

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

REQUEST BY THE AMERICAN CIVIL LIBERTIES UNION FOUNDATION  
FOR PRECAUTIONARY MEASURES UNDER ARTICLE 25(2) OF THE COMMISSION'S  
RULES OF PROCEDURE, AGAINST  
THE UNITED STATES OF AMERICA  
THE STATE OF MISSOURI  
THE STATE OF OKLAHOMA

ON BEHALF OF:

RUSSELL BUCKLEW

CHARLES WARNER

Submitted under the provisions of Article 23 of the Commission's Rules of Procedure by counsel  
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## I. INTRODUCTION

The American Civil Liberties Union (ACLU) requests precautionary measures, under Article 25 of the Rules of Procedure of the Inter-American Commission on Human Rights, on behalf of Russell Bucklew and Charles Warner, who have been sentenced to death by the state of Missouri and the state of Oklahoma, respectively. **Mr. Bucklew's execution is scheduled on May 21, 2014, while Mr. Warner's execution is scheduled on November 13, 2014.**

If Mr. Bucklew's execution proceeds, it will be the first execution in the United States since the horrific, botched execution of Clayton Lockett in Oklahoma on April 29, 2014. The Missouri protocol calls for the administration of compounded pentobarbital, a recipe for a substantial risk of excruciating pain based on other recent executions. In Mr. Bucklew's case, that risk of excruciating pain is a near certainty because he suffers from a rare and serious congenital medical condition: cavernous hemangioma. The condition has left him with a severely compromised airway and causes frequent bleeding in his face, difficulty speaking, and often severe pain. As a result of this condition, under the current protocol, there is a substantial risk that the drug will not circulate properly, leading Mr. Bucklew to hemorrhage, choke, and suffocate.

Both Missouri and Oklahoma have shielded information about the source of their drugs and have attempted to keep the execution details hidden from the world. Even in the face of a global outcry over the Lockett execution, Oklahoma has refused to order an independent investigation into the failed experimental protocol. The planned executions of Mr. Bucklew and Mr. Warner, if permitted to go forward, would violate multiple international treaties and norms, including their rights to be free from cruel, inhuman, or degrading treatment or punishment, as well as their right to be free from human experimentation without consent.

In accordance with Article 28(i) and Article 33 of the Rules of Procedure of this Commission, no claim contained within this petition has been submitted pursuant to another procedure before an international governmental organization of which the United States is a member.

## II. OVERVIEW: BACKGROUND AND CONTEXT

The United States is among the minority of member states of the Organization of American States ("OAS") that has yet to abolish the death penalty. As of May 6, 2014, 1,379 people have been executed in the United States since the modern death penalty era began in

1976.<sup>1</sup> The U.S. death penalty system in 32 states, the federal system, and the military continues to violate the obligations of the United States under both regional and human rights instruments. As of January 1, 2014, there were 3,070 people awaiting execution across the country.<sup>2</sup> Although international law does not prohibit *per se* the imposition of the death penalty, it imposes specific prohibitions and restrictions “designed to delimit strictly its application and scope, in order to reduce the application of the death penalty to bring about its gradual disappearance.”<sup>3</sup> Moreover, there is an evolving international consensus against the death penalty, with more countries abolishing it and regional and national courts increasingly holding “that the death penalty, both as a general practice and through the specific methods of implementation and other surrounding circumstances, can amount to cruel, inhuman, or degrading treatment or even torture.”<sup>4</sup>

In fact, the evolving consensus towards the abolition of the death penalty is taking root in the United States as well. In the past dozen years, the U.S. Supreme Court has outlawed the execution of juveniles, the intellectually disabled, and those who have not committed homicide.<sup>5</sup> The number of new death sentences has dropped dramatically – from a peak of 315 in 1996 to 80 in 2013.<sup>6</sup> New York, New Jersey, New Mexico, Illinois, Connecticut, and Maryland have recently repealed the death penalty. In February 2014, Governor Jay Inslee of Washington State declared a moratorium on the death penalty during his term as governor.<sup>7</sup> Furthermore, both Delaware and New Hampshire came close to repealing the death penalty in 2013 and 2014. After passing in the Senate, Delaware’s bill was tabled in the House of Representatives on March 28, 2013.<sup>8</sup> Conversely, New Hampshire’s bill to repeal capital punishment passed in its House of Representatives on March 12, 2014, but for now has been tabled in the Senate.<sup>9</sup>

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<sup>1</sup> Death Penalty Information Center, Executions by Year (1976-2014), available at <http://www.deathpenaltyinfo.org/executions-year> (last visited May 19, 2014).

<sup>2</sup> NAACP LDF, Death Penalty USA 1 (Winter 2014), available at [http://www.naacpldf.org/files/publications/DRUSA\\_Winter\\_2014.pdf](http://www.naacpldf.org/files/publications/DRUSA_Winter_2014.pdf).

<sup>3</sup> Restrictions to the Death Penalty (Arts. 4(2) and 4(4) American Convention on Human Rights), Advisory Opinion OC-3/83, Inter-Am. Ct. H.R. (ser. A) No. 3, ¶ 57 (Sept. 8, 1983).

