

**IN THE
INTER-AMERICAN COMMISSION ON HUMAN RIGHTS**

Michael Brown and Lezley McSpadden,

Petitioners,

v.

United States of America,

Respondent–State.

BRIEF ON THE MERITS

Report No. 367/22
Petition 909-15

Submitted July 5, 2023

Presented on behalf of Michael Brown and Lezley McSpadden by counsel for petitioners:

Justin Hansford, Esq.
Marques Banks, Esq.
Maggie Ellinger-Locke, Esq.
Kyla Matthews
Thurgood Marshall Civil Rights Center,
Howard University School of Law
2900 Van Ness Street, NW
Room 107
Notre Dame Hall
Washington, DC 20009
ThurgoodMarshallCenter@law.howard.edu
+1 202 250 5109

Delia Addo-Yobo, Esq.
Wade H. McMullen, Jr., Esq.
Christine Connolly
Robert F Kennedy
Human Rights
1300 19th Street, NW
Suite 750
Washington, DC 20036
Addo-yobo@RFKHumanRights.org
+1 202 463 7575

Table of Contents

I.	Introduction.....	4
	A. Summary of argument	4
	B. Procedural history.....	5
II.	Facts.....	7
	A. Contextual facts	7
	B. Facts specific to this case	7
	1. Michael Brown’s murder	7
	2. DOJ pattern and practice report and ongoing litigation	11
	3. DOJ report absolving Wilson relied on corrupted local investigation	15
	4. <i>State of Missouri v. Darren Wilson</i> , the fixed grand jury	16
	5. Review of case by newly-elected prosecutor	16
III.	Violations of the Declaration	17
	A. Deprivation of life under Article I.....	18
	1. Article I and its interpretation by the Commission	18
	2. US failure to comply with Article I duties to investigate, prosecute, and punish extrajudicial killings.....	19
	3. US federal law sets an impossibly high standard of review, effectively barring meaningful review of deaths such as Michael Brown’s	20
	4. The United States Department of Justice’s investigation and report into Michael Brown’s death is grossly flawed	22
	B. US history of policing deprives Black Americans, and particularly Michael Brown, of equality before the law under Article II.....	23
	1. Article II and its interpretation by the Commission.....	23
	a. Wilson’s detention and killing of Michael Brown was racially motivated and an intentional act of discrimination	24
	b. Michael Brown’s murder demonstrates that the USA has failed to create conditions of equality for Black people, who are at greater risk for discrimination because of the US’s history of racial violence	25
	(1) US history of racial animus towards Black Americans	25
	(2) Discriminatory policing in Ferguson, Missouri.....	27
	c. United States Department of Justice’s March 4, 2015 Report	28
	d. United States Department of Justice’s 2016 Consent Decree with the City of Ferguson	29
	C. Violation of both right to a fair trial under Article XVIII and the right to due process under Article XXVI	29
	1. Article XVIII and its interpretation by the Commission	29
	2. Article XXVI and its interpretation by the Commission	31
	a. Improper grand jury procedures	32
	b. Overview of grand jury proceedings in the US	32
	c. Exculpatory evidence presented to the grand jury	33
	d. Evidence of Wilson’s justification defense	34
	e. Evidence of drug use	35
	f. Presentation of improper testimony to the grand jury.....	35
	g. Treating grand jury witnesses inconsistently, providing deference to those who supported Wilson’s version of events.....	37
	h. Failing to cross-examine Wilson.....	37
	i. Providing a grand jury instruction which may have been unconstitutional.....	38
	j. Other evidence of grand jury misconduct.....	39

3.	The US grand jury system is flawed, systemic, politicized, and does not advance due process	40
4.	Impunity for police violence in the United States exacerbates the due process concerns that Michael Brown’s death highlights.....	42
D.	Michael Brown’s detention was arbitrary, illegal, and procedurally improper in violation of Article XXV	43
1.	Article XXV and its interpretation by the Commission	43
a.	Consensual encounters	45
b.	Investigative stops, “Terry stops”	46
c.	Arrests	47
2.	Darren Wilson arbitrarily and illegally stopped and detained Michael Brown.....	47
3.	Wilson’s illegal detention of Michael Brown arose from a civil infraction and was improper	48
4.	The US legal framework governing Terry stops violates international legal standards.....	49
a.	Deficiencies in federal law	49
b.	Deficiencies in state laws and municipal codes	50
IV.	Irrelevant civil suit.....	50
V.	Remedies request and conclusion	53
	Exhibit list.....	56

I. Introduction

On August 9, 2014, Michael Brown was walking down the street in Ferguson, Missouri, with his friend Dorian Johnson. Officer Darren Wilson came upon them and ended Mike's life. The facts are clear: Darren Wilson murdered Mike Brown that day. That murder—and the legal proceedings that followed—violated Mike Brown's rights under the American Declaration of Rights and Duties of Man, as well as those of his mother, Lezley McSpadden.¹

Darren Wilson's actions were unlawful, and the City of Ferguson, the State of Missouri, and the federal government of the United States of America—individually and collectively—failed to follow proper procedure to investigate, prosecute, and punish this extrajudicial killing.

This case has been brought on behalf of Michael Brown and Lesley McSpadden for the following violations: (i) Article I (right to life, liberty and personal security); (ii) Article II (right to equality before the law); (iii) Article XVIII: (right to a fair trial); (iv) Article XXV (right of protection from arbitrary arrest); and (v) Article XXVI (right to due process of law).

After Wilson killed Mr. Brown, police left his body on the hot asphalt for over four hours, uncovered. Images of this, blood pooling around, went viral on social media. An entire community turned out and protested in solidarity. Brown's death that day served as a catalyst for one of the largest social justice movements the United States has ever experienced—the Black Lives Matter movement. The national uprising from the death of George Floyd in 2020 was built on the foundations of much of the leadership and solidarity practices that were forged on the streets of Ferguson, after Wilson gunned down Mike Brown.²

Petitioners request the Commission investigate this matter, grant a hearing on the merits, and issue a report detailing the violations and awarding requested relief.

A. Summary of argument

This brief will show that the United States government failed Michael Brown and his mother Lezley McSpadden, and in so doing violated their human rights as detailed in the American Declaration of Rights and Duties of Man. Specifically, we argue the United States is responsible for five violations: Article I: right to life, liberty and personal security for arbitrarily killing Mike Brown; Article II: right to equality before the law for operating a discriminatory policing regime in Ferguson; Article XVIII: right to a fair trial for Prosecutor Robert McCullough exhibiting bias and manipulating the grand jury procedures to avoid bring charges against the police officer who killed Mike Brown and the federal government failing to conduct a thorough independent investigation without obvious flaws; Article XXV: right of protection from arbitrary arrest in the decision to detain Mike Brown on arbitrary grounds; and Article XXVI: right to due process of

¹ The original submission contained an inaccurate spelling of Ms. McSpadden's name. We regret this error.

² Jason Rosenbaum, *Before George Floyd in Minneapolis, there was Michael Brown* (June 4, 2020), NATIONAL PUBLIC RADIO, <https://www.npr.org/2020/06/04/869302884/before-george-floyd-in-minnesota-there-was-michael-brown-in-missouri>.

law for failure to use an objectively fair process of investigation. We will discuss each of these human rights and show how the established facts demonstrate the violations occurred. We will conclude with proposed remedies and urge the Commission to take needed action.

B. Procedural history

On May 24, 2015, Petitioners filed this complaint on behalf of Michael Brown and Lezley McSpadden. On March 18, 2022, the United States submitted its response. The Commission issued a Report on Admissibility on December 18, 2022, with instruction for the parties to proceed on the merits under Rule of Procedure Article 37. Accordingly, the Petitioners submit this timely response.

On August 20, 2014, St. Louis County Prosecuting Attorney Robert McCulloch convened a grand jury to determine whether under Missouri law Darren Wilson could be indicted for the following: (1) murder in the first degree; (2) murder in second degree; (3) voluntary manslaughter; (4) involuntary manslaughter in the first degree; or (5) involuntary manslaughter in the second degree.³ On November 24, 2014, McCulloch announced that the grand jury declined to indict Wilson on any of the charges.⁴

On September 4, 2014, the Civil Rights Division of the US Department of Justice (DOJ) opened an investigation into the Ferguson Police Department.⁵ The scope of investigation would determine whether Darren Wilson's actions could be prosecuted pursuant to 18 U.S.C. 242. On March 4, 2015, DOJ announced that it would not prosecute Darren Wilson for the murder of Mike Brown but released a report finding that the Ferguson Police Department engaged in a pattern of unconstitutional, racially biased policing.⁶

On November 11, 2014, Mike Brown's parents, Lezley McSpadden and Michael Brown Sr. testified before the United Nations Convention Against Torture Treaty Review concerning the murder of their son.⁷ The family accused the United States of violation of article 1, article 12, and article 16 of the treaty.⁸ In its 2014 report on the United States, the Committee against Torture expressed concerns about the number of deaths that occur among people in custody. It

³ *State of Missouri v. Darren Wilson* Tr. of Grand Jury 132:15-133:4, Nov. 21, 2014, <https://graphics8.nytimes.com/newsgraphics/2014/11/24/ferguson-assets/grand-jury-testimony.pdf>.

⁴ Jon Swaine, Paul Lewis & Dan Roberts, *Grand Jury Decline to Charge Darren Wilson for Killing Michael Brown* (Nov. 25, 2014), THE GUARDIAN, <https://www.theguardian.com/us-news/2014/nov/24/ferguson-police-darren-wilson-michael-brown-no-charges>.

⁵ U.S. Dep't of Justice, *Investigation of the Ferguson Police Department* 4 (2015), https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report_1.pdf.

⁶ Press Release, U.S. Dep't of Justice, *Justice Department Announces Findings of Two Civil Rights Investigations in Ferguson, Missouri* (Mar. 4, 2015), <https://www.justice.gov/opa/pr/justice-department-announces-findings-two-civil-rights-investigations-ferguson-missouri>.

⁷ Josh Levs, *Michael Brown's parents address UN: "We need the world to know,"* CNN (Nov. 12, 2014) <https://www.cnn.com/2014/11/11/us/ferguson-brown-parents-u-n-/index.html>.

⁸ Justin Hansford and Meena Jagannath, *Ferguson to Geneva: Using the Human Rights Framework to Push Forward a Vision for Racial Justice in the United States after Ferguson*, 12 *Hastings Race & Poverty L.J.* 121 (2015) https://repository.uclawsf.edu/hastings_race_poverty_law_journal/vol12/iss2/1.

highlighted “numerous reports of police brutality and excessive use of force by law enforcement officials.”⁹

In April 2015, Mike Brown’s parents, Lezley McSpadden and Michael Brown Sr., filed a wrongful death suit against the City of Ferguson, Former Police Chief Thomas Jackson, and Darren Wilson alleging civil rights violations under 42 U.S.C. 1983.¹⁰ On June 20, 2017, the parties reached a settlement.¹¹ The family was awarded \$1.5 million.¹²

On February 10, 2016, DOJ brought a civil action against the City of Ferguson under the Violent Crime Control and Law Enforcement Act of 1994, 42 U.S.C. § 14141, and Title VI of the Civil Rights Act of 1964.¹³

On April 19, 2016, the City of Ferguson and the DOJ entered into a Consent Decree following a 2015 DOJ investigation.¹⁴ The agreement between the parties terminates when the City has been in full and effective compliance for two consecutive years.¹⁵ The consent decree is only enforceable between the City and DOJ, and may not be used as the basis for a criminal, civil, or administrative action by third parties.¹⁶

In 2020, the St. Louis County Prosecuting Attorney’s Office launched an independent review of the shooting to determine whether criminal charges would be brought against Darren Wilson.¹⁷ On July 24, 2020, after a five-month investigation, Prosecutor Wesley Bell announced that no charges would be filed, as he did not believe his office would be able to prevail on murder or manslaughter charges under Missouri law.¹⁸

⁹ See, e.g., U.N. Comm. Against Torture, Concluding Observations on the Combined Third to Fifth Periodic Reports of the United States of America, U.N. Doc. CAT/C/USA/CO/3–5 (Dec. 19, 2014).

¹⁰ Christopher Coble, *Family of Michael Brown Sues Ferguson, Darren Wilson*, FINDLAW BLOG (Apr. 24, 2015), <https://www.findlaw.com/legalblogs/courtside/family-of-michael-brown-sues-ferguson-darren-wilson/>.

¹¹ Phil Helsel, *Michael Brown’s Parents, City of Ferguson Reach Settlement Deal in Lawsuit* (June 20, 2017), NBC NEWS, <https://www.nbcnews.com/storyline/michael-brown-shooting/michael-brown-s-parents-city-ferguson-reach-settlement-deal-lawsuit-n774911>.

¹² *Michael Brown’s Family Received \$1.5 Million Settlement With Ferguson* (June 23, 2017), NBC NEWS, <https://www.nbcnews.com/storyline/michael-brown-shooting/michael-brown-s-family-received-1-5-million-settlement-ferguson-n775936>.

¹³ *U.S. v. City of Ferguson* Compl. ¶ 1, <https://www.documentcloud.org/documents/2709240-Ferguson-DOJ-Lawsuit.html>.

¹⁴ Amended and Restated Consent Decree, *United States v. City of Ferguson*, No. 4:16-cv-000180 (E.D. Mo. Nov. 15, 2018) [hereinafter Consent Decree], <https://www.fergusoncity.com/DocumentCenter/View/3854/97-1-Amended-and-Restated-Consent-Decree?bidId=> .

¹⁵ Consent Decree at 120.

¹⁶ Consent Decree, at 121.

¹⁷ Anne Branigin, *St. Louis County Prosecutor, Who Campaigned on Criminal Justice Reform, Will Not Charge Darren Wilson in Mike Brown’s Death*, THE ROOT (July 31, 2020), <https://www.theroot.com/st-louis-county-prosecutor-who-campaigned-on-criminal-1844570996>.

¹⁸ Jessica Wolfrom & Reis Thebault, *Prosecutor Will Not Charge the Officer Who Shot and Killed Michael Brown in Ferguson*, WASH. POST (July 30, 2020), <https://www.washingtonpost.com/nation/2020/07/30/prosecutor-will-not-charge-police-officer-who-shot-killed-michael-brown-ferguson/>.

II. Facts

A. Contextual facts

Discriminatory and excessive policing violates the obligations of the United States under the American Declaration and the Rights and Duties of the Man which guarantees to every human “the right to life, liberty and security of his person,”¹⁹ protection from deprivation of liberty,²⁰ and equality before the law.²¹ Here, the context of pervasive police violence against Black Americans like Mike Brown is illustrated by: (1) the widespread pattern of police violence against Black people in the United States; (2) resulting impunity for police violence in the United States; and (3) the impact of police violence on Black people in the United States.

The facts specific to this case include: (1) the killing of Mike Brown; (2) the history of discriminatory policing in Ferguson; (3) failures of Missouri State officials; and (4) failures of the United States federal government.

1. Michael Brown’s murder

On August 9, 2014, Darren Wilson, a white police officer, shot and killed Mike Brown, an unarmed Black teenager. Until the moment the bullets from Darren Wilson’s gun viciously pierced Mike Brown’s flesh, he had beaten the odds. He graduated from Normandy High School, part of an underfunded school system with a graduation rate of 53% where only 20% of the students go on to attend a four-year college.²² Nevertheless, Brown graduated and enrolled in Vatterott Technical College to study engineering.²³ He would have begun college two days later if Darren Wilson had not killed him. He had no criminal record²⁴ and his entire life ahead of him.

But, at approximately noon on August 9, 2014, Mike Brown was walking down a small street near his grandmother’s apartment complex in Ferguson, Missouri—a suburb right outside of St. Louis—with a friend, Dorian Johnson, when they were approached by a white police officer.²⁵ According to Johnson, the closest witness to the afternoon’s events, the officer approached them

¹⁹ American Declaration on the Rights and Duties of Man, Art. I.

²⁰ American Declaration on the Rights and Duties of Man, Art. XXV.

²¹ American Declaration on the Rights and Duties of Man, Art. II.

²² Rebecca Klein, *Michael Brown’s High School Is an Example of the Major Inequalities in Education*, HUFFINGTON POST (Aug. 21, 2014), http://www.huffingtonpost.com/2014/08/21/michael-brown-high-school_n_5682852.html.

²³ Laura Collins, *Who Was the Real Michael Brown?*, DAILY MAIL (Aug. 22, 2014), <http://www.dailymail.co.uk/news/article-2730153/A-kid-broken-home-beat-odds-to-college-A-rapper-sang-smoking-weed-feds-A-violent-robbery-suspect-caught-shocking-video-just-real-Michael-Brown.html>.

²⁴ Manny Fernandez, *Michael Brown Never Faced Serious Felony Charges*, N.Y. TIMES (Sept. 3, 2014), http://www.nytimes.com/2014/09/04/us/michael-brown-never-faced-serious-felony-charge-st-louis-officials-lawyer-says.html?_r=0.

²⁵ *What Happened in Ferguson?*, N.Y. TIMES, (Aug. 10, 2015), <https://www.nytimes.com/interactive/2014/08/13/us/ferguson-missouri-town-under-siege-after-police-shooting.html>.

in his SUV police vehicle, told them to “get the [expletive] onto the sidewalk,” which then escalated into a confrontation followed by gunshots.²⁶

When Officer Darren Wilson noticed Mike Brown and Dorian Johnson crossing the street, he profanely ordered that they get onto the sidewalk. “The [unnecessary] use of such aggressive profanity caused an unnecessary and unwarranted escalation of this interaction.”²⁷ Wilson made contradictory statements when describing why he approached the young men, suggesting the interaction was likely a case of racial profiling, which was prevalent in Ferguson. Mike Brown and Darren Wilson exchanged a few words, but Brown and Johnson quickly disengaged and walked away. It was only a matter of seconds before Darren Wilson followed the teens in his vehicle. Wilson then turned his vehicle perpendicular to the street, blocking Brown and Johnson’s walking path. Wilson alleges he continued pursuit of the teens because they matched the description of the subjects on the radio dispatch of a theft at a local market.²⁸ However, Wilson’s allegation is suspect as it was made only after the convenience store surveillance video was publicly disseminated and it directly contradicts the police chief’s statement that the initial contact was unrelated to the burglary.²⁹

As Wilson exited his patrol car, he hit Brown’s body with the driver door, causing a collision with the teen.³⁰ Witnesses assert the two then began to scuffle.³¹ Wilson almost immediately resorted to using deadly force and attempted to withdraw his gun.³² Wilson declined to use non-deadly force, like mace or a baton, and did not attempt to reach for either.³³ Although a taser was a reasonable alternative for Wilson to use, he “usually elect[s] not to carry one.”³⁴ The only weapon that Officer Darren Wilson made immediately available to himself was the most fatal—his firearm. The heated altercation began near Darren Wilson’s police car while Brown stood at the window of the vehicle; but when the officer fired two shots, one of which penetrated Brown’s thumb, Brown ran away.³⁵

²⁶ Trymaine Lee, *Eyewitness to Michael Brown Shooting Recounts His Friend’s Death*, MSNbc NEWS (Aug. 12, 2014), <http://www.msnbc.com/msnbc/eyewitness-michael-brown-fatal-shooting-missouri>.

²⁷ Compl. at ¶ 19, *Brown v. City of Ferguson*, No. 15SLCC01367 (St. Louis Cnty. Cir. Ct. Apr. 23, 2015), <https://www.scribd.com/doc/262845216/Michael-Brown-lawsuit>.

²⁸ See Grand Jury Testimony, Volume V at 196–281.

²⁹ See Mark Berman, *Ferguson Police Chief: Encounter Between Officer and Michael Brown Did Not Relate to the Robbery*, WASH. POST (Aug. 15, 2014), https://www.washingtonpost.com/news/post-nation/wp/2014/08/15/ferguson-police-chief-encounter-between-officer-and-michael-brown-did-not-relate-to-robbery/?utm_term=.b31f78070eeb (quoting Police Chief Thomas Jackson stating: “[t]he robbery was not related to the initial contact between the officer and Brown”).

³⁰ DEPARTMENT OF JUSTICE REPORT REGARDING THE CRIMINAL INVESTIGATION INTO THE SHOOTING DEATH OF MICHAEL BROWN BY FERGUSON, MISSOURI POLICE OFFICER DARREN WILSON 6 (2015) (hereinafter DOJ REPORT INTO MICHAEL BROWN SHOOTING DEATH).

³¹ *What Happened in Ferguson?*, *supra* note 25.

³² See *Missouri v. Darren Wilson*, Tr. of Grand Jury Testimony (hereinafter Grand Jury Testimony), Volume V at 214. All volumes of released grand jury transcripts are available here, <https://apps.stlpublicradio.org/ferguson-project/evidence.html>.

³³ *Id.* at 213–214.

³⁴ *Id.* at 205.

³⁵ *What Happened in Ferguson?*, *supra* note 25.

