has the right to challenge his conviction and sentence through both direct, appellate proceedings and post-conviction, habeas corpus proceedings. Of course, these remedies are “adequate” and “available” only insofar as an individual has meaningful access to the courts. “When there has not existed effective access to remedies and there has been a delay in the application of justice, the requirement of previous exhaustion of domestic remedies cannot prevent a case of alleged human rights violations from being heard by an international

forum such as the Commission.” IACHR, Report No. 10/96, Case 10.636 (Admissibility), Guatemala, ¶ 44. In this case, Mr. Krebs’ meaningful access to the courts is subject to an “unwarranted delay.” Due to his indigence, Mr. Krebs is unable to afford legal counsel. California has informed Mr. Krebs that it will provide him appellate counsel, but *there is currently a five-year delay in appointing counsel for the initial appeal in capital cases*. This delay, according to the state, is caused by administrative complications arising from budgetary constraints. This extraordinary delay in the appointment of counsel constitutes an “unwarranted delay in rendering a final judgment.”

In addition, this delay in the appointment of counsel prejudices Mr. Krebs’ rights under the Declaration. The extended interruption in the appellate process will exacerbate the considerable delays associated with judicial review in capital cases. Since reinstating the death penalty in 1978, California has executed eleven persons; they served an average of thirteen years on death row.⁸ Following the jurisprudence of other international human rights bodies, the Commission has recognized that such delays in final judgment violate the human rights of death row inmates. IACHR, Report No. 57/96, *Andrews v. United States*, ¶¶ 46-49. The Commission’s jurisprudence on this issue provides additional evidence that the delay in this case is “unwarranted.”

The Commission, however, summarily rejected these arguments, dismissing the petition for failure to exhaust domestic remedies. In effect, the petition invited the Commission to reconsider the scope of the “unwarranted delay” exception in death penalty cases. If the Commission had agreed with our interpretation of the unwarranted delay exception, it would have empowered the Commission to intervene in many death penalty cases at a relatively early stage of the proceedings. Recall that eleventh-hour requests for “precautionary measures” are

often ineffective because the victim is executed before the Commission has an opportunity to address the merits of the case. Our view is that early intervention might increase the salience of Commission jurisprudence in death penalty cases, increasing the likelihood that domestic courts would incorporate international human rights law into their reasoning. In *Krebs*, for example, the Commission had an opportunity to issue a ruling on the merits in time for Mr. Krebs to invoke this ruling in his appeal and subsequent habeas petition. Although the Commission rejected our interpretation of the delay exception, the general thrust of our approach is, in our view, sound. The question is where might the line be drawn, and what strategies might defense counsel employ to secure a timely Commission ruling on the merits.

Two strategies merit further exploration. First, petitioners might explore the limits of the “unwarranted delay” exception in death penalty cases. This line of argument has tremendous promise, particularly since the Commission has recognized a variant of the “death row phenomenon” claim. Indeed, the decision in *Krebs* may turn more on the fact that the delay was prospective (and hence speculative) than it does on the stage of the proceedings. Perhaps five years hence, the *Krebs* case itself would be decided differently.

Second, petitioners might file with the Commission immediately after a decision by the state supreme court on direct review (and after denial of certiorari by the U.S. Supreme Court).⁹ The argument would be that the exhaustion requirement does not apply to federal habeas review because federal habeas petitions are not an effective remedy. That is, federal habeas review is futile due to the constraints imposed on collateral review of state convictions by the Antiterrorism and Effective Death Penalty Act (AEDPA) and U.S. Supreme Court doctrine. Procedural bars and highly deferential standards of review frequently preclude meaningful review of the merits in federal habeas review of

state capital convictions.

Endnotes

¹ See Rules of Procedure of the Inter-American Commission on Human Rights, art. 31, *available at* www.cidh.org/.

² Richard Steven Zeitvogel (executed on December 11, 1996, five days after IACHR requested precautionary measures); Allen J. Bannister (executed on October 23, 1997, eight days after IACHR requested precautionary measures); Sean Sellers (executed on February 4, 1999, six days after IACHR requested precautionary measures); Joseph Stanley Faulder (executed on June 17, 1999, nine days after IACHR requested precautionary measures); David Leisure (executed on September 1, 1999, five days after IACHR requested precautionary measures); Douglas Christopher Thomas (executed on January 10, 2000, four days after IACHR requested precautionary measures); Shaka Sankofa (executed on June 22, 2000, following three separate Commission requests for precautionary measures); Miguel Angel Flores (executed on November 9, 2000, two weeks after IACHR requested precautionary measures); James Wilson Chambers (executed on November 15, 2000, five days after IACHR requested precautionary measures).

³ Mr. William McLennan, a defense attorney who represented Mr. Krebs in his trial before the California Superior Court, joined us as co-petitioner before the Commission.

⁶ Under Article 19 of its Statute, the Commission has the power to act on petitions alleging human rights violations by states parties to the American Convention. See Statute of the Inter-American Commission on Human Rights, art. 19, *available at* www.cidh.org/. Article 20 empowers the Commission to examine communications pertaining to alleged human rights violations by member states of the Organization of American States that are not parties to the Convention. See *id.*, art. 20.

¹⁸ See IACHR, Report No. 52/01, *Garza v. United States*, ¶ 95 (suggesting that the “most serious crimes” requirement is satisfied where defendant was convicted of three murders committed as part of a continuing criminal enterprise). Mr. Garza’s case was, of course, significantly different from *Krebs*. Garza was accused of three intentional murders, each of which was committed as part of an illegal drug enterprise supervised by Garza. In that case, the government proved that Garza ordered the execution-style killings in furtherance of a highly organized, extremely violent criminal conspiracy.

⁶ See Carlos M. Vazquez, *The Four Doctrines of Self-Executing Treaties*, 89 Am. J. Int’l L. 695, 711-12 (1995).

²⁹ See IACHR, Report No. 30/97, *Carranza v. Argentina*, ¶ 71.

³² California Department of Corrections, *California Executions Since 1978*, *available at* www.cdc.state.ca.us/issues/capital.

³⁴ There is some precedent for this approach. In the case of Michael Domingues, the Commission requested precautionary measures on May 26, 2000, just six months after the U.S. Supreme Court denied certiorari on direct review. See *Domingues v. Nevada*, 528 U.S. 963 (Nov. 1, 1999) (denying certiorari). In the case of Victor Saldano, the Commission requested precautionary measures on March 13, 2000, almost three months before the U.S. Supreme Court granted certiorari on direct review and vacated the death sentence. See *Saldano v. Texas*, 530 U.S. 1212 (2000).