According to multiple witnesses, Wilson chased Brown on foot. Witnesses also contend that Brown raised his hands in a surrendered position—his wounds are consistent with this account—as he begged Wilson not to shoot. Despite his pleas, Wilson fired his weapon. No witness reported that Wilson gave Brown orders as these shots were fired.³⁶

Darren Wilson fired approximately twelve rounds, virtually all of the bullets in his weapon.³⁷ He fired two from the car and, as evidenced by audio recordings of the shooting that occurred further down the street,³⁸ he fired an additional six bullets. Then after several seconds, Wilson fired four more bullets.³⁹ The teenager was hit by at least six shots according to an autopsy conducted by a pathologist not affiliated with the government.⁴⁰ The autopsy further revealed that the final shots included one that entered his eye and another at the top of the head, which may have indicated his head was lowered as he collapsed or kneeled to surrender.⁴¹

Following his murder, Mike Brown's body was left uncovered in the middle of the street that runs through the Canfield Green Apartments, a densely populated apartment complex, for over four hours.⁴² Darren Wilson made no effort to resuscitate him, nor did he call for an ambulance. This treatment of Mike Brown's body, grotesquely mutilated by the six bullets and left bleeding in the street in plain view, traumatized countless neighbors who witnessed either the shooting, its aftermath, or both. This trauma was even more agonizing for Mike Brown's family, who came to the scene only to find their young son's remains quickly decomposing on the hot summer street.⁴³ At this moment, Mike Brown's family bore the lifelong agony of losing a child, meanwhile his killer was quickly removed from the scene and later placed on paid administrative leave.⁴⁴

Given the history of racial tensions in the city of Ferguson and in the United States as a whole, this particularly disrespectful treatment of Mike Brown's body demonstrated a callous disregard for the trauma it could cause Ferguson residents. It repeated and reinforced the longstanding degrading treatment of Black people by an overwhelmingly white police force. This implicit notion that the lives of Black people are not their own, but rather they belong to white police

³⁶ Ryan Reilly & Amber Ferguson, *Witnesses to Michael Brown Shooting Tell the Same Basic Story About His Death*, HUFFINGTON POST (Sep. 16, 2014), http://www.huffingtonpost.com/2014/09/16/michael-brown-shooting-video_n_5831226.html.

³⁷ See Grand Jury Testimony, Volume V at 205.

³⁸ Jason Hanna, *Audio Captured at Time of Michael Brown Shooting, Company Says*, CNN (Aug. 28, 2014), <http://www.cnn.com/2014/08/28/justice/michael-brown-ferguson-shooting-audio/>.

³⁹ "I shoot a series of shots, I don't know how many I shot, I just know I shot it." Wilson alleged he has a reasonable belief that Brown was armed. Grand Jury Testimony, Volume V at 228.

⁴⁰ POST-MORTEM EXAMINATION (2014) available at <http://www.documentcloud.org/documents/1370591-2014-5143-autopsy-report.html>.

⁴¹ Frances Robles & Julie Bosman, *Autopsy Shows Michael Brown Was Struck at Least 6 Times*, N.Y. TIMES (Aug. 17, 2014), <http://www.nytimes.com/2014/08/18/us/michael-brown-autopsy-shows-he-was-shot-at-least-6-times.html>.

⁴² Julie Bosman & Joseph Goldstein, *Timeline for a Body: 4 Hours in the Middle of a Ferguson Street*, N.Y. TIMES (Aug. 23, 2014), <http://www.nytimes.com/2014/08/24/us/michael-brown-a-bodys-timeline-4-hours-on-a-ferguson-street.html>.

⁴³ *Id.*

⁴⁴ Grand Jury Testimony, Volume V at 197, 236.

officers who may dispose of them whenever they so choose, is the reason why Stephon Clark,⁴⁵ Rekia Boyd,⁴⁶ Eric Garner,⁴⁷ Philando Castile,⁴⁸ Alton Sterling,⁴⁹ and Tamir Rice⁵⁰ are no longer living.⁵¹ The treatment of Mike Brown's Black body perpetuates this notion.

Not only did the abandonment of Mike Brown's body convey to residents that the police officer regarded the Black teen as less than human, it also illustrated the officer's brazen confidence that he would not be punished for such unwarranted violence. One local leader noted that this action was a message from the police that "we can do this to you any day, any time, in broad daylight, and there's nothing you can do about it."⁵² Such treatment recalls the deplorable American tradition of lynching, which took place in the era of Jim Crow segregation.⁵³ Similar to the intended message of terror conveyed by lynching, a local resident shared her belief that the treatment of Mike Brown's body was done to "set an example," that "they shot a black man, and they left his body in the street to let you all know this could be you."⁵⁴

⁴⁵ On March 18, 2018, Sacramento Police fired 20 shots and killed Stephon Clark in his backyard when responding to a call about a burglary. Police first alleged that Clark had a gun, but they later said it was a "toolbar." All police recovered from the scene was a cellphone. Richard Winton, et. al, *Stephon Clark Shooting: How Police Opened Fire on an Unarmed Black Man Holding a Cellphone*, L.A. TIMES, (Mar. 23, 2018),

<http://www.latimes.com/local/lanow/la-me-stephon-clark-shooting-sacramento-explainer-20180323-story.html>.

⁴⁶ Twenty-two-year-old Rekia Boyd was shot in the back of the head by an off-duty Chicago officer after the officer initiated a hostile confrontation. Boyd and friends were walking down an alleyway when the officer pulled up in his car telling them to be quiet. An altercation ensued, however Boyd and friends walked away. It was at this time that the officer fired shots hitting Boyd in the head and her boyfriend in the thumb. Editorial Board, *Rekia Boyd Shooting Was "beyond reckless," So Cop Got a Pass*, CHI. TRIBUNE, (Apr. 22, 2015),

<http://www.chicagotribune.com/news/opinion/editorials/ct-cop-verdict-servin-edit-0423-20150422-story.html>.

⁴⁷ Eric Garner was choked to death, despite 11 repetitive pleas of "I can't breathe," by New York City police trying to arrest and restrain him for selling untaxed cigarettes. Al Baker, et. al, *Beyond the Chokehold: The Path to Eric Garner's Death*, N.Y. TIMES (June 13, 2015), <https://www.nytimes.com/2015/06/14/nyregion/eric-garner-police-chokehold-staten-island.html>.

⁴⁸ Police shot Philando Castile to death in front of his girlfriend and her four-year-old daughter during an investigatory stop. When asked to present insurance and registration, Castile told the officer that he had a firearm on his person. The officer instructed Castile not to reach for it, and Castile complied. Then the officer fired seven shots, five striking Castile. Jay Croft, *Philando Castile Shooting: Dashcam Video Shows Rapid Event*, CNN, (June 21, 2017), <https://www.cnn.com/2017/06/20/us/philando-castile-shooting-dashcam/index.html>.

⁴⁹ Baton Rouge officers fatally shot a restrained Alton Sterling, who was selling CDs outside a convenience store after reports of false allegation that Sterling had pointed a gun at someone. Radley Balko, *Alton Sterling's Death Appears to Be Another Police Shooting That Was Both Legal and Preventable*, THE WASH. POST, (July 6, 2016), https://www.washingtonpost.com/news/the-watch/wp/2016/07/06/alton-sterlings-death-appears-to-be-another-police-shooting-that-was-both-legal-and-preventable/?utm_term=.c39d55d75eec.

⁵⁰ In late 2014, a Cleveland police officer shot dead twelve-year-old Tamir Rice. The officer was responding to a call that a young boy was playing with a pellet gun. Despite the fact that the caller indicated that the gun was "probably fake," the officer shot Rice within seconds of pulling up beside him. Jacey Fortin & Jonah Engel Bromwich, *Cleveland Police Officer Who Shot Tamir Rice is Fired*, N.Y. TIMES (May 30, 2017), <https://www.nytimes.com/2017/05/30/us/cleveland-police-tamir-rice.html>.

⁵¹ All of these people, although different ages and from different parts of the country, have three things in common: each was (1) unarmed, (2) African American, and (3) killed by a police officer.

⁵² Bosman & Goldstein, *supra* note 42.

⁵³ Editorial Board, *Lynching as Racial Terrorism*, N.Y. TIMES (Feb. 11, 2015), www.nytimes.com/2015/02/11/opinion/lynching-as-racial-terrorism.html.

⁵⁴ David Hunn & Kim Bell, *Why was Michael Brown's Body Left There for Hours?*, ST. LOUIS POST-DISPATCH (Sept. 14, 2014), http://www.stltoday.com/news/local/crime-and-courts/why-was-michael-brown-s-body-left-there-for-hours/article_ob73ec58-c6a1-516e-882f-74d18a4246e0.html.

2. DOJ pattern and practice report and ongoing litigation

The errant police practices and deeply rooted racial bias within the Ferguson Police Department provide context for the killing of Mike Brown by Darren Wilson. Ferguson law enforcement frequently detain people, most of whom are Black, without reasonable suspicion or the probable cause required by the Fourth Amendment of the United States Constitution.⁵⁵ Additionally, Ferguson Police Department engages in a pattern of excessive force and “the overwhelming majority of force...is used against African Americans.”⁵⁶

According to the DOJ’s investigation, the city of Ferguson’s “approach to law enforcement both reflects and reinforces racial bias, including stereotyping,” which has an overwhelming impact on Black people.⁵⁷ In its findings the Department of Justice agreed there was a pattern or practice of unconstitutional policing in Ferguson, and yet, it failed to find Officer Wilson responsible for Mike Brown’s death.⁵⁸ This pattern and the resulting impact is the result of both implicit bias and intentional racial discrimination on the part of the police officers that make up the city’s police department. Between 2012 and 2014 alone, Black people made up 67% of the population in Ferguson yet accounted for 85% of Ferguson Police Department’s traffic stops.⁵⁹ Black people accounted for 95% of Manner of Walking charges, 94% of Failure to Comply charges, 92% of Resisting Arrest charges, 92% of Peace Disturbance charges, and 89% of Failure to Obey charges;⁶⁰ Black residents in Ferguson were also more than twice as likely to be searched during a stop but were 26% less likely to be found with contraband.⁶¹ The racial bias embedded in these statistics is further highlighted by the fact that the FPD’s disparate impact on Black residents is 48% larger when citations are issued by police officers rather than by radar or laser alone.⁶²

Racial bias and discrimination are not only evident in these statistics, but also in the very words of police supervisors and court staff in Ferguson. Emails have circulated in which those officials stereotype racial minorities as criminal, including one specific email that joked about a Black woman’s abortion as a means of crime control.⁶³ Another email asked, “what black man holds a steady job for four years” in reference to former President Barack Obama, and even another depicted him as a chimpanzee.⁶⁴ The emails further employed racial stereotypes about Black families and the way they speak.⁶⁵ No police or court official was ever disciplined for the emails

⁵⁵ U.S. DEP’T OF JUSTICE, CIVIL RIGHTS DIV., INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT 16 (2015), https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf (hereinafter FERGUSON REPORT).

⁵⁶ *Id.* at 28.

⁵⁷ *Id.* at 4.

⁵⁸ *Id.* at 5.

⁵⁹ *Id.* at 62.

⁶⁰ *Id.*

⁶¹ *Id.* at 4.

⁶² *Id.* at 5.

⁶³ *Id.* at 72.

⁶⁴ *Id.*

⁶⁵ *Id.*

nor was any employee officially asked to stop sending such emails or reported for them.⁶⁶ In sum, the emails offered a poignant view into the racist internal culture of a department and court system supposedly charged with meting out justice in the small community.

Research shows a correlation between awareness of negative stereotypes about Black people and use of excessive force by police officers. One study in the journal of Personality and Social Psychology showcased findings from a simulation that emulates police encounters where it is unclear whether a target is potentially armed and dangerous, and found a direct correlation between awareness of stereotypes about African Americans as violent and a decision to use deadly force despite ambiguity in the encounter. “Participants may use the stereotypic association between the social category, African American, and concepts like violence or danger as a schema to help interpret ambiguous behavior on the part of any given African American target . . . when ambiguous behavior is performed by an African American, it seems more hostile, more mean, and more threatening than when it is performed by a White person.”⁶⁷

The research further revealed that mere awareness of stereotypes is sufficient to produce the bias, even if a person does not subscribe to them consciously, although a personal belief that Black = criminal fortifies the propensity to shoot. “The proposed process does not require a participant to dislike African Americans, or to hold any explicit prejudice against them, nor does it require that the participant endorse the stereotype; it simply requires that, at some level, the participant associates the two concepts “African American” and violent. Indeed, “Shooter Bias was more pronounced among participants who believed that there is a strong stereotype in American culture characterizing African Americans as aggressive, violent and dangerous.”⁶⁸

Darren Wilson discussed African Americans in these terms (aggressive, violent, dangerous) during his grand jury testimony, describing predominantly Black communities as “hostile” and characterized by violence. The statements he made included the following: “There’s a lot of gangs that reside or associate with that area, there’s a lot of gun activity, drug activity, it is just not a very well-liked community. That community doesn’t like the police.” He also stated about the Ferguson neighborhood, “That’s not an area where you can take anything really lightly. Like I said, it is a hostile environment. There are good people over there, there really are, but I mean there is an influx of gang activity in that area.” And finally he concluded that “It is an anti police area for sure.”

⁶⁶ *Id.*

⁶⁷ Joshua Correl, et. al, The Police Officer’s Dilemma, Using Ethnicity to Disambiguate Potentially Threatening Individuals, *Journal of Personality and Social Psychology*, Vol. 83, No. 6, 1314 - 1329, at 1320 (2002).

⁶⁸ *Id.* at 325.

Wilson worked in a police department that fostered an anti-Black, which helps to explain why—according to the DOJ—Black residents accounted for 88% of reported cases of police use of force from 2010 to 2014.⁶⁹ Many of those cases of use of force were constitutionally excessive and unreasonable and included the use of such tactics as electronic control weapons and canines, sometimes in a punitive and retaliatory manner and often as a result of unlawful arrest and officer escalation.⁷⁰ Notably, a high number of reported use-of-force incidents involved only Failure to Comply or Resisting Arrest charges, meaning “officers who claim to act based on reasonable suspicion or probable cause of a crime either are wrong much of time or do not have an adequate legal basis for many stops and arrests in the first place.”⁷¹ The concern about these unlawful practices is compounded by the widespread lack of reporting of incidents of use-of-force in the department and the lack of any meaningful review or discipline process when it is unlawfully used. The manifestation of these practices in Ferguson and other parts of the United States are the result of deeply rooted implicit racial biases.⁷² As a consequence, Black men and women—like Mike Brown—are killed at alarming rates by police officers’ inexcusable use of excessive force.⁷³

In the wake of public condemnation of the lack of accountability in excessive use of force cases involving Black Americans, the federal government announced that the municipality had agreed to a consent decree. In this decree, the municipality agreed to 37 different reform measures to help restore community trust in the department, create better policing practices in the municipality, and a generally more equal community in Ferguson.⁷⁴ After the transition from the Obama Administration to the Trump Administration, there was concern about the DOJ’s commitment to the consent decree process.⁷⁵ Despite these concerns and a rocky start to implementing the consent decree—including the Ferguson council initially voting not to approve the decree and attempting to amend it⁷⁶—the judge overseeing the decree said that Ferguson and the DOJ were both, “working ‘in good faith’ and making ‘good progress’” towards fully implementing the decree.⁷⁷

Despite the judge’s characterization of the consent decree’s implementation at that time, citizens of Ferguson still had complaints about the consent decree’s execution, citing concerns about

⁶⁹ U.S. DEP’T OF JUSTICE, CIVIL RIGHTS DIV., INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT 62 (2015), https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf (hereinafter FERGUSON REPORT).

⁷⁰ *Id.* at 29–35.

⁷¹ *Id.* at 35.

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *See generally* Consent Decree.

⁷⁵ Robert Patrick, *Federal Judge Lauds Progress So Far on Ferguson Consent Decree*, St. Louis Post-Dispatch (Sep. 19 2017), http://www.stltoday.com/news/local/crime-and-courts/federal-judge-lauds-progress-so-far-on-ferguson-consent-decree/article_95807f54-93d9-57cf-9de0-b437968914b2.html.

⁷⁶ Laura Wagner, *Ferguson City Council Accepts Consent Decree Worked Out with Justice Department*, NPR (Mar. 15, 2016), <https://www.npr.org/sections/thetwo-way/2016/03/15/470598733/ferguson-city-council-accepts-deal-with-justice-department>.

⁷⁷ Patrick, *supra* note 75.

keeping deadlines and lack of transparency.⁷⁸ There were also citizens who did not believe the consent decree went far enough to fix the injustices that plague Ferguson and did not trust Ferguson officials to fix the problems they helped create.⁷⁹

Several years later, the concerns of these citizens persist, and full and substantive implementation of the consent decree continues to stall. A September 2020 letter from the NAACP Legal Education and Defense Fund to the judge overseeing the consent decree summarizes several major issues with enforcement of the consent decree that remain.⁸⁰ Among those issues are: Ferguson city officials' failure to meet many of the consent decree's requirements; those same officials' lack of compliance with the community engagement provisions of the consent decree; the Ferguson Police Department's reliance on outside law enforcement agencies in circumvention of the consent decree's requirements to protect protestors' First Amendment rights; and the use of ShotSpotter, a gunshot technology device with the potential to invade community members' privacy, erode trust in the community, and give a police department with a history of racially discriminatory practices more power than it already has.⁸¹

Notably, five years after the implementation of the consent decree, there has been very little engagement with the broader community outside of the Neighborhood Policing Steering Committee.⁸² This includes the absence of any public updates on the community engagement plan required by the consent decree. Although the Monitor of the consent decree held a public forum on February 12, 2020, neither the parties to the decree nor the Monitor have engaged further with the residents of Ferguson.⁸³ In the aftermath of the death of George Floyd in May of 2020 and the months of national protests that followed, the residents of Ferguson have been left uninformed of the status of their own consent decree regarding their ability to exercise their First Amendment rights and be free from police brutality in doing so.

Aside from the marked failures of the city to productively and publicly enforce the consent decree, residents of Ferguson—with good reason—continue to distrust the very people in charge of doing so. Statements of then-mayor James Knowles III and interim city manager Jeffrey Blume to the press in early 2020 characterized compliance with the consent as a serious

⁷⁸ Robert Patrick, *Complaints Come with Some Progress on Ferguson Consent Decree*, ST. LOUIS POST-DISPATCH (June 22, 2017), http://www.stltoday.com/news/local/crime-and-courts/complaints-come-with-some-progress-on-ferguson-consent-decree/article_od2cad62-72a7-53c7-a0d6-4e5b2b50a909.html/.

⁷⁹ Stephen Deere, *Federal Judge Approve Agreement between Ferguson, Justice Department*, ST. LOUIS POST-DISPATCH (Apr. 20, 2016), http://www.stltoday.com/news/local/crime-and-courts/federal-judge-approves-agreement-between-ferguson-justice-department/article_da3eb60a-84ab-5b19-a850-51d2f6652929.html.

⁸⁰ Letter from Katurah Topps, Pol'y Counsel, NAACP Legal Def. and Educ. Fund, to Judge Catherine D. Perry, E.D. Mo. (Sept. 21, 2020), <https://www.naacpldf.org/wp-content/uploads/9.21.2020-LDF-FINAL-Comment-Letter-on-Ferguson-Consent-Decree-Implementation.pdf>.

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.*

financial threat to the city that could lead to eventual dissolution;⁸⁴ Blume is the same person that residents call “the architect of the black body ATM,” a plan he orchestrated to increase municipal and traffic tickets to raise revenue for the city and for which he was investigated by the Department of Justice, a fact that continues to sow distrust.⁸⁵ Although James Knowles III has since been replaced by Ella Jones—the first Black mayor of Ferguson—Blume continued as the city manager until May 2021, undermining any accountability for his misconduct.⁸⁶

These failures by the city of Ferguson and the Monitor in charge of overseeing the implementation of the consent decree’s requirements continue to put the rights of the residents of Ferguson in jeopardy and demonstrate the indifference with which officials—local and otherwise—treat the rights of those residents.

3. DOJ report absolving Wilson relied on corrupted local investigation

On March 4, 2015, the US Department of Justice issued two reports. One examining the pattern and practice of civil rights violations by the Ferguson police, discussed above, and the other absolving Officer Wilson of criminal and civil-rights violations for killing Michael Brown. This latter report is the result of dozens of witness interviews, an examination of forensic evidence, and more. The DOJ report relied heavily on the local investigation—it credits evidence favoring Wilson’s story, discredits witnesses whose testimony contradicts Wilson’s, and tries to justify that under the color of law. A careful review reveals internal inconsistencies. For example, Wilson claims Brown reached for his waistband with his *right hand* just before he fired the fatal gunshot. DOJ thought that the position of Brown’s body, after he crumpled dead to the ground, corroborated that story—one deployed to combat the witnesses and evidence that suggests Brown had his hands up when killed. Specifically, DOJ cited the position of one of his hands near his waistband. But it found Wilson’s story corroborated by *the wrong hand*. “Wilson’s version of events is corroborated by . . . the fact that Brown went to the ground with his left hand at (although not inside) his waistband.”

Wilson shot Brown in the right hand before he killed him with a shot to the head. If Brown had reached for his waistband with the injured hand, there would have been blood on that area; there was not. Like McCulloch’s grand-jury, the DOJ report takes great pains to rehabilitate Wilson’s contradictory and self-serving testimony, apparently making a political choice not to charge Wilson for civil rights violations, instead of a choice grounded in the facts.

⁸⁴ *Ferguson Still Dragging Its Feet on DOJ Consent Decree*, ST. LOUIS AM., (Feb. 6, 2020), https://www.stlamerican.com/news/political_eye/ferguson-still-dragging-its-feet-on-doj-consent-decree/article_784bf8ce-4886-11ea-98d6-fb7953a3b4bc.html.

⁸⁵ *Ferguson Extends Contract of Jeff Blume, Villain of DOJ Report*, ST. LOUIS AM., (Feb. 26, 2020), http://www.stlamerican.com/news/political_eye/ferguson-extends-contract-of-jeff-blume-a-villain-of-doj-report/article_6598f7be-5906-11ea-811b-9754bcf2294b.html.

⁸⁶ *Id.*

4. *State of Missouri v. Darren Wilson, the fixed grand jury*

As discussed in greater detail below, the use of the grand jury to absolve Darren Wilson of wrongdoing violated international human rights laws. From the beginning, St. Louis County Prosecuting Attorney Robert McCulloch, announced he would share “all available evidence” with the grand jury, and not just evidence supporting a finding of probable cause. McCulloch put his thumb on the scale for Wilson, by failing to cross-examine Wilson’s contradictory testimony, knowingly presenting perjured testimony, cross-examining only witnesses favorable to a probable cause finding, likely use of an unconstitutional jury instruction, contradicting the physical record, presenting irrelevant evidence of Michael Brown’s cannabis use but failing to present evidence of Wilson’s likely and much more relevant steroid use, and more. The record shows that Prosecutor McCulloch, who had a decades-long history of evincing support for police over the community in his personal life,⁸⁷ decided long before the grand jury result was announced what the result would be. Legal scholars across the country overwhelmingly condemned his actions,⁸⁸ yet the ultimate result has been the same—no justice for Michael Brown or his family.

5. Review of case by newly-elected prosecutor

In 2018, Wesley Bell was elected as St. Louis County Prosecuting Attorney, replacing the incumbent prosecutor in charge of the initial investigation into Michael’s death, Robert McCulloch. Upon taking office, Bell reopened the investigation into Michael’s death and conducted a five-month review of the case. Bell concluded that at trial his office would not be able to prove beyond a reasonable doubt that Wilson violated Missouri’s homicide statutes.⁸⁹

This question is not before the Commission. Rather, the question is whether the US fulfilled its obligation to conduct a fair and proper criminal investigation. As the facts demonstrate, the US has not met this burden.

The Commission has noted in prior opinions that the requirement to “investigate, prosecute and punish” is an important element of every person’s right to truth.⁹⁰ Although the Commission has observed that “the right to truth is not explicitly included in inter-American human rights instruments,” it has recognized that “the right to truth is a just expectation that the State must satisfy for victims of human rights violations and their family members.”⁹¹ The Commission has further stated that this implicit right “entails the obligation of states to clarify and investigate violations and bring to trial and punish those responsible for grave violations of human rights,

⁸⁷ Pema Levy, *Ferguson Prosecutor Robert P. McCulloch’s Long History of Siding With the Police*, Newsweek (Aug. 29, 2014) <https://www.newsweek.com/ferguson-prosecutor-robert-p-mccullochs-long-history-siding-police-267357>.

⁸⁸ Danica Lo, *Legal Scholars and the National Bar Association Question Ferguson Grand Jury’s Failure to Indict*, Glamour Magazine (Nov. 26, 2014) <https://www.glamour.com/story/legal-scholars-and-the-nationa>.

⁸⁹ Rachel Lippman & Jason Rosenbaum, *St. Louis County Prosecutor Bell Will Not Charge Darren Wilson*, St. Louis Pub. Radio (July 30, 2020), <https://news.stlpublicradio.org/law-order/2020-07-30/wesley-bell-will-not-charge-darren-wilson>

⁹⁰ Case 10.573, *José Isabel Salas Galindo and others*, summary (in Spanish) (2018).

⁹¹ *Id.*

so that victims and their family members can know the truth about the acts constituting those grave violations of human rights and the identity of those taking part in them.” This is especially so, as here, in cases of racial discrimination.⁹²

III. Violations of the Declaration

The Declaration sets out fundamental rights of the individuals, many of which have been recognized by this Commission and other international bodies as encompassing *jus cogens* norms.

The United States is bound to respect an individual’s rights protected under the Declaration. This Commission has confirmed that the United States is subject to this obligation and the jurisdiction of the Commission as a Member State of the Organization of American States that deposited its instrument of ratification of the OAS Charter on June 19, 1951, pursuant to Article 10 of the Commission’s Statute and Article 49 of the Commission’s Rules of Procedure.⁹³

Furthermore, this Commission has clarified that, in accordance with general principles of international law, it will exercise its Charter-based mandate of reviewing petitions pursuant to the Declaration by taking into account other international obligations and instruments:

“Pursuant to the principles of treaty interpretation, the Inter-American Court of Human Rights has likewise endorsed an interpretation of international human rights instruments that takes into account developments in the corpus juris of international human rights law over time and in present day conditions.”⁹⁴

In *Ramon Martinez Villareal v. United States*, for example, the Commission held that “in interpreting and applying the American Declaration, it is necessary to consider its provisions in the context of developments in the field of international human rights law since the Declaration was first composed and with due regard to other relevant rules of international law applicable to member States against which complaints of violations of the Declaration are properly lodged. Developments in the corpus of international human rights law relevant in interpreting and applying the American Declaration may in turn be drawn from the provisions of other prevailing international and regional human rights instruments.”⁹⁵

⁹² Orlando Cordia Hall v. United States, Inter-Am. C.H.R., Report No. Case 12.719, (2020).

⁹³ *Djamel Ameziane v. United States*, para 111; *Andrea Mortlock v United States*, ¶¶ 50–51; *Coard v. United States*, ¶ 36.

⁹⁴ *Ameziane*, ¶¶ 111–113.

⁹⁵ *Ramon Martinez Villareal v. United States*, Case 11.753, Inter-Am. C.H.R., Report No. 52/02, doc. 5 rev. 1 at 821, ¶ 60 (2002) (citing *Juan Raul Garza v. United States*, Case 12.243, Report No. 52/01, OEA/Ser.L/V/II.111, doc. 20 rev. at 1255 ¶¶ 88-89 (2000)); see also *Maya Indigenous Community of the Toledo District v. Belize*, Case 12.053, Inter-Am. C.H.R., Report No. 40/04, OEA/Ser.L/V/II.122, doc. 5 rev. 1 ¶¶ 86-88 (2004); *Mary & Carrie Dann v. United States*, *supra* note 76, at ¶¶ 96-97.

States' duties emanating from the Declaration are both positive and negative.⁹⁶ The Commission emphasized in *Lenahan*:

“States are obligated not only to refrain from committing human rights violations contrary to the provisions of the American Declaration, but also to adopt affirmative measures to guarantee that the individuals subject to their jurisdiction can exercise and enjoy the rights contained in the American Declaration.”⁹⁷

Negative duties include the duty not to commit acts or omissions, or implement measures which would violate the rights of individuals guaranteed under the Declaration. In *Bulacio*, this Commission also held that States cannot enact provisions that exclude liability of state actors for extra-judicial killings.

A. Deprivation of life under Article I

1. Article I and its interpretation by the Commission

Article I of the Declaration provides “*Every human being has the right to life, liberty, and security of his person.*”

Article I seeks to prevent violations of every human being's right to life, liberty, and security. This is an international standard, which has historically been applied to States by the Commission.⁹⁸ Here are the essential elements for establishing international liability⁹⁹:

- i. An act or omission exists which violates an obligation established by a rule of current international law.*
- ii. The illegal act must be imputable to the State.*
- iii. Damage or harm must have occurred as a result of the illegal act.*
- iv. Existence of an act or omission that violates an obligation established by a rule of international law.*

The right to life under the Declaration has been described previously by the Commission as “as the supreme right of the human being, respect for which the enjoyment of all other rights depends.”¹⁰⁰ The right to life therefore, holds the status of *jus cogens*, i.e. it is a peremptory rule

⁹⁶ By contrast, the U.S. Constitution confers only negative rights, described by Circuit Judge Richard Posner as a “charter of negative rather than positive liberties.” Furthermore, the Fourteenth Amendment (adopted in 1868) was drafted with a laissez-faire approach towards offering protection to U.S. citizens *from* state oppression, as opposed to focusing on the provision of basic governmental services. *See generally* David P. Currie, “Positive and Negative Constitutional Rights,” 53 *University of Chicago Law Review* 864 (1986).

⁹⁷ *Lenahan*, supra note 46, ¶ 118; see also *Maya Indigenous Community*, supra note 45, para. 162; *Oscar Elías Bicet v. Cuba*, Case 12.476, Inter-Am. Comm'n H.R., Report No. 67/06, paras. 227-231 (2006).

⁹⁸ IACHR, Report No. 47/96, Case 11.436, Merits, Victims of the Tugboat '12 de Marzo' v Cuba (1996).

⁹⁹ Eduardo Jiménez de Aréchaga *Derecho Internacional Público (International Public Law)*, Volume IV, p. 34, University Culture Foundation, 1991.

¹⁰⁰ Gary T. Graham (Shaka Sankofa) v. United States IACHR, Report 97/03, Case 11.193,, (2003) para. 26; IACHR, Report 62/02, Case 12.285, Michael Domingues (United States), October 22, 2002, para. 38.

of international law, and, therefore, is a non-derogable human right. The importance of the right to life is reflected in its incorporation into every key international human rights instrument¹⁰¹ and status under customary international law.¹⁰²

The right to life under Article I entails the right not to be killed arbitrarily, by act or omission,¹⁰³ particularly by state actors such as the police. The killing of Michael Brown by Darren Warren was an action carried out by a state actor in violation of Michael's rights to life, liberty and security of his person. As a result, the United States breached its negative duty not to violate Michael's Article I rights as enshrined by the Declaration. Furthermore, following his death, Michael's body was left uncovered in the middle of a street adjacent to the densely populated apartment complex in which his grandmother lived, for over four hours. Darren Wilson made no effort to resuscitate him and did not call for an ambulance. The further inhumane treatment of Michael after he had been shot and killed amounts to a further violation on Michael's human right to life.

The United States at a state and federal level, failed to act with due diligence and discharge its positive obligations adequately to investigate, prosecute, and sanction a violation of a right guaranteed under the Declaration.

2. US failure to comply with Article I duties to investigate, prosecute, and punish extrajudicial killings

In cases involving extrajudicial killings by state actors, such as the police, there is a heightened burden placed on the State to investigate, prosecute, and punish such killings. The Commission has previously discussed its position on this issue, explaining that, "if a person was detained in good health conditions and subsequently died, the State has the obligation to provide a satisfactory and convincing explanation of what happened."¹⁰⁴ The absence of such action following Michael's extrajudicial killing demonstrates the United States' failure to uphold his Article I rights.

¹⁰¹ See, e.g., Universal Declaration of Human Rights, article 3; International Covenant on Civil and Political Rights, article 6; European Convention on Human Rights, article 2; African Charter on Human Rights and Peoples' Rights, article 4, among others.

¹⁰² IACHR, Report N° 28/07, Cases 12.496-12.498, Claudia Ivette González and Others (Mexico), March 9, 2007, paras. 251-252; IACHR, Access to Justice for Women Victims of Violence in the Americas, OEA/Ser. L/V/II. doc.68, January 20, 2007, paras. 195-197; IACHR, Violence and Discrimination against Women in the Armed Conflict in Colombia, OEA/Ser/L/V/II. 124/Doc.6, October 18, 2006, paras. 102-106; IACHR, Report on the Rights of Women in Haiti to be Free from Violence and Discrimination, OEA/Ser.L/V/II, Doc. 64, March 10, 2009, para. 90.

¹⁰³ IACHR, Report No. 27/09, Case 12.249, Merits, *Jorge Odir Miranda et al. v. El Salvador* (2009), para.18.

¹⁰⁴ Inter-American Commission on Human Rights, Statement on the Duty of the Haitian State to Investigate the Gross Violations of Human rights Committed during the Regime of Jean-Claude Duvalier, available at www.oas.org/en/iachr/docs/other/Haiti2011.asp.

3. US federal law sets an impossibly high standard of review, effectively barring meaningful review of deaths such as Michael Brown's

The United States imposes standards for the use of force by law enforcement officers in 18 U.S.C. 242. The Statute states in part that “Whoever, under color of any law, . . . willfully subjects any person . . . to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States [shall be guilty of a crime].”

When this standard is applied to a police officer's use of force during a search or seizure, the standard must be interpreted under the Fourth Amendment's prohibition on “unreasonable” seizures. The reasonableness assessment applies “not only on when [the search] is made, but also on how it is carried out.”¹⁰⁵

This “reasonableness” is assessed based exclusively on “whether the officers' actions are ‘objectively reasonable’ in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation.”¹⁰⁶ When analyzing reasonableness, the United States Supreme Court looks to factors of reasonableness including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officer or others, and whether he is actively resisting arrest or attempting to evade arrest by flight.¹⁰⁷

The drastically low bar for reasonableness that police officers must act within, creates an incredibly high bar for relief for victims. Courts are incredibly lenient in their definition of the level of threat required and its temporal relationship to the use of deadly force. For example, the Eleventh Circuit Court of Appeals held a few years prior to Michael's death that “the law does not require officers in a tense and dangerous situation to wait until the moment a suspect uses a deadly weapon to act to stop the suspect.”¹⁰⁸

The reasonableness standard for police use of force in the United States is anything but reasonable. Statistics support the effective bar on meaningful review that the United States has erected to protect its police force. For example, the federal government has yet to file criminal charges under this statute in the wake of Eric Garner's murder at the hands of Officer Daniel Pantaleo in July 2014.¹⁰⁹ Moreover, in 2017, only 31 cases were prosecuted under 18 U.S.C. § 242.¹¹⁰ This number must be contextualized with the fact that, according to most estimates, police kill at least 1,000 people per year in the United States.¹¹¹

¹⁰⁵ *Graham v. Connor*, 490 U.S. 386 (1989).

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Long v. Slaton*, 508 F.3d 576 (11th Cir. 2007).

¹⁰⁹ Evan Perez & Shimon Prokupecz, *Feds at Odds Over Charges in Eric Garner Case*, CNN ONLINE (June 2, 2016), <https://www.cnn.com/2016/06/02/politics/feds-eric-garner-charges-odds/index.html>.

¹¹⁰ Transactional Records Access Clearinghouse (TRAC) Reports, *Prosecutions for 2017—Lead Charge: 18 U.S.C. § 242 – Deprivation of Rights Under Color of Law*, <http://tracfed.syr.edu/results/9x705ac188a022.html>.

¹¹¹ See, e.g., Police Brutality Center, <https://policebrutalitycenter.org/police-brutality-statistics/>; Mapping Police Violence, <https://mappingpoliceviolence.us/>.

Even United States government officials concede that the bar is too high. Eric Holder, the United States Attorney General who oversaw the federal investigation of Mike Brown’s killing, stated in the aftermath of the investigation that the federal civil rights laws implicated in the prosecution of police officers’ possible use of force require meeting a standard of proof that is “too high.”¹¹² According to the Attorney General, “[w]e do need to change the law. I do think the standard is too high.”¹¹³ Commentators have also long decried this standard. Historically, “prosecutors . . . could rarely prove to a jury that even a [Ku Klux] Klansman had lynched his victim for the purpose of depriving his victim of rights.”¹¹⁴ For this reason, federal investigations as a rule fail to provide meaningful review and, as a result, create an erroneous assumption in the eyes of the public that no wrongdoing has occurred, eroding community trust in the criminal judicial system.

Implicit racial bias only increases the limitations for redress imposed by the United States.¹¹⁵ It is well understood that racial bias operates subconsciously as well as consciously¹¹⁶ and that it need not require animus—only knowledge of the stereotype.¹¹⁷ In light of this knowledge, requiring a plaintiff to show that an officer willfully intended to deprive the plaintiff of a constitutional right—including the right to life—seems almost impossible at best.

Implicit racial bias and racial anxiety “can aggravate interracial dynamics in ways that create significant harm.”¹¹⁸ Such racial bias permeates society, often including police departments,¹¹⁹ prosecutor’s offices, and even the juries before which cases are tried. In bodies of law requiring a showing of explicit malintent, as the law in the United States does, redress will be unlikely to attain because implicit racial bias is nearly impossible to demonstrate on an individual level.

According to one legal scholar, “requiring proof of conscious or intentional motivation as a prerequisite to constitutional recognition that a decision is race-dependent ignores much of what we understand about how the human mind works. It also disregards both the irrationality of racism and the profound effect that the history of American race relations has had on the individual and collective unconscious.”¹²⁰ Although this remark was made about the Equal Protection Clause of the U.S. Constitution, the concern is equally relevant here; where intent—

¹¹² Kelly Cohen, *Holder: ‘Standard is Too High’ in Federal Civil Rights Cases*, WASH. EXAMINER (Feb. 27, 2015), <http://www.washingtonexaminer.com/holder-standard-is-too-high-in-civil-rights-cases/article/2560811>.

¹¹³ *Id.*

¹¹⁴ Mark Joseph Stern, *Will Justice Department Charge Darren Wilson?*, SLATE (Mar. 14, 2015), http://www.slate.com/articles/news_and_politics/jurisprudence/2014/11/will_justice_department_charge_darren_wilson_supreme_court_gutted_civil.html.

¹¹⁵ Charles R. Lawrence, III, *The ID, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 335 (1987).

¹¹⁶ Lorie Fridell, *This is Not Your Grandparents’ Prejudice: The Implications of the Modern Science of Bias for Police Training*, TRANSLATIONAL CRIMINOLOGY (Fall 2013).

¹¹⁷ Irene Blair & Mahzarin Banaji, *Automatic and Controlled Processes in Stereotype Priming*, 70 J. PERSONALITY & SOC. PSYCHOL. 1142-63 (1996).

¹¹⁸ Rachel Godsil & L. Song Richardson, *Racial Anxiety*, 102 IOWA L. REV. 2235 (2017).

¹¹⁹ Tracey G. Gove, *Implicit Bias and Law Enforcement*, POLICE CHIEF 45-56 (Oct. 2011) http://www.policechiefmagazine.org/magazine/index.cfm?fuseaction=display_arch&article_id=2499&issue_id=102011.

¹²⁰ *Id.* at 323.

whether to discriminate or engage in other unlawful conduct—is a necessary showing under the law, the impact of racial discrimination and bias on that intent will almost always be underemphasized to the detriment of those affected by it.

Because of the high bar set by civil rights laws in the United States—especially 18 USC 242—very few cases that constitute excessive force under international law qualify for investigation under this statute. To that end, because Article II of the American Declaration’s focus is on disparate impact of racial discrimination and not necessarily intent,¹²¹ it is a more productive and responsive vehicle for providing accountability and avoiding police impunity.

4. The United States Department of Justice’s investigation and report into Michael Brown’s death is grossly flawed

The Department of Justice made questionable conclusions of both a factual and legal nature in its report in violation of Article I. In the investigation of Officer Wilson, federal investigators concluded “there was no credible evidence to refute Wilson’s stated subjective belief that he was acting in self-defense.”¹²² Accordingly, investigators dismissed witnesses 101 and 127, notwithstanding their claims that Brown turned around with his hands raised in surrender and that he never reached for his waistband. Further, the investigation failed to consider the gaping wound left in Mike Brown’s hand from the initial gunshot inflicted on him in the car and the lack of blood on his pants near his waistband, as would be necessary if he did indeed reach for his waistband. The absence of blood near Mike Brown’s waistband substantiates witness accounts that no such gesture was made and sheds considerable doubt on Darren Wilson’s claim of self-defense, despite the investigators’ conclusion to the contrary.

In addition, the Department of Justice’s use of case law from the United States Court of Appeals is misplaced. For example, it presents *Loch v. City of Litchfield* as dispositive regarding whether Darren Wilson reasonably perceived a deadly threat from Mike Brown even if his hands were empty and he never reached into his waistband because of Brown’s actions in refusing to halt his forward movement towards Wilson. However, the analogy between this case and *Loch* is misplaced because the determinative facts in *Loch* are not present in Mike Brown’s case. Notably, in *Loch* a gun was present on the scene and thrown away by one of the suspects,¹²³ whereas the only gun present in Mike Brown’s case was the one Darren Wilson used to kill Mike Brown. Also, the person shot by the officer in *Loch* had a cell phone in his waist that the officer perceived as a mysterious black object,¹²⁴ whereas in this case there is no evidence that Mike Brown had a cell phone on his waist or that Darren Wilson perceived any object on Mike

¹²¹ See Comm. on the Elimination of Racial Discrimination, *Concluding Observations of the U.S.*, U.N. Doc. CERD/C/USA/CO/7-9, ¶ 8 (Sep. 25, 2014); Comm. on the Elimination of Racial Discrimination, *Concluding observations of the U.S.*, U.N. Doc. CERD/C/USA/CO/6, ¶ 14 (May 8, 2008).

¹²² DOJ REPORT INTO MICHAEL BROWN SHOOTING DEATH, *supra* note 30, at 12.

¹²³ *Loch v. City of Litchfield*, 689 F.3d 961, 963 (8th Cir. 2012). (“The Court held that an officer’s use of force was objectively reasonable. The officer responded to plaintiffs’ residence on the report of an intoxicated man supposedly armed with a firearm attempted to leave in a vehicle. When the plaintiff moved towards the officer who commanded plaintiff to the ground. When plaintiff did not comply with officer’s commands, the officer shot plaintiff.”)

¹²⁴ *Id.*

Brown's person to be a weapon.¹²⁵ So, what is clear in this case is that something other than the perceived threats present in *Loch* were at play in this case—likely the presence of racial bias, both explicit and implicit.

Like the law itself, the DOJ memorandum regarding the shooting of Mike Brown similarly failed to account for the implicit—and sometimes explicit—racial bias permeating the Ferguson Police Department and likely Officer Wilson's own perception of Mike Brown. The lack of any mention whatsoever in the report of potential racial bias—especially in light of the DOJ report on the FPD issued the same day—doubly highlights the limitations of the U.S. laws and the processes used to ensure the vindication of the rights protected by those laws. In sum, “by discrediting evidence and failing to consider judicial precedent against Wilson..., the Justice Department acted so zealously on behalf of the accused that it breached its legal responsibility to vindicate the civil rights of the victim.”¹²⁶

B. US history of policing deprives Black Americans, and particularly Michael Brown, of equality before the law under Article II

1. Article II and its interpretation by the Commission

Article II of the Declaration states: “All persons are equal before the law and have the rights and duties established in this Declaration, without distinction as to race, sex, language, creed or any other factor.”

Principles of equality before the law, equal protection and non-discrimination are recognized as *jus cogens* norms, as “the whole legal structure of national and international public order rests on it.”¹²⁷ Further, the Commission has clarified that it defines discrimination as:

“any *distinction, exclusion, restriction or preference*, which is based on any ground such as *race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status*, and which has *the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms.*¹²⁸”
[emphasis added]

States' duties arising from this Article are two-fold. This Commission has emphasized that States must prohibit arbitrary differences of treatment and, in addition, create conditions of real

¹²⁵ In a request for admissions in the civil case against Darren Wilson, when asked whether Brown displayed a weapon or a threatening object, Wilson objected to the use of the term “weapon” claiming that Brown's body could constitute a weapon. Otherwise, he never answers affirmatively that Brown had a weapon. That is, he concedes that there was no gun or a weapon of the like. See Def.'s Resp. to Pl.'s Reqs. for Admis. ¶¶ 41–42 (2016), available at <http://www.kmov.com/story/34900285/court-docs-may-show-contradictions-in-darren-wilsons-account-of-michael-brown-shooting>.

¹²⁶ Paul Savoy, *Reopening Ferguson and Rethinking Civil Rights Prosecutions*, 41 N.Y.U. L. Rev. 277, 283 (2017).

¹²⁷ IACHR, Report No. 50/16, Case 12.834, Merits, Undocumented Workers, United States, Nov. 30, 2016, ¶ 72

¹²⁸ Julius Omar Robinson v USA; IACHR, Report No. 50/16, Case 12.834, Merits (Publication), Undocumented Workers, United States, Nov. 30, 2016, para. 75

equality for groups that have been historically excluded or that are at greater risk of being discriminated against.¹²⁹ Notably, this includes direct discrimination (intentional or “targeted”) and indirect discrimination (involuntary or “by outcome”), whether *de facto* or *de jure*.¹³⁰

The present case involves both direct and indirect discrimination: (1) Officer Wilson exercised his police powers, and committed an extra-judicial killing in his capacity as a state actor, on the basis of Michael’s race and color; and (2) the US failed to ensure Wilson was appropriately and sufficiently held to account for his actions through both a flawed state grand jury process with a predetermined result, and failing to hold Wilson accountable for federal civil rights violations. These events each had the effect of nullifying and impairing the recognition, enjoyment, and exercise of Michael, on an equal footing, of all his rights and freedoms protected under the American Declaration.

a. Wilson’s detention and subsequent killing of Michael Brown was racially motivated and an intentional act of discrimination

Officer Wilson has given inconsistent reasons as to why he chose to approach, follow, detain, and subsequently kill Mike Brown. Wilson first told police investigators that he did not suspect Mike Brown or his companion Dorian Johnson of having committed a crime when the physical altercation between him and Mike Brown occurred as corroborated by the police chief’s press conference a week after the killing.¹³¹ Yet, only after the footage of the robbery was made public did Wilson change his story, stating that he did suspect the pair of having robbed a nearby convenience store when the altercation occurred. This reason is also in direct contradiction with the police chief’s statement that the initial contact with Mike Brown was unrelated to the theft. During a press conference on August 15, 2014, Ferguson Police Chief Thomas Jackson repeatedly stated that Brown and Jackson were stopped because “they were walking down the middle of the street.”¹³²

Taken together, the inconsistency of the alleged reasons for stopping and killing Mike Brown make it impossible to conclude that Wilson has a proper, objective reason for his actions. In the context of policing practices in Missouri, the treatment of Black people in Missouri and America, and the vastly disproportionate actions adopted by Wilson, the most plausible suggestion for Wilson’s detention of Mike Brown is on the basis of racial profiling.

¹²⁹ IACHR, Report No. 5/14. Case 12,841. Merits. Angel Alberto Duque. Colombia. April 2, 2014, para. 67

¹³⁰ 1 IACHR, Report No. 5/14. Case 12,841. Merits. Angel Alberto Duque. Colombia. April 2, 2014, ¶ 67; *Julius Omar Robinson v. United States*.

¹³¹ Greg Botelho and Don Lemon, *Ferguson police chief: Officer didn’t stop Brown as robbery suspect*, CNN (Aug. 15, 2014) <https://www.cnn.com/2014/08/15/us/missouri-teen-shooting/index.html>.

¹³² Erin McClam, *Chief defends release of robbery surveillance video*, NBC News (Aug. 15, 2014), <https://www.nbcnews.com/storyline/michael-brown-shooting/chief-defends-release-robbery-surveillance-video-n181786>.

b. Michael Brown’s murder demonstrates that the US has failed to create conditions of equality for Black people, who are at greater risk for discrimination because of the US’s history of racial violence

(1) United States history of racial animus toward Black Americans

As already acknowledged by the Commission, in the USA, there is a pattern of structural discrimination that permeates the actions of law enforcement and the criminal justice system as a whole.¹³³ This structural discrimination targets and victimizes Black communities. This structural discrimination has emerged from a historical, socioeconomic, and cultural context whereby the “Afro-descendant population in the Americas has endured a history of neglect, exclusion, and social and economic disadvantage that impairs the enjoyment of their fundamental rights.”¹³⁴

The Commission’s 2018 report explicitly found discriminatory policing practices and racial disparities in the United States criminal justice system, noting that Black people in the US are “consistently targeted on the basis of race for searches and arrests (racial profiling).”¹³⁵

Over-policing of Black communities is part of a system of racial and social control and is rooted in historical oppression.¹³⁶ For example, the first modern-style police forces in the United States began as slave patrols in the pre-Civil War South.¹³⁷ From the time of slavery, through the era of *de jure* racial discrimination, to contemporary policing practices, enforcing racial hierarchy has been central “in the formation and organizing ethos of the police.”¹³⁸ In addition, Black people in the United States are “more likely to be killed by police, more likely to be unarmed, and less likely to be threatening someone when killed.”¹³⁹ They are also more likely to die at the hands of police than their white, Latino, and Asian American counterparts. In 2022, Black Americans were 12% of the United States population but were 26% of those killed by police.¹⁴⁰ Black victims are three times more likely to be murdered, not just harmed, by police.

Today, a number of interrelated trends in aggressive and discriminatory police practices are the primary drivers of the use of excessive force disproportionately against Black people in the U.S.:

¹³³ IACHR, *Police violence against Afro-descendants living in the United States*, OEA/Ser.L/V/II, Doc. 156, OEA/Ser.L/V/II. Doc. 156 at 19 (2018)<https://www.oas.org/en/iachr/reports/pdfs/PoliceUseOfForceAfrosUSA.pdf>.

¹³⁴ *Id.* at 37.

¹³⁵ *Id.* at 19.

¹³⁶ See Sarah Childress & Michelle Alexander, *A System of Racial and Social Control*, FRONTLINE (Apr. 29, 2014), <http://www.pbs.org/wgbh/frontline/article/michelle-alexander-a-system-of-racial-and-social-control/>.

¹³⁷ James Conser, Rebecca Paynich & Terry Gingerich, *LAW ENFORCEMENT IN THE UNITED STATES* 50 (3d ed. 2013).

¹³⁸ Sandra Bass, *Policing Space, Policing Race: Social Control Imperatives and Police Discretionary Decisions*, 28 SOC. JUST. 83, 159, 163 (2001).

¹³⁹ Mapping fatal police violence across U.S. metropolitan areas: Overall rates and racial/ethnic inequities, 2013-2017; Schwartz GL, Jahn JL (2020), <https://doi.org/10.1371/journal.pone.0229686>.

¹⁴⁰ MAPPING POLICE VIOLENCE (last visited July 5, 2023) <https://mappingpoliceviolence.us/>.

“broken windows” policing, racial profiling, increased militarization of police forces, and policing motivated by profit.¹⁴¹

First, “broken windows” policing is a law enforcement strategy that targets petty crimes such as loitering, spitting, vandalism, marijuana possession, and public consumption of alcohol under the theory that these minor infractions, if left unaddressed, invite more mischief and increasingly serious crime.¹⁴² Data shows this type of policing disproportionately targets communities of color with little to no evidence of effectiveness. Instead, broken windows policing practices “may have done more harm than good,” increasing the frequency of civilian encounters with police and thereby elevating the exposure of members of targeted communities to the risk of police violence.¹⁴³ Michael was a direct victim of such broken windows policing, Michael was detained under a “manner of walking” ordinance.

Second, racial profiling creates a disproportionate burden for communities of color. Black Americans are more likely than members of other ethnic and racial groups to be stereotyped as violent criminals.¹⁴⁴ The Committee on the Elimination of Racial Discrimination of the United Nations has repeatedly recommended that the United States strengthen its efforts to combat racial profiling, emphasizing that the use of policing tactics with racially disparate impacts contravenes the State’s obligations under the International Convention on the Elimination of All Forms of Racial Discrimination.¹⁴⁵

The racial profiling of Black people is a self-perpetuating cycle. When Black people are arrested and jailed at grossly outsized rates, they are stereotyped as criminals. That stereotype in turn fuels the profiling of Black individuals and communities, driving the rates of police encounters, arrests, and incarceration even higher.¹⁴⁶ According to 2014 guidelines issued by the U.S. Department of Justice, federal law enforcement officers are absolutely forbidden from relying upon generalized stereotypes based on race.¹⁴⁷ The articulation of such a prohibition is a positive

¹⁴¹ James Q. Wilson & George L. Kelling, *Broken Windows*, ATL. MONTHLY (Mar. 1982), <http://www.theatlantic.com/magazine/archive/1982/03/broken-windows/304465>.

¹⁴² Christina Sterbenz, *How New York City Became Safe Again*, BUS. INSIDER (Dec. 2, 2014), <http://www.businessinsider.com/criticism-for-giulianis-broken-windows-theory-2014-12> (last visited Sept. 27, 2015); See also Randall G. Shelden, *Assessing ‘Broken Windows’: A Brief Critique*, Center on Criminal and Civil Justice, n.d., at 11, <http://www.cjcj.org/uploads/cjcj/documents/broken.pdf>.

¹⁴³ *Id.* The death of Sandra Bland throws this issue into sharp relief. Sandra Bland, a Black woman, died in a Texas jail in 2015 after she was pulled over—and later arrested—for failing to signal while changing lanes. The arresting officer violently yanked Bland out of her car and threatened to “light her up” after she refused to put out her cigarette during a traffic stop. Bland was heard crying out in pain after the officer slammed her head to the ground, to which the officer replied, “Good.” Bland was in custody for three days before she died. Texas authorities ruled her death a suicide—a characterization that her family disputes.

¹⁴⁴ Kelly Welch, *Black Criminal Stereotypes and Racial Profiling*, 23 J. CONTEMP. CRIM. JUST. 276, 278 (2007).

¹⁴⁵ See Comm. on the Elimination of Racial Discrimination, *Concluding Observations of the U.S.*, U.N. Doc. CERD/C/USA/CO/7-9, ¶ 8 (Sep. 25, 2014); Comm. on the Elimination of Racial Discrimination, *Concluding observations of the U.S.*, U.N. Doc. CERD/C/USA/CO/6, ¶ 14 (May 8, 2008).

¹⁴⁶ See generally Michelle Alexander, *The New Jim Crow: Mass Incarceration in the Age of Colorblindness* (2010).

¹⁴⁷ U.S. DEP’T OF JUST., *Guidance for Federal Law Enforcement Agencies Regarding the Use of Race, Ethnicity, Gender, National Origin, Religion, Sexual Orientation, or Gender Identity* (Dec. 2014), <http://www.justice.gov/sites/default/files/ag/pages/attachments/2014/12/08/use-of-race-policy.pdf>.

step, but its effectiveness is unproven and there is nothing to suggest that police officers are adhering to this guideline. The Ferguson report of 2015 in particular documented the prevalence of this practice in Darren Wilson's police department

Third, police departments have become more militarized, using heavy arms and combat equipment with greater frequency¹⁴⁸ and deploying SWAT teams¹⁴⁹ to carry out routine policing duties, including in response to reports of non-violent crimes. Despite recent U.S. actions to ban federal transfers of certain military-style equipment to police departments, gear may still be purchased from private vendors.¹⁵⁰ The militarization of the police encourages disproportionate responses by law enforcement and is at odds with principles enshrined in international human rights law.¹⁵¹ Indeed, Officer Wilson's decision to shoot 12 bullets at Michael, who was unarmed and had his hands up in surrender, is another clear demonstration of such disproportionate responses by law enforcement.

(2) Discriminatory policing for financial profit in Ferguson Missouri

The fourth factor, policing for financial profit, was perhaps the signature characteristic of the Ferguson police department, which sparked a national debate on the extent to which police around the nation preyed on low income Black and Brown communities for financial gain through exorbitant imposition of fines and fees.¹⁵² Following Mike Brown's murder the United States Department of Justice conducted an extensive review of the Ferguson Police Department. DOJ summary was perhaps the first federal investigation to shine light on the practice, as it concluded that the Ferguson Police Department engages in a pattern of not only excessive force and racial discrimination generally, but specifically, it unlawfully targeted African American residents for fines and petty enforcement actions, such as the "manner of walking" charge which led to the confrontation with Darren Wilson and Mike Brown.¹⁵³

¹⁴⁸ Lauren Carroll, *Rand Paul Says Federal Program Incentivizes Police Militarization*, POLITIFACT (Aug. 21, 2014), <http://www.politifact.com/truth-o-meter/statements/2014/aug/21/rand-paul/rand-paul-says-federal-program-incentivizes-police/>. The 1990 National Defense Authorization Act authorized the transfer of military equipment from the federal U.S. Department of Defense ("DOD") to state and local law enforcement agencies for use in "counterdrug activities," ostensibly to aid in the "war on drugs"; Bret McCabe, *Does the Militarization of American Police Help Them Serve and Protect*, JOHNS HOPKINS MAG. (Spring 2015), <http://hub.jhu.edu/magazine/2015/spring/aclu-militarization-of-police>; *The 1033 Program*, JUSTNET, https://www.justnet.org/other/1033_program.html (last visited Oct. 11, 2015).

¹⁴⁹ SWAT stands for "Special Weapons and Tactics" and normally references a unit within a police force that is trained to respond with unusually dangerous force.

¹⁵⁰ ACLU, *WAR COMES HOME: THE EXCESSIVE MILITARIZATION OF AMERICAN POLICING* (2014), <https://www.aclu.org/report/war-comes-home-excessive-militarization-american-police>.

¹⁵¹ Colleen McCain Nelson, *Obama Calls for Restricting Military Gear to Local Police*, WALL STREET J. (May 18, 2015), <http://www.wsj.com/articles/white-house-to-announce-new-policing-standards-1431943381>.

¹⁵² Joseph Shapiro, *In Ferguson, Fines and Fees Fuel Anger*, NATIONAL PUBLIC RADIO (August 25, 2014), <https://www.npr.org/2014/08/25/343143937/in-ferguson-court-fines-and-fees-fuel-anger>.

¹⁵³ Michael Martinez, *Policing for Profit: How Ferguson's fines violated the rights of African Americans*, CNN (March 6, 2015), <https://www.cnn.com/2015/03/06/us/ferguson-missouri-racism-tickets-fines/index.html>.

c. United States Department of Justice's March 4, 2015 Report

The investigation into the Ferguson Police Department began on September 4, 2014. Following a six-month investigation, DOJ published an extensive report concluding that the Ferguson Police Department shows a “pattern or practice of unlawful conduct within the Ferguson Police Department that violates the First, Fourth, and Fourteenth Amendments to the United States Constitution, and federal statutory law.”¹⁵⁴ DOJ identified the city of Ferguson’s “approach to law enforcement both reflects and reinforces racial bias, including stereotyping,” which has an overwhelming impact on Black people.¹⁵⁵ In its findings the Department of Justice agreed there was a pattern or practice of unconstitutional policing in Ferguson, and yet, it failed to find Officer Wilson responsible for Mike Brown’s death.¹⁵⁶

This pattern and practice is the result of both implicit bias and intentional racial discrimination on the part of the police officers that make up the city’s police department. Between 2012 and 2014 alone, Black people made up 67% of the population in Ferguson yet accounted for 85% of Ferguson Police Department’s traffic stops.¹⁵⁷ Black people accounted for 95% of Manner of Walking charges, 94% of Failure to Comply charges, 92% of Resisting Arrest charges, 92% of Peace Disturbance charges, and 89% of Failure to Obey charges;¹⁵⁸ Black residents in Ferguson were also more than twice as likely to be searched during a stop but were 26% less likely to be found with contraband.¹⁵⁹ The racial bias embedded in these statistics is further highlighted by the fact that the FPD’s disparate impact on Black residents is 48% larger when citations are issued by police officers rather than by radar or laser alone.¹⁶⁰ Court fines and fees constituted the city of Ferguson’s second largest source of revenue, over \$2.6 million of the city’s approximately \$20 million dollar budget.¹⁶¹

DOJ found that a stark contrast in treatment of Black residents of Ferguson was even greater when looking only at the use of force. From 2010-2014 DOJ. concluded that 88% of incidents involving the use of force also involved a Black resident of Ferguson. Notably, a high number of reported use-of-force incidents involved only Failure to Comply or Resisting Arrest charges, meaning “officers who claim to act based on reasonable suspicion or probable cause of a crime either are wrong much of time or do not have an adequate legal basis for many stops and arrests in the first place.”¹⁶² Many of those cases of use of force were constitutionally excessive and unreasonable and included the use of such tactics as electronic control weapons and canines, sometimes in a punitive and retaliatory manner and often as a result of unlawful arrest and officer escalation.¹⁶³

¹⁵⁴ DOJ REPORT INTO FERGUSON POLICE DEPARTMENT *supra* note 55, at 1.

¹⁵⁵ *Id.* at 4.

¹⁵⁶ *Id.* at 5.

¹⁵⁷ *Id.* at 62.

¹⁵⁸ *Id.*

¹⁵⁹ *Id.* at 4.

¹⁶⁰ *Id.* at 5.

¹⁶¹ Joseph Shapiro, *In Ferguson, Fines and Fees Fuel Anger*, National Public Radio (August 25, 2014), <https://www.npr.org/2014/08/25/343143937/in-ferguson-court-fines-and-fees-fuel-anger>.

¹⁶² DOJ REPORT INTO FERGUSON POLICE DEPARTMENT *supra* note 55, at 35.

¹⁶³ *Id.* at 29–35.

Racial bias and discrimination in Ferguson permeates beyond the outlined statistics. DOJ reviewed numerous written communications and emails circulated within the Ferguson Police Department, which were tinged with implicit and blatant racial animus. The emails offered a poignant view into the racist internal culture of a department and court system supposedly charged with meting out justice in the small community.¹⁶⁴

d. United States Department of Justice’s 2016 Consent Decree with the City of Ferguson

As described above,¹⁶⁵ in 2016, DOJ entered a consent decree with the City of Ferguson.¹⁶⁶ In the decree, Ferguson agreed to 37 different reform measures to help restore community trust in the City’s police department, create better policing practices in the municipality, and to generally increase equality for the Black American community in Ferguson.

Several years later, the concerns of community members persist, and full and substantive implementation of the consent decree continues to stall.¹⁶⁷

The failures by the city of Ferguson and the Monitor in charge of overseeing the implementation of the consent decree’s requirements, continue to put the rights of Ferguson residents in jeopardy and demonstrates the indifference with which officials—local and otherwise—treat the rights of those community members.

C. Violation of both right to a fair trial under Article XVIII and the right to due process under Article XXVI

1. Article XVIII and its interpretation by the Commission

Article XVIII of the American Declaration states “Every person may resort to the courts to ensure respect for his legal rights. There should likewise be available to him a simple, brief procedure whereby the courts will protect him from acts of authority that, to his prejudice, violate any fundamental constitutional rights.” This is also called the right to a fair trial.

IACHR Article XVIII guarantees the fundamental right to a fair trial. This Commission has consistently relied on the case of *Herrera Ulloa v. Costa Rica* to state analysis of a fair trial rests on both subjective and objective aspects. Subjectively, there must be a lack of personal bias in

¹⁶⁴ *Id.* at 71-73, “ direct evidence of racial bias.”

¹⁶⁵ See *supra* pg. 12-13

¹⁶⁶ See *generally* Consent Decree.

¹⁶⁷ Letter from Katurah Topps, Pol’y Counsel, NAACP Legal Def. and Educ. Fund, to Judge Catherine D. Perry, E.D. Mo. (Sept. 21, 2020), <https://www.naacpldf.org/wp-content/uploads/9.21.2020-LDF-FINAL-Comment-Letter-on-Ferguson-Consent-Decree-Implementation.pdf>.

the proceedings. Objectively, the court “must inspire the ‘necessary confidence in the parties to the case, as well as in the citizens in a democratic society.’”¹⁶⁸

The court in *Herrera Ulloa* stated that the “impartiality of the tribunal implies that its members do not have a direct interest, a position taken, or a preference for any of the parties and that they are not involved in the controversy.” This Commission consistently states that guarantees of objectivity must remove any doubt that the defendant or the community have regarding the impartiality of the proceedings.

Access to an effective remedy in accordance with the due process requirements of Article XVIII requires States to conduct an investigation. Due process affords every person the right “to resort to a court when any of his or her rights have been violated and the right to a judicial investigation by a competent, impartial, and independent court in order to ascertain whether the right was violated and if so to uphold the right to reparation for the damage inflicted.”¹⁶⁹ To demonstrate proper investigation, the state must show that it “conducted an immediate, exhaustive, serious, and impartial investigation.”¹⁷⁰

The IACHR has acknowledged that the right to truth—which is not an expressly defined right in the American Declaration of the Rights and Duties of Man—is nevertheless an obligation fulfilled by the States when a proper investigation is conducted. This right to truth “is a just expectation that the State must satisfy for victims of human rights violations and their family members.”¹⁷¹ This obligation requires States to “bring to trial and punish those responsible for grave violations of human rights, so that victims and their family members can know the truth about the acts constituting those grave violations of human rights and the identity of those taking part in them.”¹⁷²

The IACHR has previously recognized that distinctions based on race are subject to a “particularly strict level of scrutiny whereby States must provide an especially weighty interest and compelling justification for the distinction.”¹⁷³ Racial inequality in the United States and the provision of due process to Black Americans is already recognized by the IACHR as a heightened concern.

As this Commission has already found, the questions of due process and possible racial discrimination cannot be considered in isolation; it is precisely the deficiencies in due process that have left the possibility of racial discrimination unresolved. The Commission recalls that the obligation to guarantee the human rights of individuals implies the obligation of the State to

¹⁶⁸ *Ramiro Ibarra Rubi v. United States*, Case No. 13.829, Inter-Am. Comm’n H.R., OEA/Ser.L/V/II doc. 470 ¶ 87 (2021).

¹⁶⁹ *José Isabel Salas Galindo v. United States*, Case No. 10.573, Inter-Am. Comm’n H.R., OEA/Ser.L/V/.169 doc. 138 ¶ 433 (2018).

¹⁷⁰ *Id.* at ¶ 434.

¹⁷¹ *Id.*

¹⁷² *Id.*

¹⁷³ *Julius Omar Robinson v. United States*, Case No. 13.361, Inter-Am. Comm’n H.R., OEA/Ser.L/V/II doc. 224 ¶ 60 (2021).

take all necessary measures to remove the obstacles that may exist for individuals to enjoy the rights recognized in the American Declaration.¹⁷⁴

The IACHR has previously held that the results of its own *Report on Police Violence Against Afro-descendants in the United States (2018)* recognizes a disparate impact on Black Americans which is “out of line with the State’s duty to ‘prohibit and eliminate racial discrimination in all its forms, including practices and legislation that may not be discriminatory in purpose, but are discriminatory in effect.’”¹⁷⁵ The United States itself has acknowledged that “the race of defendants and the race of victims of crimes has an undeniable influence on conviction and sentencing patterns.”¹⁷⁶

Further, the IACHR acknowledges that racial discrimination in the United States leads to members of marginalized groups being more severely punished and that such “inequalities, stereotypes and prejudices are mirrored in the criminal justice system.”¹⁷⁷ Disparate treatment based on race is subject to strict scrutiny. Strict scrutiny must be applied to these cases “to guarantee that the distinction is not based on the prejudices and/or stereotypes that generally surround suspect categories of distinction.”¹⁷⁸ The IACHR has previously established that the state has a duty “not only to investigate, but to investigate beyond the formally stated motivation and to take into consideration all indicia, circumstantial evidence and other elements.”¹⁷⁹ *Id.* When the courts of the United States bar a person from access to an effective remedy, especially when racial discrimination is involved, there is a violation of Article XVIII of the American Declaration. Michael Brown was not afforded this fundamental right.

2. Article XXVI and its interpretation by the Commission

Article XXVI of the American Declaration states: “Every accused person is presumed to be innocent until proved guilty. Every person accused of an offense has the rights to be given an impartial and public hearing, and to be tried by courts previously established in accordance with pre-existing laws, and not to receive cruel, infamous or unusual punishment.”

The IACHR consistency reads Article XXVI with Article XVIII.¹⁸⁰ Generally, the facts presenting a violation of the right to a fair trial will, necessarily, also present facts leading to a conclusion that Due Process was not properly afforded. In this regard, an opinion finding a violation of Article XXVI follows the logical analysis of cases analyzing Article XVIII. The discussion of Article XVIII, *supra*, applies equally to Article XXVI.

¹⁷⁴ *Id.* ¶ 8.

¹⁷⁵ Case 13.361, Julius Omar Robinson, 2020.

¹⁷⁶ Case 12.719, Orlando Cordia Hall (2020).

¹⁷⁷ Case 12.719, Orlando Cordia Hall (2020).

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ *See, e.g.*, Case 12.994, Bernardo Aban Tercero (2015).

a. Improper grand jury procedures

Michael Brown has been denied the right to a fair trial. A trial has never been conducted into the facts surrounding his death. Instead, St. Louis County Prosecuting Attorney Robert McCulloch convened a grand jury in a highly unusual manner, seeking to absolve Officer Wilson of any criminal wrongdoing. As we explain below, McCulloch effectively put his thumb on the scale for Wilson and at the expense and interest of Brown, his family, and a whole community. McCulloch's long history as an officer of the court makes it clear that his actions directed at the grand jury were purposeful and not an accident or error.

The Commission recognizes States hold a "special duty" to investigate and prosecute police misconduct.¹⁸¹ The Commission has held that the rights contained in the American Declaration are implicated when a State fails to prevent, prosecute, and sanction violations of these rights.¹⁸² Instead the United States has designed a legal system that permits criminal prosecutors to cover up and absolve police for actions that otherwise might be treated as homicides. The grand jury system—a system that today only exists in two countries worldwide, the United States and Liberia—encourages prosecutors to cover up murders at the hands of police, even in violation of their own duties to the public. Human rights advocates have been arguing the United States should abolish the grand jury system for over 100 years.¹⁸³

b. Overview of grand jury proceedings in the US

In the United States, prosecutors enjoy discretion in criminal cases when determining how to bring charges against a particular defendant. This includes the "the right to choose a course of action" in a case. *State on inf. McKittrick v. Wallach*, 353 Mo. 312, 182 S.W.2d 313 (1944). The decision to prosecute and what charges to file "generally rests entirely within the prosecutor's discretion" and is a decision that is "rarely subject to judicial review."¹⁸⁴

In Missouri, criminal charges may be filed against a defendant through either indictment or an information. Mo. R. Crim. P. 23.01. An information gives the prosecutor authority to bring charges on their own by filing a complaint with the court and seeking signature from a judge. The prosecutor may also file charges through a grand jury, who is convened to review the charges and assess whether probable cause exists to indict a person. The prosecutor is "entitled to exercise his discretion as to which course of action he selects."¹⁸⁵

When using a grand jury, a proceeding will only go forward if a grand jury returns an indictment based on a probable cause standard. Grand jury decisions are not reviewable for sufficiency of

¹⁸¹ IACHR, *Citizen Security and Human Rights* (2009), ¶ 46.

¹⁸² *Lenahan* at ¶ 119; *see also* Report No. 54/01, case 12.051, Maria Da Penha Maia Fernandes (Brazil), Annual Report of the IACHR 2001, ¶¶ 3, 37–44.

¹⁸³ George Lawyer, *Should the Grand Jury System be Abolished?*, 15 Yale L.J. 178, 187 (1906), https://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=3095&context=facsch_lawrev.

¹⁸⁴ *State v. Potts*, 181 S.W.3d 228 (Mo. Ct. App. 2005) (cleaned up).

¹⁸⁵ *State v. McGee*, 757 S.W.2d 321, 325 (Mo. Ct. App. 1988)

the evidence,¹⁸⁶ meaning that in practice, grand juries can follow whatever path they choose.¹⁸⁷ In the vast majority of cases, grand juries simply serve as a rubber stamp of approval for the prosecutor's office. Less than .01% of prosecutions fail to go forward as a result of a grand jury failure to indict.¹⁸⁸

McCulloch conducted the grand jury with the goal to avoid bringing charges against the officer, ensuring Wilson would not face criminal charges, in violation of Brown's Article XVIII and Article XXVI rights as recognized by the Commission. The following facts support this contention.

c. Exculpatory evidence presented to the grand jury

In the United States, the purpose of a grand jury is to assess whether there is probable cause to believe that a crime has been committed. Members of the grand jury make this determination following a presentation of evidence from prosecutors, who present only the evidence necessary to support probable cause. The decision at the grand jury stage is only to identify probable cause, not to execute a mini trial prior to the actual trial. As the United States Supreme Court has stated:

If a “balanced” assessment of the entire matter is the objective, surely the first thing to be done—rather than requiring the prosecutor to say what he knows in defense of the target of the investigation—is to entitle the target to tender his own defense. To require the former while denying (as we do) the latter would be quite absurd. It would also be quite pointless, since it would merely invite the target to circumnavigate the system by delivering his exculpatory evidence to the prosecutor, whereupon it would *have* to be passed on to the grand jury—unless the prosecutor is willing to take the chance that a court will not deem the evidence important enough to qualify for mandatory disclosure.¹⁸⁹

The St. Louis County prosecutor, Robert McCulloch, deviated from this evidentiary standard and presented evidence to the grand jury regarding Michael's murder which extended beyond merely establishing probable cause. In so doing, McCulloch decreased the likelihood that an indictment would issue. United States courts have stated this was inappropriate, noting that “If the grand jury has no obligation to consider all ‘substantial exculpatory’ evidence, we do not understand how the prosecutor can be said to have a binding obligation to present it.”¹⁹⁰

¹⁸⁶ *State v. Ivey*, 442 S.W.2d 506, 508 (Mo. 1969); *State v. Selle*, 367 S.W.2d 522, 526 (Mo. 1963).

¹⁸⁷ Frank O. Bowman III, *Vox Populi: Robert McCulloch, Ferguson, and the Roles of Prosecutors and Grand Juries in High-Profile Cases*, 80 Mo. L. Rev. (2015).

¹⁸⁸ Mark Motivans, *Federal Justice Statistics 2010 – Statistical Tables*, U.S. DEP' OF JUST. (Dec. 2013), available at <http://www.bjs.gov/content/pub/pdf/fjs10st.pdf>; Ferguson Michael Brown Indictment, *DataLab*, available at: <http://fivethirtyeight.com/datalab/ferguson-michael-brown-indictment-darren-wilson/>.

¹⁸⁹ *United States v. Williams*, 504 U.S. 36 (1992).

¹⁹⁰ *Id.*

The procedure utilized was improper, against the norms of the United States judicial system, and resulted in the presentation of improper evidence to the Grand Jury.

d. Presentation of Wilson’s justification defense

The purpose of a grand jury proceeding is not to test the sufficiency of a grand jury target’s affirmative defenses. *United States v. Williams*, 504 U.S. 36, 51–52 (1992). Rather, the proceeding has the exclusive purpose “only to examine ‘upon what foundation [the charge] is made’ by the prosecutor.” *Id.* The United States Supreme Court has made clear that “the suspect under investigation by the grand jury [does not] have a right to testify or to have exculpatory evidence presented.” *Id.*

Prosecutor McCulloch directly contravened this binding Supreme Court precedent when he permitted Officer Wilson to testify in his own defense during the grand jury proceedings. McCulloch treated this case in a special manner without reason or justification. Other Missouri defendants are not afforded an opportunity to present defenses to the grand jury—much less have prosecutors present their defenses for them. That Wilson killed Brown in his capacity as a police officer is of no import; no special considerations require prosecutors to pursue criminal investigations against police officers differently than those against non-police officers. To hold otherwise would provide police officers with an impermissible and unjustified favored status under the law. *In re Nofziger*, 938 F.2d 1397, 1402 (D.C. Cir. 1991) (holding that criminal law applies equally to public officials and private citizens).

The junior prosecutors, who worked under the direction of St. Louis County Prosecutor Robert McCullough, even admitted to the grand jury not only that their approach was atypical, but that as a result they too were confused about how they would conduct the grand jury process, although their job is to conduct dozens of these processes each year. Prosecutor Alizadeh admitted to the grand jury on November 11, 2014, eighty-three days into the grand jury investigation, that the prosecutors did not know how to instruct the grand jury regarding its consideration of Wilson’s affirmative defense. “The question we don’t really know is [whether you must find Officer Wilson acted in self defense] beyond a reasonable doubt, [or] what is the standard by which you have to consider that.” She continued, stating, “I don’t know, we don’t know what kind of instruction to give you on . . . I don’t know, we don’t know that. We don’t want to tell you the wrong thing. So we’re still trying to work that out.” Grand Jury Testimony, Volume XXII at 101–04. It is so unusual for prosecutors to present evidence of an affirmative defense to a grand jury that this irregularity created great confusion among the prosecutors. It is possible that this confusion affected the grand jury’s weighing of evidence.

It is therefore our position that structuring the grand jury proceeding to permit evidence of Officer Wilson’s defense—including testimony from the target of the grand jury investigation—denied Michael the fairness and equal application of law which Article XVIII and Article XXVI protect.

e. Evidence of drug use presented against Mike Brown, evidence of Darren Wilson’s drug use hidden from grand jury

Two toxicology reports were run during the investigation of Michael’s death: one on Wilson and one on Michael Brown. A grand jury, who only needs to determine whether probable cause exists to believe that a crime occurred, need not know an involved party’s toxicology status to meet this minimum standard. Even so, Prosecutor McCulloch chose to introduce toxicology during the grand jury proceedings. Further, Prosecutor McCulloch only introduced one of the two reports, effectively hiding it from the grand jury.

Had McCulloch followed standard grand jury procedure and only presented enough evidence to demonstrate probable cause, only Wilson’s toxicology report would have been presented to the grand jury. Instead, only Michael Brown’s toxicology report was presented. Rather than present the evidence that Wilson had high levels of creatinine in his system¹⁹¹—indicative of anabolic steroid use which is a substance known to increase a person’s propensity for violence¹⁹²—McCulloch only presented evidence that Michael had marijuana in his system. Even further, McCulloch used Michael’s toxicology report to impeach his character during the grand jury proceedings, repeatedly asking witnesses about Michael’s cannabis use.¹⁹³ McCulloch sought to show that Michael was in some way incapacitated during his encounter with Wilson. This is evidence that does not go to probable cause regarding whether a crime occurred, and was improperly presented to the grand jury. Furthermore, improper introduction of Michael Brown’s toxicology report should be seen as a direct attempt to further stigmatize a young Black man amidst the cultural backdrop of systemic racism, evoking anti-Black social narratives established during the discriminatory “War on Drugs” in the United States that prevail to this day.

One purpose of Article XVIII is to “protect [every person] from acts of authority that, to [their] prejudice, violate any fundamental constitutional rights.” Here, McCulloch followed improper procedure and presented evidence during the grand jury proceeding which should not have been considered at all. This procedural decision prejudiced Michael Brown and denied him due process.

f. Presentation of improper testimony to the grand jury

McCulloch admittedly provided the grand jury with perjured testimony. Despite knowledge that witnesses were “clearly not telling the truth,” McCulloch “decided that anyone who claimed to

¹⁹¹ See Darren Wilson Toxicology Report at 2, <https://www.documentcloud.org/documents/1370727-darren-wilson-toxicology-report>.

¹⁹² See, e.g., HealthTap, Top 10 Doctor Insights on Anabolic Steroids and High Creatinine Levels, <https://www.healthtap.com/topics/anabolic-steroids-and-high-creatinine-levels>; see also National Institute on Drug Abuse, Drug Facts: Anabolic Steroids, <http://www.drugabuse.gov/publications/drugfacts/anabolic-steroids> (July 2012).

¹⁹³ See, e.g., Grand Jury Testimony, Volume XIII at 233; Volume XIX at 70–79.

have witnessed anything was gonna [sic] be presented to the grand jury.”¹⁹⁴ Specifically, McCulloch permitted “Witness 40,” to testify.¹⁹⁵ This witness had a known history of inserting herself into criminal cases she was not connected to, had a documented history of posting racist statements online, and primarily adopted her witness testimony from news reports.

DOJ noted the issues with this witness testimony in their investigative report, highlighting that “large parts of her narrative have been admittedly fabricated from media accounts, and her bias in favor of Wilson is readily apparent... [F]ederal prosecutors determined that her account as a whole was not reliable and therefore did not consider it when making a prosecutive decision.”¹⁹⁶

Although prosecutors have wide discretion in the grand jury room, their discretion is not absolute. Grand juries may not rely on perjured testimony. Courts in the United States state that if a grand jury relies on perjured testimony in issuing an indictment, the indictment must be reversed. *United States v. Thompson*, 576 F.2d 784 (9th Cir. 1978). Further, If the grand jury relies on witness testimony that has serious credibility issues in choosing to bring an indictment, the prosecutor has an obligation to inform the jury of those credibility issues *United States v. Samango*, 607 F.2d 877 (9th Cir. 1979) (citing 8 Moore’s Federal Practice P 6.03(2), at 6-41 (2d ed. 1978)). Perjured testimony is permitted in the grand jury’s consideration only if the “perjury is not knowingly sponsored by the government.” *United States v. Strouse*, 286 F.3d 767 (5th Cir. 2002). Here, the perjury was known to the government¹⁹⁷ and offered anyway. This clearly shows “sponsorship” of the perjured testimony and its consideration invalidates the grand jury proceedings.

Permitting a witness to lie under oath during the investigation of Michael’s death, denied Michael his fundamental constitutional rights to a fair trial. This prosecutorial misconduct and improper grand jury procedure worked to directly prejudice Michael and compromised his fundamental rights under Article XVIII and Article XXVI.

¹⁹⁴ See, e.g., Peter Holley, *Ferguson Prosecutor Says He Knew Some Witnesses Were ‘Clearly Not Telling the Truth.’ They Testified Anyway.*, Wash. Post (Dec. 20, 2014), <http://www.washingtonpost.com/news/post-nation/wp/2014/12/20/ferguson-prosecutor-says-he-knew-some-witnesses-were-clearly-not-telling-the-truth-they-testified-anyway/>.

¹⁹⁵ See, e.g., Peter Holley, *Ferguson Prosecutor Says He Knew Some Witnesses Were ‘Clearly Not Telling the Truth.’ They Testified Anyway.*, THE WASH. POST (Dec. 20, 2014), <http://www.washingtonpost.com/news/post-nation/wp/2014/12/20/ferguson-prosecutor-says-he-knew-some-witnesses-were-clearly-not-telling-the-truth-they-testified-anyway/>. “‘Witness 40,’ a woman whose elaborate story of witnessing Brown’s death was allegedly taken from newspaper accounts. The woman, who told investigators that she is racist, bi-polar and has raised money for Wilson, approached prosecutors five weeks after the Aug. 9 shooting. In a journal entry that she showed the grand jury, the woman said she had driven through Ferguson at the time of the shooting ‘so I stop calling Blacks N— and Start calling them People.’”

¹⁹⁶ DEPARTMENT OF JUSTICE REPORT REGARDING THE CRIMINAL INVESTIGATION INTO THE SHOOTING DEATH OF MICHAEL BROWN BY FERGUSON, MISSOURI POLICE OFFICER DARREN WILSON 72 (2015) (hereinafter DOJ REPORT INTO MICHAEL BROWN SHOOTING DEATH).

¹⁹⁷ Shasha Goldstein, *Witness 40 for Ferguson grand jury exposed as a racist, mentally ill felon who lied about shooting*, NY Daily News (Dec. 14, 2014), <https://www.nydailynews.com/news/national/witness-40-ferguson-grand-jury-racist-liar-report-article-1.2047404>.

g. Treating grand jury witnesses inconsistently, providing deference to those who supported Wilson’s version of events

In addition to offering testimony supporting Wilson—regardless of its source or validity—McCulloch also selectively chose which grand jury witnesses to cross-examine. In so doing, McCulloch only cross-examined witnesses that supported a finding of probable cause. The aforementioned “Witness 40” who presented perjured testimony but whose testimony supported a finding of no indictment, was never cross-examined.¹⁹⁸

By contrast, prosecutors effectively cross-examined “Witness 34,” whose testimony supported a probable cause finding. Although “Witness 34” presented testimony to support a probable cause finding, Prosecutor McCulloch undercut this testimony by stating within his questions to the witness that the witness’s testimony did not comport with the physical evidence or with his prior statement to law enforcement.¹⁹⁹ Additionally, Dorian Johnson, who was walking with Michael Brown during Michael’s encounter with Officer Wilson, was repeatedly questioned in a manner meant to corroborate Officer Wilson’s testimony. That is, prosecutors repeatedly sought to manipulate Johnson’s testimony to support their “theory of the case” (that Michael was a threat to Officer Wilson) by questioning Johnson about when Michael “charged” at Officer Wilson before shots were fired.²⁰⁰

h. Failing to cross-examine Wilson

The prosecution cherry-picked which grand jury witnesses to cross-examine and which not to. This is no more clear than the prosecutor’s decision not to cross-examine Officer Wilson when he testified on his own behalf. Notwithstanding the improper nature of Wilson’s testimony during the proceedings, see *supra* section IX.b.iii.1, prosecutors behaved in an additionally improper manner by selectively choosing not to cross-examine Wilson.

Prosecutors deliberately failed to cross-examine Wilson even though his testimony conflicted with his prior statements to law enforcement and the physical evidence.²⁰¹ Wilson initially told police investigators he did not suspect Michael or his friend Dorian Johnson of having committed a crime when he detained them on the street. The police chief’s press conference a week after the killing occurred corroborates this statement.²⁰² Yet, after a nearby convenience store released footage of a robbery just before Michael Brown’s murder, Wilson changed his story to state that he *did* suspect the pair of having robbed a nearby convenience store when the altercation occurred.

Additionally, Wilson told his supervisor that Michael Brown ran about 30 to 40 feet away from his vehicle before the fatal shooting occurred. Yet, Michael Brown’s body was found over 150 feet from Wilson’s police vehicle, indicating that Wilson pursued Michael Brown much longer

¹⁹⁸ Grand Jury Testimony, Volume XV at 84–227.

¹⁹⁹ Grand Jury Testimony, Volume XIII at 115–37.

²⁰⁰ Grand Jury Testimony, Volume IV at 158–59.

²⁰¹ Grand Jury Testimony, Volume V at 196–281.

²⁰² Berman, *supra* note 85.

than he initially disclosed.²⁰³ Prosecutors similarly failed to challenge Wilson’s testimony that he acted in self-defense when he allegedly saw Michael move his right hand “under his shirt in his waistband” prior to firing the fatal shots. Wilson’s claim of self-defense is questionable, considering Wilson shot Michael’s right hand before chasing him. Had Michael reached for his waistline, a fresh bullet wound on his right hand would have left blood on or near his waistline. No forensic evidence showed smears or smudges around Michael’s waistline indicating such a movement occurred. Wilson further testified that when the struggle occurred between himself and Brown in the police vehicle, Brown struck him twice and he believed the next punch could be fatal.²⁰⁴ Prosecutors did not challenge this account, even though Wilson suffered only minor injuries to his face.²⁰⁵

Darren Wilson’s grand jury testimony clearly conflicted with his prior statements to law enforcement and the physical evidence. Failure to cross-examine Wilson’s contradictory testimony is inapposite to the prosecutor’s direct efforts to cross-examine witnesses who supported a finding of probable cause. Again, this practice of cherry-picking when and how to apply proper grand jury procedure heavily indicated a prejudicial process. Such prejudicial process clearly violates Michael’s rights under Article XVIII, which guarantees that “the courts will protect him from acts of authority that, to his prejudice, violate any fundamental constitutional rights.” It further violates Michael’s rights under Article XXVI affords every person the “right to be given an impartial and public hearing, and to be tried by courts previously established in accordance with pre-existing laws.”

i. Providing a grand jury instruction that may have been unconstitutional

At the beginning of the grand jury process, the grand jury was instructed to evaluate Wilson’s actions under Missouri Revised Statute § 563.046. However, prosecutors did not properly instruct the grand jury on the statute or case law modifying the statute since its enactment. Of grave importance is that the statute is no longer constitutional. As a result, the final instructions given to the grand jury were modified from the instructions they received prior to the presentation of evidence. However, the final instructions cannot be reviewed for accuracy—or constitutionality—because they have never been publicly released. Because these instructions were never released, it is impossible to know whether the grand jury evaluated Officer Wilson’s actions under a constitutional standard.

Missouri Revised Statute § 563.046 is unconstitutional under Supreme Court precedent from *Tennessee v. Garner*, 417 U.S. 1 (1985). The Court clarified in *Garner* that police officers may not use deadly force against a fleeing suspect to prevent a suspect’s flight unless the officer has a

²⁰³ Shaun King, *Why Exactly Did the Police Lie for 108 Days About How far Mike Brown Ran from Darren Wilson?*, DAILY KOS (Nov. 26, 2014), <http://www.dailykos.com/story/2014/11/26/1347499/-Why-exactly-did-the-police-lie-for-108-days-about-how-far-Mike-Brown-ran-from-Darren-Wilson>.

²⁰⁴ Grand Jury Testimony, Volume V at 216–17.

²⁰⁵ Grand Jury Testimony, Volume V at 94–97; *see also* Pictures of Officer Wilson’s Injuries, <http://apps.stlpublicradio.org/ferguson-project/photos.html>.

reasonable belief that the suspect presents a threat of death of significant bodily injury to the officer or the public. Because the Missouri Statute in effect during the grand jury proceedings did not clarify the use of force guardrails imposed by *Garner*, the instructions the grand jury received prior to hearing evidence did not comport with the United States Constitution.

Further, even assuming that Missouri Revised Statute § 563.046 *was* constitutional, prosecutors did not present evidence sufficient to find Wilson’s actions permissible. Under the defunct statute, a police officer could use deadly force to prevent someone suspected of a felony from fleeing. Yet, prosecutors presented no evidence suggesting Wilson believed Michael had committed a felony—as opposed to a misdemeanor (manner of walking)—when he shot and killed him. Further, the only evidence that Wilson believed Michael was a threat to the lives of others when the fatal shooting occurred came from Wilson himself.

Given the improper and unconstitutional initial instructions to the grand jury, and the inability to confirm whether the prosecutors provided constitutional instructions at the conclusion of the grand jury proceeding, it is impossible to know whether Michael’s constitutional rights were adequately protected. Even if the second instruction were proper, the initial instruction through which the grand jury heard all presented evidence, was unconstitutional. Instructing the grand jury at the outset of their review to consider the evidence under an unconstitutional standard, necessarily deprived Michael and his next of kin of their fundamental rights under Article XVIII and Article XXVI.

j. Other evidence of grand jury misconduct

Finally, we would like to make the Commission aware of an anonymous letter sent to counsel of record in *Simmons v. McCulloch*, attorney Maggie Ellinger-Locke, who is also serving as counsel in these current proceedings. This letter is included in the appendix as Attachment A.

The letter is signed “a concerned citizen” and describes how neither the grand jury nor the DOJ explored the existence of “evidence 17,” the object on the road that laid closest to Michael Brown’s body. The letter included a photocopy of the police report legend from the Ferguson police investigation, which describes evidence 17 as an “apparent projectile.” Detectives in the case testified before the grand jury that they took close-up photographs of every piece of evidence, but no photographs of evidence 17 were ever produced—despite the prosecutor’s office having, according to them anyway, released all the evidence put to the grand jury. Concerned citizen’s letter speculates that evidence 17 would support a probable cause finding of guilt against Wilson, and that this evidence may have been purposefully omitted. Also enclosed in the letter were materials from the crime scene investigation, where notes on evidence 17 are absent, though the projectile is marked in a photograph that includes the blood spatter from where Brown’s body lay.

It is impossible to tell who concerned citizen is, how they gained access to these materials, and what motivation they had in sending them to an attorney challenging McCulloch’s conduct. We found this letter and included materials interesting—they show another big problem with the

grand jury proceedings—and offer them to the Commission, in the event it also finds them of interest.

One other matter we would also like to make the Commission aware of is a case, *Grand Juror Doe v. McCulloch*, where a grand juror sued to enforce his First Amendment right to speak about his experience in the case—a suit the ACLU of Missouri ultimately did not prevail in. In the complaint the Plaintiff alleged:

the presentation of evidence to the grand jury investigating Wilson differed markedly and in significant ways from how evidence was presented in the hundreds of matters presented to the grand jury earlier in its term... the State’s counsel to the grand jury investigating Wilson differed markedly and in significant ways from the State’s counsel to the grand jury in the hundreds of matters presented to the grand jury earlier in its term... the investigation of Wilson had a stronger focus on the victim than in other cases presented to the grand jury... [and] the presentation of the law to which the grand jurors were to apply the facts was made in a muddled and untimely manner compared to the presentation of the law in other cases presented to the grand jury.²⁰⁶

Here a grand juror wanted to speak out about the way they felt this case was badly presented, and challenge the lifetime gag order they were subjected to. The case was originally filed in federal court where a judge ordered it transferred to state court where ultimately the court upheld the gag order. While the suit was unsuccessful for the plaintiff, grand juror doe, its mere filing supports the proposition that something was amiss in the grand jury room.

3. The US grand jury system is flawed, systemic, politicized, and does not advance due process

The apathy to prosecute in this case reveals itself when juxtaposed to how similar cases have been handled by other states. For example, in the officer-involved murder of 40 year-old white Australian Justine Damond,²⁰⁷ Minnesota Attorney General Mike Freeman convened a grand jury that ultimately determined that probable cause existed to indict Officer Mohamed Noor, a Black Muslim-American, with charges of third-degree murder and manslaughter.²⁰⁸ As to the murder charge, the grand jury found that sufficient evidence existed to substantiate a charge of murder that said Officer Noor committed an “eminently dangerous act.”²⁰⁹ As to the manslaughter charge, the grand jury found that it is likely that Noor acted with “culpable negligence creating unreasonable risk.”²¹⁰ However, the issue is not that this Black officer was

²⁰⁶ See Compl. at ¶¶ 19-22, *Grand Juror Doe v. McCulloch*, No. 4:15-cv-00006 (Jan. 5, 2015), https://www.aclu-mo.org/sites/default/files/field_documents/grand_juror_doe_complaint_1-5-15_1.pdf.

²⁰⁷ Police murdered Justine Damond in her yard after she called them to report a sexual assault occurring in the alley behind her home. *Timeline of Australian Justine Damond’s shooting by cop*, SF GATE (Mar. 21, 2018), <https://www.sfgate.com/news/crime/article/Timeline-of-Justine-Damond-shooting-12769182.php>.

²⁰⁸ Amy Forliti, *Police Officer who Shot and Killed Justine Damond Charged with Murder*, TIME (Mar. 20, 2018), <http://time.com/5207979/justine-damond-shooting/>.

²⁰⁹ *Id.*

²¹⁰ *Id.*

charged, but officers who murder Black Americans are not charged for similar conduct.²¹¹ This case demonstrates that police officers are not in-fact immune to justice; justice is simply pre-determined and selectively pursued.

Likewise, in the death of Jonathan Ferrell,²¹² then-Attorney General, now Governor Roy Cooper of North Carolina convened two grand juries in order to charge Officer Randall Kerrick. In the first grand jury, Governor Cooper presented only two witnesses and convened only fourteen jurors. In the second grand jury, he presented four witnesses and convened a full panel of eighteen jurors.²¹³ It is worth noting that Cooper was emerging as the Democratic gubernatorial candidate in North Carolina around that same time and was looking to court Black voters.

To that end, the use of the grand jury device at the state and federal level is arbitrary. The essential purpose of a grand jury is not purely investigatory or purely protective.²¹⁴ The typical grand jury process is for—“when the public interest so requires”²¹⁵—prosecutors to present evidence to a grand jury without the presence of defense counsel or the formal adjudication of a judge.²¹⁶ The idea is that when the prosecutor has made an evidentiary showing that satisfies the probable cause standard, an indictment will follow.²¹⁷ Under federal law, probable cause only requires “the kind of ‘fair probability’ on which ‘reasonable and prudent [people,] not legal technicians, act.’”²¹⁸ But, the process is concealed from public record and chiefly driven by prosecutorial discretion. So, there is no assurance that the prosecutor is putting on all available evidence and making a compelling-enough presentation of all readily available evidence at the grand jury stage. While it is true that the prosecutor “must do nothing to inflame or otherwise improperly influence the grand jurors,”²¹⁹ there is an inherent conflict of interest when

²¹¹ Balko, *supra* note 105; Also, the officers who killed Alton Sterling in July 2016 were not charged in his death, despite video recordings showing the officers shouting profanity and expletives at Sterling while simultaneously threatening to kill him moments before his murder. *Alton Sterling Shooting: Police Officer fired Over Killing*, AL JAZEERA (Mar. 31, 2018), <https://www.aljazeera.com/news/2018/03/alton-sterling-shooting-police-officer-fired-killing-180331085848803.html>.

²¹² Jonathan Ferrell, 24, was in a car crash when he knocked on a woman’s door in Charlotte, North Carolina for help. The woman assumed that he was breaking into her house and called the police. Upon their arrival, Ferrell advanced toward the police officers with his hands up. One officer shot him with a taser; when he was not subdued, Officer Randall Kerrick fired 12 bullets at Ferrell, hitting his body with 10. Jonathan Ferrell was unarmed. Trymaine Lee, *The 911 Call that Led to Jonathan Ferrell’s Death*, MSNBC (Sept. 17, 2013), <http://www.msnbc.com/msnbc/the-911-called-jonathan-ferrells>.

²¹³ *Id.*

²¹⁴ See *Branzburg v. Hayes*, 408 U.S. 665, 668 (1972) (“Because the [grand jury’s] task is to inquire into the existence of possible criminal conduct and to return only well-founded indictments, its investigative powers are necessarily broad).

²¹⁵ FED. CRIM. R. P. T 6(a)(1).

²¹⁶ See Office of the Exec. Sec’y, Supreme Court of Va., Handbook for Virginia Grand Jurors 1 (May 2013), http://www.courts.state.va.us/courts/circuit/handbook_grand_jurors.pdf [<https://perma.cc/4EER-AWZK>].

²¹⁷ See *Branzburg* (emphasizing that the grand jury can only return well-founded indictments); see also *Restoring Legitimacy: The Grand Jury as the Prosecutor’s Administrative Agency*, 130 HARV. L. REV. 1205 (Spring 2017).

²¹⁸ *Kaley v. United States*, 134 S. Ct. 1090, 1103 (2014) (quoting *Florida v. Harris*, 133 S. Ct. 1050, 1055 (2013)).

²¹⁹ Dep’t of Justice, U.S. Attorney’s Manual, § 9-11.010.

prosecutors call a grand jury in these cases that involve bringing charges against police officers. It is as if the state is putting itself on trial.²²⁰

The selectivity with which prosecutors employ the grand jury device is telling of how its protectionist function largely causes an evasion of due process for victims' families—especially Michael Brown and his family in this case. This selectivity employed by McCulloch underscores the fact that Brown was not ensured a fair trial on the state level, which is precisely why Wilson left the grand jury free of an indictment for *any* charge. McCulloch deliberately misused the grand jury process, resulting in the state failing to hold Wilson accountable for Michael's death and the violation of his rights.

4. Impunity for police violence in the United States exacerbates the due process concerns that Michael Brown's death highlights

“The injustice perpetrated by a pattern of racial discrimination in police killings is exacerbated by a pattern of impunity in cases of police killings of African Americans.”²²¹ One study found that in thousands of police killings between 2005 and 2015, just 54 police officers were ever charged with a crime and most were eventually cleared or acquitted.²²² Despite widespread acknowledgement of the excessive and pervasive nature of police violence against Black people, police officers rarely face criminal charges, convictions, or any other form of accountability. In fact, 98.3% of killings by police from 2013 to 2020 did not result in the prosecution of police officers.²²³ In 2022, only eleven officers—one percent of all officers involved in police killings—were charged with a crime.²²⁴ Further, when officers do face criminal charges, they are often acquitted or, if convicted, receive much lighter sentences than are typical for civilians convicted of similar offenses.²²⁵

Victims of police violence in the U.S. may seek redress through the civil legal system. However, suits where victims sue individual officers, police departments, or municipalities and seek monetary damages are often unsuccessful. And, even if monetary damages are awarded, it is the municipality or city that pays the judgment not the individual officer, representing further impunity for the police officers causing the harm and passing responsibility onto taxpayers.

The ability of police in the United States to act with this near total impunity can be attributed to a lack of meaningful accountability for the killings of Black people. In its previous press releases²²⁶ and reports on structural racism and police violence in the United States, the

²²⁰ See Nisha Chittal, *Six of Your Questions About Grand Juries Answered*, MSNBC NEWS, (Dec. 5, 2014), <http://www.msnbc.com/msnbc/6-your-questions-about-grand-juries-answered>.

²²¹ IACHR REPORT 2018, *supra* note 1, at ¶ 104.

²²² *Id.* at ¶ 105.

²²³ *Id.*

²²⁴ Police Violence Map, *supra* note 7.

²²⁵ Kimberly Kindy & Kimbriell Kelly, *Thousands Dead, Few Prosecuted*, WASH. POST (Apr. 11, 2015), <http://www.washingtonpost.com/sf/investigative/2015/04/11/thousands-dead-few-prosecuted/>.

²²⁶ See Press Release, IACHR, *IACHR calls on the United States to implement structural reforms in the institutional systems of security and justice to counter historical racial discrimination and institutional racism* (August 8, 2020); Press Release, IACHR, *The IACHR expresses strong condemnation for George Floyd's murder, repudiates structural*

Commission, and several international human rights bodies,²²⁷ have continuously called on the United States to address police violence against Black communities through demands for accountability. In its 2018 report in particular, the Commission acknowledged that a structural situation of discrimination against Black people exists in the region, and that “this context of structural violence contributes to a situation of impunity and lack of reparations for police killings in the U.S.”²²⁸

D. Michael Brown’s detention was arbitrary, illegal, and procedurally improper in Violation of Article XXV

1. Article XXV and its interpretation by the Commission

Article XXV provides that:

“No person may be deprived of his liberty except in the cases and according to the procedures established by pre-existing law.

No person may be deprived of liberty for nonfulfillment of obligations of a purely civil character.

Every individual who has been deprived of his liberty has the right to have the legality of his detention ascertained without delay by a court, and the right to be tried without undue delay or, otherwise, to be released. He also has the right to humane treatment during the time he is in custody.”

The Commission has stated that this Article specifies three fundamental requirements, against which the Commission will assess a State’s compliance:

- i. first, preventive detention, for any reason of public security, must be based on the grounds and procedures set forth in domestic law;

racism, systemic violence against Afro-Americans, impunity and the disproportionate use of police force, and urges measures to guarantee equality and non-discrimination in the United States (June 8, 2020).

²²⁷ The Committee on the Elimination of Racial Discrimination (“CERD”) discussed systemic racism in the U.S. in its concluding observations in May 2008 (CERD/C/USA/CO/6) and August 2014 (CERD/C/USA/CO/7-9) and most recently issued a Decision pursuant to its early warning/urgent action mandate on June 12, 2020 following the death of George Floyd calling for accountability for excessive use of force by law enforcement personnel. On June 5, 2020, many UN Special Procedures and the Chair of CERD issued two statements, one on the Protests against Systemic Racism in the United States and one condemning “modern-day racial terror lynchings in the US and call[ing] for systemic reform and justice.” In 2016, the Working Group of Experts on People of African Descent conducted a mission to the United States, and it noted that “killings of unarmed African Americans by the police is only the tip of the iceberg in what is a pervasive racial bias in the justice system.” HRC, Report of the Working Group of Experts on People of African Descent on its Mission to the United States of America, A/HRC/33/61/Add.2, ¶ 24 (Aug. 18, 2016).

²²⁸ IACHR REPORT 2018, *supra* note 1, at ¶ 295.

- ii. second, the relevant domestic provisions must not be arbitrary within the context of the guarantees established by the Inter-American human rights instruments;
- iii. finally, even if the detention meets the requirements of a domestic legal provision that is compatible with said instruments, it should be determined whether the application of the law in the specific case was arbitrary.²²⁹

The Commission has further clarified that it considers “arbitrary” deprivation of liberty to encompass not only an act which is “against the law,” but it should be interpreted more broadly to include “elements of impropriety, injustice and unpredictability as well as principles of due process.”²³⁰

The US legal framework on police powers of arrest encompasses (1) Federal laws; (2) State laws (of Missouri); and (3) Municipal codes of the City of Ferguson.

At the Federal level, the Fourth Amendment guarantees people the right to be free from unreasonable searches and seizures by the government.

“The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.” Warrantless searches are per se unreasonable under the Fourth Amendment, subject to only a few, established exceptions.”

Generally, there are three levels that describe interactions between police and individuals (from least to most serious): (1) consensual encounters, ie, conversations; (2) investigative stops (aka “Terry stops”); and (3) arrests.

a. Consensual encounters

A “consensual encounter” between an officer and an individual can be described as a more casual or relaxed interaction between the parties, as compared to an investigative or “Terry stop” or an arrest. Typically, this looks like an officer approaching a person on the street or in a public place and striking up a conversation. A “seizure does not occur simply because a police officer approaches an individual and asks a few questions.”²³¹

²²⁹ *Nelson Ivan Serrano Saenz v. United States*, REPORT No. 200/20, Case 13.356, Report on Admissibility and Merits, ¶ 53.

²³⁰ *José Trinidad Loza Ventura v. United States*, Inter-Am. Comm’n H.R., OEA/Ser.L/V/II doc. 468 Report No. 454/21 (2021).

²³¹ *Florida v. Bostick*, 501 U.S. 429, 434 (1991); see *United States v. Drayton*, 536 U.S. 194, 200–01 (2002) (“Law enforcement officers do not violate the Fourth Amendment’s prohibition of unreasonable seizures merely by

As long as an encounter remains consensual, Fourth Amendment protections will not be triggered and an officer will not need reasonable suspicion to engage a person. However, in order for an encounter to be characterized as consensual, the individual must believe that they are free to walk away from the officer. If “a reasonable person would feel free ‘to disregard the police and go about his business’” then it is a consensual encounter. “A consensual encounter ripens into a seizure, whether an investigative detention or an arrest, when a reasonable person under all the circumstances would believe he was not free to walk away or otherwise ignore the police’s presence.”²³² When an officer, whether through physical force or show of authority, restrains a person’s liberty, a ‘seizure’ has occurred.²³³

Following the initial interaction between Brown and Wilson, the situation was no longer a consensual encounter as Wilson (1) followed Brown and his friend; (2) blocked his path with his vehicle; and (3) subsequently shot and killed Brown.

b. Investigative stops, “Terry stops”

A Terry stop is a brief investigatory detention that stops short of arrest. In *Terry v Ohio*,²³⁴ the U.S. Supreme Court held that police officers may detain individuals absent probable cause so long as *reasonable suspicion* exists, and they may search individuals if officers believe that a person is presently armed and dangerous.

Generally, absent exigent circumstances, an officer must obtain a warrant for searches and seizures. The court noted “*that the police must, whenever practicable, obtain advance judicial approval of searches and seizures through the warrant procedure.*”²³⁵ Yet, officers may initiate an investigative stop as long as they have reasonable suspicion that a person has committed, is committing, or is about to commit a crime.

approaching individuals on the street or in other public places and putting questions to them if they are willing to listen.”).

²³² *United States v. Long Huang You*, 198 F. Supp. 2d 393, 396 (S.D.N.Y. 2002).

²³³ In *State v. Sund*, the Supreme Court of Missouri found that an officer’s demand to search a person’s trunk after the conclusion of a traffic stop constituted an unlawful seizure. The officer stopped a vehicle because he wanted to check that the driver was not sleepy or intoxicated after seeing the car touch the dotted white line. After determining that the driver was not intoxicated or sleepy and had no outstanding warrants, he issued a traffic ticket. As the driver was about to leave, the officer asked to search the trunk of the car, and then threatened that he’d have a canine unit come after the driver refused to allow the search. The officer admitted that he did not have reasonable suspicion of any criminal activity. The State argued that the conversation about the trunk took place after completion of the traffic stop and turned into a “consensual encounter.” However, the court reasoned that the driver did not feel free to leave because the officer made a show of his authority by threatening a canine sniff search if the driver refused to let him search the trunk, resulting in an unlawful search and seizure

²³⁴ In *Terry v. Ohio*, 392 U.S. 1 (1968), three men were approached by a plain clothes police officer who believed that the men were preparing to rob a store. The officer approached the men, identified himself, and asked them what they were doing. After the men “mumbled” an answer in response to his questions, the officer grabbed one of them, patted him down, felt a gun, and removed it from the man’s coat.

²³⁵ 392 U.S. at 20 (1968).

Reasonable suspicion must be supported by specific and articulable facts. For example, in *State v. Long*, the Missouri Court of Appeals found that rarely, if ever, would a lone, anonymous tip be the basis of Terry stop.²³⁶ A mere “hunch” or inchoate and unparticularized suspicion is not enough to amount to reasonable suspicion.²³⁷

Terry stops must be limited. To initiate a *Terry* stop, an officer’s action “*must be must be justified at its inception, and [...] reasonably related in scope to the circumstances which justified the interference in the first place.*”²³⁸ A *Terry* stop cannot last for an excessive period of time or resemble a traditional arrest.

Michael was subjected to a *Terry* stop by Officer Wilson.

c. Arrests

Of the three types of police-civilian encounters, arrests are the most serious and require the highest amount of Fourth Amendment scrutiny probable cause.

A police-civilian encounter may escalate from a consensual encounter or Terry stop to an arrest. If the seizure (stop) and pat down search (frisk) give rise to probable cause to believe that a person committed a crime, an officer may make formal arrest and do a full-blown search of that person.

Arrests are subject to Fourth Amendment requirements, but officers may arrest a person without a warrant if they have probable cause to believe that a person committed a felony or misdemeanor in their presence. However, a significant number of arrests are made absent a warrant. Like reasonable suspicion, probable cause must be based on the particular facts and circumstances of the individual case.

Both the City of Ferguson²³⁹ and the State of Missouri²⁴⁰ have similar rules relating to the police’s power of arrest. They provide that a police officer may arrest on view and without a warrant, any person seen “violating or who he has reasonable grounds to believe has violated” any ordinance or law of the state, including a misdemeanor or infraction, or has violated any section of this Code over which the relevant officer has jurisdiction. While some states have statutes providing restrictive safeguards to limit warrantless arrests for minor infractions, the State of Missouri has not imposed statutory limitations.

²³⁶*State v. Long*, 417 S.W.3d 849, 853 (Mo. Ct. App. 2014).

²³⁷ Cite, Id

²³⁸ *Terry*, 392 U.S. at 19-20.

²³⁹ Section 33-22, Article II, Chapter 33 of the City of Ferguson Code of Ordinances.

²⁴⁰ Missouri Revisor of Statutes 544.216.

2. Darren Wilson arbitrarily and illegally stopped and detained Michael Brown

Michael Brown was deprived of his liberty by a police officer in circumstances which were not permitted under US federal or state law, and his arrest was carried out in an arbitrary manner. Michael Brown was also subject to inhumane treatment by virtue of the unlawful, unnecessary, and disproportionate actions taken by Officer Wilson. As a result, Michael Brown's rights under Article XXV were violated by a US state actor.

Officer Wilson, whilst on duty as a police officer:

- approached Michael Brown and his friend, Dorian Johnson, in an SUV police vehicle and demanded that they “*get the [expletive] onto the sidewalk*” and subsequently there was a minor interaction (even though there was no sidewalk on the street)²⁴¹;
- When Michael disengaged from the initial interaction with Officer Wilson, Officer Wilson followed the two men in his vehicle and turned it perpendicular to the street, with the effect that Michael's movement on the walking path was restricted; and
- subsequently Officer Wilson exited his car and, [after an argument between the two] used his gun to fire approximately 12 shots at Michael Brown, requiring him to run away for self-protection, and raise his hands in surrender.

All of the actions above resulted in Michael's Brown's movement being restricted, and his life being placed at risk. As set out at paragraph [x] above, although the US legal framework, and in particular the state laws and municipal codes, grant police officers relatively wide discretion in exercising powers, it is clear that such police officers need to:

- In respect of Terry stops—have reasonable suspicion that a person has committed, is committing, or is about to commit a crime;
- In respect of arrests—have probable cause to believe that a person committed a felony or misdemeanor in their presence;
- In respect of state law and municipal code—either “*see*” a violation of a law or have “*reasonable grounds to believe*” a law has been violated.

Officer Wilson did not fulfill any of the above standards/conditions, such that his actions were in violation of both federal and state law.

The reason given by Officer Wilson as to why he took the actions set out in paragraph [x] above have been vastly inconsistent. During the initial police investigation into the events of August 9, 2014, he told police investigators he did not suspect Michael or his friend Dorian Johnson of

²⁴¹ Aubrey Byron, *In much of Ferguson, walking in the street remains the only option*, Strong Towns (Feb. 20, 2018) <https://www.strongtowns.org/journal/2018/2/19/ferguson-sidewalks-mike-brown-decline>

having committed a crime when the physical altercation between him and Michael occurred.²⁴² Before the grand jury Wilson testified that he thought Michael and Dorian Johnson matched the descriptions of the subjects on the radio dispatch relating to a theft at a local market. This reason is unreliable and insufficient because: (1) Darren Wilson only made this claim after the local convenience store surveillance of Michael and his friend in the store prior to encountering Officer Wilson was publicly disseminated; and (2) it is in direct contradiction with the police chief's public statement that the initial contact with Michael was unrelated to the theft. During a press conference on August 15, 2014, Ferguson Police Chief Thomas Jackson repeatedly stated that Brown and Jackson were stopped because "*they were walking down the middle of the street.*"²⁴³ It was only after video footage of Michael in the convenience store allegedly stealing cigarillos surfaced that Officer Wilson modified his statement to imply that he had probable cause and reasonable suspicion for the Terry stop.

Taken together, the inconsistency of the alleged reasons for stopping Michael in the street demonstrate that Wilson neither saw nor had reasonable grounds to believe that Michael had violated any laws. In the context of policing practices in Missouri and the treatment of Black people in Missouri and America, the most plausible suggestion for Wilson's unreasonable and disproportionate actions in relation to Michael's detention is on the basis of racial profiling. As such, Wilson did not exercise his powers of arrest in accordance with municipal code, state law, or federal law.

Moreover, Wilson arrested Michael Brown in an arbitrary manner. This Commission has established that "[a]mong the protections guaranteed are the requirements that [...] a detainee be informed of the reasons for the detention and promptly notified of any charges against them."²⁴⁴ There is insufficient evidence to demonstrate that Wilson had a reasonable, articulable suspicion that criminal activity was occurring, there was no objective basis for which Wilson stopped Michael, he did not clearly inform Michael and his friend of the basis on which they were being stopped or why they were being followed, and he did not stop shooting at Michael even when the latter was running away and had raised his hands in surrender. As the Commission has previously emphasized, "improper conduct of the police force constitutes one of the main threats to individual freedom and security." The actions perpetrated against Michael by Officer Wilson unfortunately give further weight to this pertinent observation of the Commission.

3. Wilson's illegal detention of Michael Brown arose from a civil infraction and was improper

As set out above, one reason provided by Wilson for detaining Michael is that he was walking down the middle of the street. To the extent that sufficient evidence is brought forth by Officer Wilson to satisfy the evidentiary burden of his claim (and, for the avoidance of doubt, the

²⁴² Statement of Darren Wilson to St. Louis County Police Department (Aug. 10, 2014).

²⁴³ Politics Nation, *NBC News* (Aug. 15, 2014), <https://www.nbcnews.com/id/wbna55889127>.

²⁴⁴ 6 IACHR, Report on Terrorism and Human Rights, OEA/Ser.L/V/II.116.Doc.5 rev.1, October 22, 2002, para. 120; Report No. 211/20, Case 13.570, Report on Admissibility and Merits, Lezmond C. Mitchell.

Petitioners do not accept that there is such sufficient evidence), Wilson detained Michael for breach of a purely civil law, violating Michael’s rights under Article XXV.

At the time of the events (now repealed), the Ferguson Municipal Code, which is a civil code, provided that:

“(a) Where sidewalks are provided, it shall be unlawful for any pedestrian to walk along and upon an adjacent roadway. (b) Where sidewalks are not provided, any pedestrian walking along and upon a highway shall, when practicable, walk only on the left side of the roadway or its shoulder facing traffic which may approach from the opposite direction.”²⁴⁵

This is commonly referred to as a “manner of walking” charge. As identified by the US Department of Justice, manner of walking charges have been routinely used by Ferguson police to detain and harass Black people in the city.²⁴⁶

4. The US legal framework governing Terry stops violates international legal standards

The US’s legal framework regarding police power of detention fails to guarantee people will not be deprived of liberty in a manner consistent with international law standards.

a. Deficiencies in federal laws

The Commission has previously identified significant concerns with “*Terry stops*”, which may allow or encourage expressions of bias in policing and therefore could have a disproportionate impact on minorities.

Terry stops empower police to briefly stop individuals if they have a “reasonable suspicion,” formed on an “objective basis,” that an individual is engaged in or about to be engaged in criminal activity. In this regard, the Commission has highlighted that ““reasonable suspicion” is a lower threshold than the “probable cause” required for searches or seizures required under the Fourth Amendment, and is shaped by social context. For example, the Supreme Court has found that the fact of a black man running in a “high-crime” area may be sufficient to give rise to a “reasonable suspicion” for a police officer to decide to stop him²⁴⁷”.

This legal framework does not clearly define the conditions for arrest or detention in order to allow a person to foresee the consequence which a given action may entail²⁴⁸, and in this case it was certainly not foreseeable that a person such as Michael would be at risk of being stopped, chased and shot [12 times] by a police officer for no reasonably objective basis.

²⁴⁵ Ferguson Muni. Ord. s 44-344 (2015), *repealed by* Ferguson Muni. Ord. No. 2016-3617, § 1 (Apr. 26, 2016).

²⁴⁶ DOJ report, *supra* note 55 at page 7.

²⁴⁷ *José Trinidad Loza Ventura v. United States*, Inter-Am. Comm’n H.R., OEA/Ser.L/V/II doc. 468 Report No. 454/21 (2021).

²⁴⁸ *Id.*

b. Deficiencies in state laws and municipal codes

Both the City of Ferguson²⁴⁹ and the State of Missouri²⁵⁰ have laws allowing police to arrest for *any* infraction. This includes things like having grass too high on one’s lawn or excessively tinted car windows. Municipal courts are designed to address civil cases. But because their effects are actually criminal in nature, defendants are regularly subjected to criminal legal court proceedings without the benefit of the constitutional protections they would be afforded in actual criminal court, such as a right to speedy trial or right to counsel.²⁵¹ This renders the code “quasi-criminal” in nature.

Scholars have effectively argued that, “[a]lthough the United States Supreme Court has never separately addressed the issue, its search and seizure jurisprudence supports a determination that custodial arrest for civil wrongdoing [i.e., a municipal ordinance violation,] is simply unlawful.”²⁵²

In addition, municipal courts are able to review and determine cases involving alleged breaches of civil laws based on charges by the police. Yet procedurally the municipal courts do not have to follow a process that would be applicable to criminal law proceedings. As a result, despite the breaches of civil law (including manner of walking charges) are treated as *de facto* criminal in nature, alleged perpetrators are faced with the potential of police arrest and criminal sanctions being imposed against them but without the benefit of constitutional protections they would be afforded in relation to breaches of criminal law, including right to counsel and right to speedy trial.²⁵³

Moreover, this Commission has stressed that legality of a detention also relates to the “quality of the law,” requiring it to be compatible with the rule of law.²⁵⁴ The European Court of Human Rights has held (and this Commission has reinforced) that the “quality of law” implies that where a national law authorizes deprivation of liberty, it must be sufficiently accessible, precise and foreseeable in its application to avoid all risk of arbitrariness.

“The standard of “lawfulness” requires that all law be sufficiently precise to allow the person to foresee, to a degree that is reasonable in the circumstances, the

²⁴⁹ See Ferg. Mun. Code § 33-22, https://library.municode.com/mo/ferguson/codes/code_of_ordinances?nodeId=PTIICOOR_CH33PO_ARTIIPODE_S33-22POAR

²⁵⁰ Mo. Rev. Stat. § 544.216, <https://revisor.mo.gov/main/OneSection.aspx?section=544.216>

²⁵¹ For an in depth exploration of this issue see Thomas Harvey, et al., *ArchCity Defenders: Municipal Court White Paper 6* (2014), <https://www.archcitydefenders.org/wp-content/uploads/2019/03/ArchCity-Defenders-Municipal-Courts-Whitepaper.pdf>.

²⁵² Quinn & Cheverud, *Civil Arrest? (Another) St. Louis Case Study in Unconstitutionality*, 52 Wash.U.J.L. & Pol’y 95, 98 (2016).

²⁵³ Thomas Harvey, et al., *ArchCity Defenders: Municipal Court White Paper 6* (2014), <https://www.archcitydefenders.org/wp-content/uploads/2019/03/ArchCity-Defenders-Municipal-Courts-Whitepaper.pdf>.

²⁵⁴ *Id.*

consequences which a given action may entail. Where deprivation of liberty is concerned, it is essential that domestic law clearly defines the conditions for the arrest or detention.”²⁵⁵

As such, the applicable procedure and the express or implied general principles involved in relation to deprivation of liberty must be compatible with inter-American instruments and standards.²⁵⁶

The US’s legal framework for enforcement of civil obligations, namely the ability of the police to detain, arrest, and ultimately charge an individual for a civil law breach, coupled with the lack of procedural protections that would typically be afforded to an individual accused of a crime, are arbitrary and render the US in violation of its positive obligation to guarantee an individual’s right not to be subject to arbitrary detention. This is particularly the case against the backdrop of racism in the US undergirding all police activity. Now repealed, but in 2014, Ferguson Municipal Code defined “manner of walking along roadway”²⁵⁷ as “(a) Where sidewalks are provided, it shall be unlawful for any pedestrian to walk along and upon an adjacent roadway. (b) Where sidewalks are not provided, any pedestrian walking along and upon a highway shall, when practicable, walk only on the left side of the roadway or its shoulder facing traffic which may approach from the opposite direction.”

Manner of walking charges have been routinely used by Ferguson police to detain and harass Black people in the city. According to the DOJ report, Investigation of the Ferguson Police Department, during the years 2011-2013, African Americans accounted for 95% of these ordinance violations.²⁵⁸ In Ferguson, like in the rest of St. Louis County, the municipal code is ostensibly civil in nature. But because enforcement of the code is carried out by police who routinely make arrests for these violations, the code becomes “quasi-criminal” in nature, and people are commonly detained, arrested, and subjected to other police violence for civil (mis)conduct.

So not only do the criminal and legal systems policing the people of Ferguson violate international legal standards, they likely violate US constitutional standards as well.

This was the context that Michael Brown and Darren Wilson found themselves in on August 9, 2014. An extra-judicial policing system operating with the veneer of legitimacy routinely subjecting overwhelmingly Black people to police violence, and in the case of Michael Brown, summary execution. The conditions that created this system, lived out by the people of St. Louis County, created the kindling. The actions of police in not only murdering Michael Brown, but leaving his body to bake, uncovered, in the boiling August heat, provided the spark. And the Ferguson Uprising was born.

²⁵⁵ ECHR. *Del Rio Prada v. Spain* [GC], no. 42750/09. October 21, 2013, para. 125; IACHR, Report No. 129/17. Case 12.315. Merits. *Carlos Alberto Fernandez and Carlos Alejandro Tumbeiro v. Argentina*, October 25, 2017, para. 49.

²⁵⁶ *Id.*

²⁵⁷ Ferg. Muni. Code § 44-344 (2015), *repealed by* Ferguson Muni. Ord. No. 2016-3617, § 1 (Apr. 26, 2016).

²⁵⁸ DOJ report *supra* note 55 at 7.

IV. Irrelevant civil suit

On June 20, 2017, Michael's parents settled a wrongful death civil lawsuit against the City of Ferguson.²⁵⁹ The United States alleges that this civil settlement amounts to an adequate and complete remedy for Michael's death.²⁶⁰ Not so. Although Petitioner's freely and fairly availed themselves of the remedies provided by the United States court system and voluntarily agreed to a settlement,²⁶¹ the wrongful death suit is not the proper measure for adequacy of the domestic remedy.

Financial compensation from the City does not relieve the State's duty to hold the perpetrator accountable. The standard advocated by the United States (that compensation from a wrongful death civil lawsuit is a sufficient remedy for a violation to the right to life) would set an incredibly dangerous precedent in general and especially amidst the backdrop of systemic nature of killings of Black Americans by police in the United States. The notion advocated by the United States would thus harden into law a rule that murderers wearing a police uniform would never have to face individual accountability and that the State would somehow be relieved of its duty under international law to prosecute and punish perpetrators of the right to life.

In any event, the Commission already rejected this argument in its Decision on Admissibility: "the Commission considers that the petition cannot, in principle, be dismissed at the admissibility stage, based on a settlement or agreement concluded before the domestic courts."²⁶²

As this Commission correctly recognized, the issue here is not based in civil settlements, but instead whether the criminal laws of the United States have been fairly and adequately enforced. They have not, and the wrongful-death settlement does not preclude this Commission's inquiry.

The United States says it has discovered a new exhaustion requirement to bar this claim. "Implicit in the requirement of exhaustion in Article 31 of the Rules is the incontrovertible principle that if a petitioner has received an effective remedy in the domestic system, then their claim is not admissible before the international forum."²⁶³ Nothing in Article 31's text even makes this suggestion. What does the United States mean by "effective" anyway?

²⁵⁹ *Brown v. City of Ferguson*, No. 4:15CV00831 ERW, 2017 BL 210939 (E.D. Mo. June 20, 2017).

²⁶⁰ See United States Response to Petition at 3 (March 3, 2022).

²⁶¹ *Id.*

²⁶² Report on Admissibility ¶ 20.

²⁶³ Response of the United States at 4.

V. Remedies request and conclusion

The United States has a legal duty to provide full reparations to Michael Brown's family for the violations of the American Declaration.²⁶⁴ For a remedy to be effective, it must "provide results or responses consistent with the objectives that it was intended to serve, which is to avoid the consolidation of an unjust situation."²⁶⁵ Michael Brown's murder and subsequent treatment by various government entities did not arise in a vacuum. As detailed above, his murder came about in a context of racial capitalism and settler colonialism. In order to account for the violations of his human rights under the Declaration, the United States must make significant structural changes to its policing, criminal justice systems, and economy. Only big bold action can bring about the change necessary to begin to redress the lengthy list of harms the United States is responsible for. In this light the Petitioners respectfully call on the Commission to make findings in their favor and urge the United States to implement significant changes, as detailed below.

We respectfully ask that the Commission grant any relief it deems just and proper, including but not limited to:

1. grant a hearing on the merits to investigate the facts discussed in the petition;
2. clarify that the remedies afforded by the domestic civil and criminal proceedings following the killing were not effective, meaningful, or complete, and as a result the United States is responsible for violating the American Declaration of the Rights and Duties of Man Articles I, II, XVIII, XXV, and XXVI in regards to it's disposition of this case;
3. demand the U.S. Department of Justice appoint a special prosecutor to carry out an independent and effective investigation into the shooting death of Mike Brown and bring charges to prosecute those responsible in under federal law;
4. demand that the Missouri Governor appoint a special prosecutor to conduct a full investigation of the St. Louis County Prosecuting Attorney's Office 2014 grand jury process and 2020 investigation of the Mike Brown case;
5. demand public apology to the family of Mike Brown on behalf of the federal government for its failures to enforce Mike's human rights as recognized in the American Declaration;
6. demand public apology to the family of Michael Brown on behalf of local and state officials in Missouri for failure to enforce Mike's human rights as recognized by the American Declaration. Specifically apologies are owed from Assistant Prosecutor Kathi Alizadeh, Prosecutor Wesely Bell, Prosecutor Robert McCulloch, Gov. Jay Nixon, Assistant Prosecutor Sheila Whirley, and Officer Darren Wilson;

²⁶⁴ See e.g. U.N. GAOR. 56th Sess., Supp. No. 10 at 91, U.N. Doc. A/56/10 (2001); see also American Convention on Human Rights, O.A.S. Treaty Series No. 36, 1144 U.N.T.S. 123 entered into force July 18, 1978, reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/1.4 rev.8 at 43, art. 62(3) (2001).

²⁶⁵ Report on the merits Víctor Hugo Saldaño, IACHR Case 12.254, (2017).

7. demand that the governor appoint a special prosecutor to effectuate the criminal prosecution of Darren Wilson under Missouri law;
8. mandate creation of a “Mike Brown Fund” on the local, state, and federal level that subsidizes the costs of mental health counseling to family members of victims who have been killed by police officers in the United States using existing police budgets;
9. express concern that notwithstanding the commission’s report issued in 2019 which detailed targeting of police violence against Afro-Descendant communities in the United States, that the Mike Brown Case and the example of the Ferguson Police department’s actions demonstrate that U.S. police forces have a widespread, systemic problem with the excessive and lethal use of force as well as the disproportionate targeting of people of color, and authorities are promulgating a system of impunity for those law enforcement mechanisms.

We further ask the Commission to urge the the U.S. Congress to implement these changes:

1. enact the BREATHE Act, H.R. 585 (2019), a comprehensive invest/divest piece of legislation designed to divest federal resources from incarceration and policing in order to end harms caused by the criminal legal system, including prohibiting the type of “broken windows” over policing and policing for profit which led to the interaction between Mike Brown and Darren Wilson;
2. amend 42 U.S.C. § 1983 and criminal 18 U.S.C. § 242 to to adjust the standard of proof for such claims, as the statutory standard currently fails international standards for police accountability. Former United States Attorney General Eric Holder, in an interview while still in office, advocated for this suggestion as well, specifically in reference to the death of Michael Brown;²⁶⁶
3. enact the End Racial and Religious Profiling Act, S. 2355 (2019), which would prohibit federal, state, or local law enforcement from targeting a person based on actual or perceived race or ethnicity, similar to the way Mike Brown was targeted in this case.
4. enact the Helping Families Heal Act, H.R. 8914 (2022), designed to create greater accountability for police killings and provide funding for victims and their families to access mental health services, including:
 - a. establish a Helping Families Heal Program under the Health and Human Services to implement community-based mental health programs and services to victims and families of victims who have experienced law enforcement violence;
 - b. establish the Healing for Students Program under the Department of Education to increase mental health resources for students and school personnel impacted by law enforcement violence;

²⁶⁶ Mike Allen, *Holder’s Parting Shot: It’s too difficult to bring civil rights cases*, Politico (Feb. 27, 2015), <https://www.politico.com/story/2015/02/eric-holder-civil-rights-interview-mike-allen-115575>.

- c. allocate \$100 million to support mental health resources and improve access to mental health services for communities harmed by police violence.

Additionally, we respectfully request the Commission urge state legislatures and local governments to take the following actions:

1. end the grand jury system—which is susceptible to manipulation in ways that allow for bias against state accountability such as was effectuated in the matter at hand;
2. prohibit police from conducting stops and arrests for petty offenses such as ordinance violations and misdemeanors;
3. downgrade non-violent petty offenses from crimes to civil infractions;
4. adopt changes to local policing regimes as suggested in the BREATHE Act.

Finally, we close with the words of Lezley McSpadden, who has written an affidavit included in this filing for the benefit of the Commission, “I may never experience true justice or peace after losing my child to such a depraved and hateful attack, but I hope that hearing my words and seeing my pain today inspires you to endorse a societal transformation that protects other families from enduring this devastating loss.”²⁶⁷

²⁶⁷ Lezley McSpadden, aff. 4-5.

Exhibit List

Exhibit A Victim Impact Statement written by Lezley McSpadden, mother of Mike Brown

Exhibit B Concerned Citizen letter

Exhibit A

June 27, 2023

Inter-American Commission on Human Rights

Michael Brown Jr. and Lezley McSpadden

Petition P-909-15

Dear Commissioners,

I write as the mother of Michael O.D. Brown to share with you my personal story of grief and loss, and how my life has been dramatically altered since August 9, 2014, when a former Ferguson police officer murdered my son.

The injustice that occurred on that day shattered not only my life as I knew it, but my family's life. Michael— “Mike Mike” as we called him—grew up in a close knit and loving family. He was not the only victim of the Ferguson police on August 9th—everybody who was lucky enough to know him suffered an enormous loss the day he was killed. I lost my kind and creative eldest son; his grandparents lost their first-born grandchild; and my three younger children, all just kids at the time, lost their big brother and role model.

It is vital that right now you get the chance to learn who my son was. Michael was an overcomer. In May of 2014, he celebrated his high school graduation from the Normandy School District. This was not an easy feat for him because he had learning challenges. He had an Individualized Education Plan in school, which meant he had to work harder than some to accomplish all that he achieved in his eighteen years. He struggled with verbal expression but thrived with computers and technology. He had a curious and creative mind,

often taking things apart to figure out how they fit then skillfully put them back together. Making music was a natural gift and a joyful hobby. I still haven't been able to listen to his music since he's been gone, but I know it is there waiting for me when I am ready.

No matter how tall Mike got—and he towered over me—he was still a kid, but he was well on his way to becoming an exceptional young man. He was learning to drive and looking forward to attending college and future milestones. Looking back on his life—his determination and perseverance—he showed us that he could have accomplished anything he wanted, had he been allowed the chance.

I see this when I look at my three younger kids today and observe how much he influenced them. As an older brother, Mike led by example and through his journey he showed his younger siblings how to overcome adversity. He taught them the skills they would have to rely on to survive so much heartbreak and trauma with strength and resilience. He paved the way forward for them when he graduated from high school, and they all followed in his path. My son was an incredible human being and he left a lasting mark on this world, particularly in the lives of those who knew him best.

While I hope knowing more of Michael's story gives you insight into how our community hurts, if you have not lost a child yourself, then you will never understand the gravity of the pain I have suffered since Michael's murder. The injustice of knowing his killer gets to celebrate milestones my son will never experience; the guilt I feel because I wasn't there to protect him; and the

mental health toll that a loss this excruciating creates, are things most people will never experience, and that no person ever should.

In the United States, resources are not readily available for people who experience what my family and I went through. I had to navigate finding community, healing, and counseling by myself. It is a lonely and isolated place. It shouldn't be this way, so I am working hard to make things better. I have built community with other mothers who have lost children to police violence and share my deep sense of grief and pain. We lean on each other for support and share resources for healing.

After losing Michael, I met with some of the Mothers of the Movement. At this time, one of the mothers gave me the idea of starting a foundation. In 2015, I sued the Ferguson Police Department and I used that money to create the Michael O.D. Brown Foundation. Today the Foundation is a force for change and part of that work includes Rainbow of Mothers, a community of support for grieving mothers. Together, we have attended Essence Fest and healing retreats; we share resources and deliver "love baskets" during the holidays; and we count on each other for care and emotional support.

One of my hopes with Rainbow of Mothers is to create a space for grieving parents to share their stories like I am doing now. I need people to understand that when a life is stolen by gun violence or police brutality, the impact goes much farther than the news cycle allows you to see. Every day is a battle against heartache and loss. The system that fails to deliver justice and accountability for the perpetrators of violence also denies families the resources to heal from it. Having lived through this pain and knowing other

families who suffer like mine, I lobbied Congress to pass the Mike Brown Bill and allocate federal funding to support the mental health of families grieving from loss inflicted at the hands of the state.

My own son is gone, and I cannot bring him back, so now I put my energy into projects that protect and enhance the lives of other children. Through my foundation, we created the Michael O.D. Memorial Scholarship for Social Justice, Performing Arts, and Trades. We formed a Michael Brown Growing and Learning Garden in the Jennings School District to teach children how to grow fruit and vegetables and promote a healthy lifestyle. And we started the Brown Cousins Candy Shop to teach kids about entrepreneurship.

These projects help me honor my son and build a legacy of lasting impact. Throughout his life, Mike was strong, resilient, and persevering. His strength inspires me to be strong for him and for my other three children. However, this is not the same as justice; none of it amounts to justice. None of it changes the reality that my son was killed by a man whose alleged duty was to protect. Or that my daughter, who was only 15 at the time, was outside that day to witness the scene of her brother's murder. Or that the St. Louis prosecutor's office dismissed my family and my son's humanity. Instead doing everything in its power to protect the killer of my child so that he could walk free and experience life's milestones after robbing my 18-year-old boy of the chance to do the same.

I may never experience true justice or peace after losing my child to such a depraved and hateful attack, but I hope that hearing my words and seeing my

pain today inspires you to endorse a societal transformation that protects other families from enduring this devastating loss.

Sincerely,

Lezley McSpadden

Exhibit B

Hello Maggie, I've been reading with interest about your case in front of Circuit Judge Walsh regarding the Michael Brown shooting. I hope the information contained here is of some help. I think this will show that the prosecutor was negligent in his duties. There is a key piece of evidence that was not presented to the Grand Jury. It was the closest piece of physical evidence to Michael Brown's body and would have surely had an impact on the GJ decision. Evidence #17 was a bullet recovered about 4 feet from MB's right foot. There were a total of 6 bullets or projectiles recovered from the shooting. Three of them were pulled from MB's body. One was pulled from an apartment at 2909 Canfield and another was pulled from Darren Wilson's police cruiser. There are over a dozen pictures of both of these regarding their retrieval. The remaining bullet was recovered from the roadway. Photos of Evidence #17 (aka QB5 on the Crime Lab report) are nowhere to be found. The Forensic Scientist/ Lead Detective testified that he took a close-up and an intermediate shot of all the evidence and labeled such, so why no photographs of #17. It is important to carefully read his testimony and his interaction with the Assistant Prosecutor (Grand Jury Volume 2 page 168-170). The discussion seems to be very dismissive about # 17 and then they move on to a longer discussion regarding the projectile pulled from the Canfield Apt. I believe this was done on purpose. A trajectory analysis on QB5 would tell exactly how close Darren Wilson was to Michael Brown when he fired this shot. If Michael Brown's DNA is on this bullet it is possible it is the one that went through the right side of his forehead and exited his lower right jaw. This would mean MB was on his knees as described by Dorian Johnson when he was shot. I could go on and on but I think you get the picture here. As far as Judge Walsh's statement that "What better special prosecutor do we have than all the wealth and power of the United States Department of Justice?" it is important to note that County Prosecutor Bob McCulloch stated at the press conference after the release of the DOJ report that "They looked at the same evidence we looked at". It appears that the neither the Grand Jury nor the DOJ had the opportunity to see this piece of evidence. I've enclosed some items from the GJ. Hope this helps.

A concerned citizen

St. Louis County Police Report 99-14-43984 Legend

<u>ITEM NUMBER</u>	<u>Baseline (West from Copper Creek)</u>	<u>South of Baseline</u>
1. Black/Yellow Bracelet	208'2"	14'2"
2. Red Baseball cap	208'2"	16'3"
3. .40 cal Federal Spent Casing	201'1"	17'1"
4. .40 cal Federal Spent Casing	210'	29'2"
5. Black Bead Bracelet	201'3"	8'3"
6. White Nike Sandal (left foot)	179'7"	25'7"
7. White Nike Sandal (right foot)	136'	14'9"
8. Red Stain Driver Front Door Ext.		
9. Red Stain Driver Side Rear Door Ext.		
10. .40 cal Federal Spent Casing	56'	25'8"
11. .40 cal Federal Spent Casing	50'4"	33'9"
12. .40 cal Federal Spent Casing	50'1"	34'1"
13. .40 cal Federal Spent Casing	47'4"	24'
14. .40 cal Federal Spent Casing	43'	26'4"
15. .40 cal Federal Spent Casing	42'	23'11"
16. .40 cal Federal Spent Casing	36'10"	16'9"
17. Apparent Projectile	45'3"	10'10"
18. .40 cal Federal Spent Casing	33'4"	14'6"
19. Red Stain in Roadway	31'	11'9"
20. Red Stain In Roadway	26'7"	11'6"
21. .40 cal Federal Spent Casing	36'10"	31'10"
22. .40 cal Federal Spent Casing	47'4"	31'3"

Ferguson Marked Police Vehicle #108

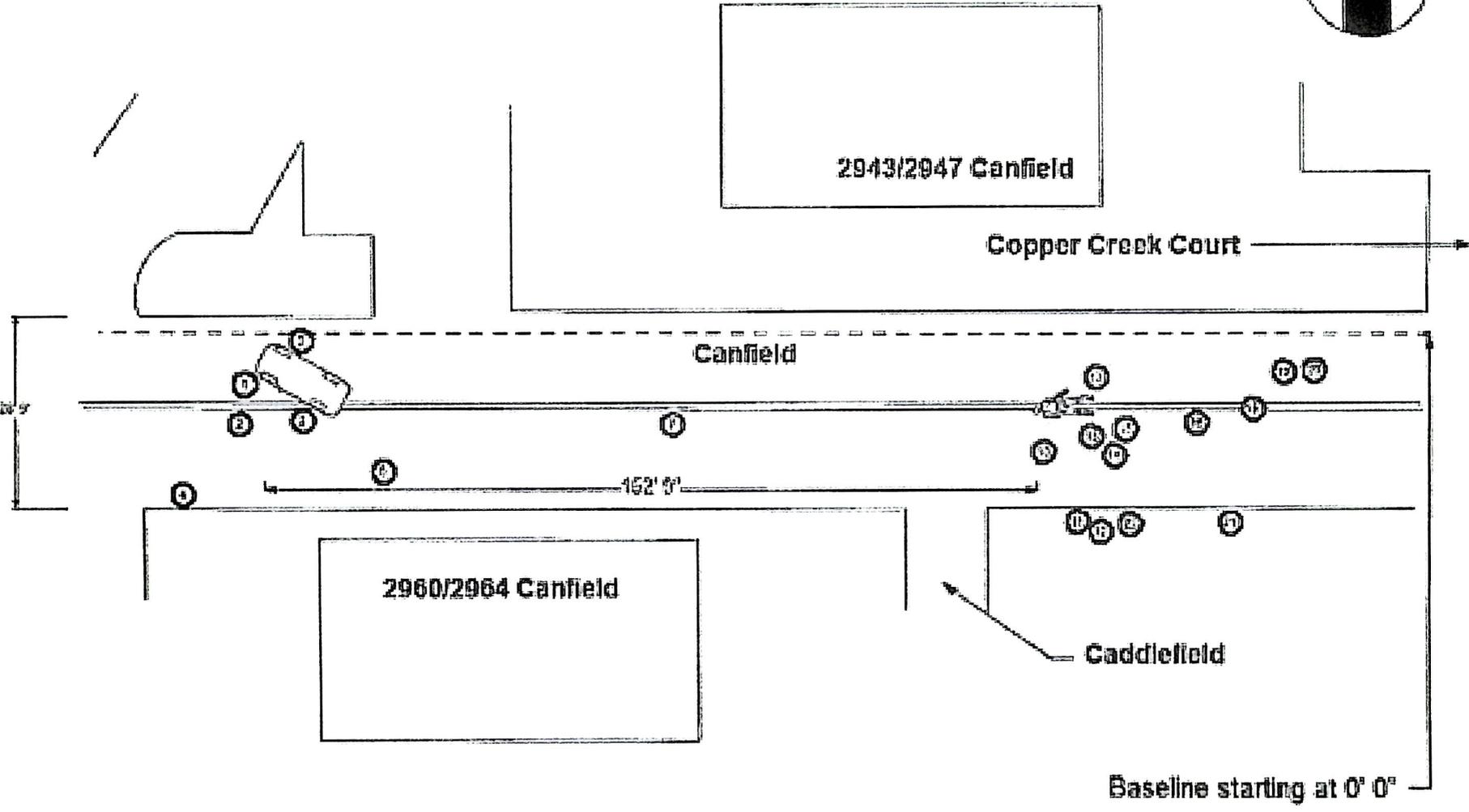
Driver Side Front Tire Center	206'3"	12'9"
Passenger Side Front Tire Center	203'8"	6'6"
Driver Side Rear Tire Center	197'3"	16'5"
Passenger Side Rear Tire Center	194'9"	10'4"

M. Brown's Location

Left Foot	48'2"	15'6"
Right Foot	48'2"	13'6"
Left Hand	51'4"	15'3"
Right Hand	52'11"	12'3"
Head	53'6"	15'9"

Baseline runs East to West, on North Side of Canfield, with 0'0" starting at Copper Creek Ct.

Case Name: Assault on LEO	St. Louis County Case No.: 2014-43984	Enguson Case No.: 2014-12391	Location of Occurrence: 2457 Canfield	Date of Occurrence: 00-09-2014	NOT TO SCALE
-------------------------------------	---	--	---	--	---------------------





ST. LOUIS COUNTY POLICE DEPARTMENT CRIME LABORATORY WEAPON ANALYSIS REPORT

Juris: 089 Complain 2014 - 43984 Sheet 5 Item 1



SPECIMENS:

- QB1 - COPPER JHP BULLET (DAMAGED), .40 CAL., 6-L, FROM "FPD VEH. 108". (158.0 gr.) {CSU #7}
- QB2 - COPPER JHP BULLET (DAMAGED), .40 CAL., 6-L, FROM BROWN'S "RIGHT SIDE OF BACK". (177.0 gr.) {CSU #14}
- QB3 - COPPER JHP BULLET (DAMAGED), .40 CAL., 6-L, FROM BROWN'S "RIGHT SIDE OF CHEST". (152.6 gr.) {CSU #15}
- QB4 - COPPER JHP BULLET (DAMAGED), .40 CAL., 6-L, FROM BROWN'S "RIGHT SIDE OF HEAD". (151.0 gr.) {CSU #16}
- QB5 - COPPER JHP BULLET (DAMAGED), .40 CAL., 6-L, FROM "ROADWAY". (180.2 gr.) {CSU #17}

QC1-12 - TWELVE FIRED CARTRIDGE CASES (FEDERAL), .40 S&W CALIBER.
 (QC1,2 ARE CSU'S ITEMS 3,4 FROM "STREET IN FRONT OF 2964 CANFIELD"; QC3 IS CSU'S ITEM 10 FROM "STREET 2943 CANFIELD"; QC4,5 ARE CSU'S ITEMS 11,12 FROM "GRASSY AREA BETWEEN ROAD/SIDEWALK ON SOUTH SIDE OF ROAD"; QC6-10 ARE CSU'S ITEMS 13-18 AND 18 FROM "ROADWAY IN FRONT OF 2943 CANFIELD"; AND QC11,12 ARE CSU'S ITEMS 21,22 FROM "GRASSY AREA BETWEEN ROAD AND SIDEWALK ON SOUTH SIDE OF ROAD".)

NARRATIVE:

SPECIMENS QB1-5 WERE COMPARED MICROSCOPICALLY WITH EACH OTHER AND TEST-FIRED SPECIMENS TB1A,B. DUE TO THE DAMAGE SUSTAINED BY SPECIMEN QB1, IT WAS INCONCLUSIVE. HOWEVER, SPECIMENS QB2-5 WERE IDENTIFIED FOR HAVING BEEN FIRED FROM THE DESCRIBED PISTOL, SPECIMEN QF1, BASED ON THE SUFFICIENT QUANTITY AND QUALITY OF MATCHING INDIVIDUAL CHARACTERISTICS IN THE RIFLING STRIATIONS.

SPECIMENS QC1-12 WERE COMPARED MICROSCOPICALLY WITH EACH OTHER AND TEST-FIRED SPECIMENS TC1A,B. THESE SPECIMENS WERE IDENTIFIED FOR HAVING BEEN FIRED IN THE DESCRIBED PISTOL, SPECIMEN QF1, BASED ON THE SUFFICIENT QUANTITY AND QUALITY OF MATCHING INDIVIDUAL CHARACTERISTICS IN THE BREECH FACE IMPRESSIONS.

FIREARM EXAMINER

CONCURRED.

Administrative Approval By: _____

Date: 8-19-14