<sup>4</sup> Juan E. Méndez, *The Death Penalty and the Absolute Prohibition of Torture and Cruel, Inhuman, and Degrading Treatment or Punishment* 20 Human Rights Brief 2 (2012), available at <http://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1849&context=hrbrief>.

<sup>5</sup> *Roper v. Simmons*, 543 U.S. 551 (2005); *Atkins v. Virginia*, 536 U.S. 304 (2002); *Kennedy v. Louisiana*, 554 U.S. 407 (2008).

<sup>6</sup> Death Penalty Information Center, The Death Penalty in 2013: Year End Report (2013), available at <http://www.deathpenaltyinfo.org/documents/YearEnd2013.pdf>.

<sup>7</sup> Jonathan Kaminsky, *Washington state governor declares death penalty moratorium*, Reuters, Feb. 11, 2014, available at <http://www.reuters.com/article/2014/02/12/us-usa-executions-washingtonstate-idUSBREA1A1TC20140212>.

<sup>8</sup> Jon Swaine, *New Hampshire opponents of death penalty urge repeal with proposed law*, Guardian, Apr. 5, 2014, available at <http://www.theguardian.com/world/2014/apr/05/new-hampshire-death-penalty-proposed-law>.

<sup>9</sup> Katharine Q. Seelye, *Measure to Repeal Death Penalty Fails by a Single Vote in New Hampshire Senate*, N.Y. Times, Apr. 18, 2014 at A12, available at [http://www.nytimes.com/2014/04/18/us/in-new-hampshire-measure-to-repeal-death-penalty-fails-by-a-single-vote.html?hpw&rref=us&\\_r=1](http://www.nytimes.com/2014/04/18/us/in-new-hampshire-measure-to-repeal-death-penalty-fails-by-a-single-vote.html?hpw&rref=us&_r=1).

The American Civil Liberties Union (ACLU) opposes the death penalty in all circumstances. The U.S. death penalty system continues to be flawed and unsalvageable. Following the U.S. International Covenant on Civil and Political Rights (ICCPR) Review in March 2014, the U.N. Human Rights Committee highlighted the shortcomings of the U.S.'s capital punishment system and expressed concern over the high number of people wrongfully sentenced to death, racial disparities in death penalty sentencing, inadequate compensation after wrongful conviction, and the lack of oversight of lethal drug providers. State by state, momentum is building towards nationwide abolition, which would remedy the numerous violations plaguing the system.

But until the 32 death penalty states and the federal government abolish the death penalty, international human rights law requires them to use execution methods that will produce the least possible physical and mental suffering. As noted by Human Rights Watch in its 2006 report, *So Long as They Die: Lethal Injections in the United States*, "it is not enough for public officials to believe that lethal injection is inherently more humane than the electric chair. States must choose carefully among possible drugs and administration procedures to be sure they have developed the specific protocol that will reduce, to the greatest extent possible, the prisoner's risk of mental or physical agony."<sup>10</sup>

Although the U.S. Supreme Court has held that one method of lethal injection used in the U.S. is constitutional,<sup>11</sup> that method depended upon a drug which is no longer available after its manufacturer objected to the use of the drug for executions. States have hurriedly switched to new, untested methods, with little information released or oversight allowed.<sup>12</sup> As a result, many states, including South Dakota, Pennsylvania, Georgia, Texas, Ohio, Oklahoma, and Missouri, have begun purchasing lethal drugs from compounding pharmacies that produce derivative drugs not approved by the Food and Drug Administration,<sup>13</sup> and have turned to novel and untested drug combinations.

The current lethal injection schemes in Oklahoma and Missouri violate the United States Constitution's Eighth Amendment ban on cruel and unusual punishment by creating an objectively intolerable risk of excruciating pain. These unconstitutional practices have been facilitated by the secrecy surrounding the development and implementation of lethal injection protocols in these states. On April 7, 2014, the United States Supreme Court declined to review whether Missouri's current execution protocol is constitutional under *Baze v. Rees*.<sup>14</sup> On April

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<sup>10</sup> Human Rights Watch, *So Long as They Die: Lethal Injections in the United States* (2006), available at <http://www.hrw.org/sites/default/files/reports/us0406webwcover.pdf>.

<sup>11</sup> *Baze v. Rees*, 553 U.S. 35 (2008).

<sup>12</sup> *Lethal Injection*, Death Penalty Information Center, <http://www.deathpenaltyinfo.org/lethal-injection-moratorium-executions-ends-after-supreme-court-decision#changes> (last visited May 18, 2014).

<sup>13</sup> *Compounding Pharmacies and Lethal Injection*, Death Penalty Information Center, <http://www.deathpenaltyinfo.org/compounding-pharmacies> (last visited may 18, 2014).

<sup>14</sup> *Zink v. Lombardi*, (8th Cir. 2014). *cert. denied* (U.S. Feb. 25, 2014) (No. 13-8856).

23, 2014, the Supreme Court of Oklahoma rejected the claim that secrecy surrounding the source of drugs used in executions violated the defendants' constitutional access to courts.<sup>15</sup>

### **The Rise of Botched Executions across the United States**

Condemned prisoners across the United States have suffered prolonged, excruciating pain during executions under these experimental protocols and drug combinations.

In October 2012, in South Dakota, Eric Robert was executed using compounded pentobarbital. Witnesses reported that he appeared to clear his throat and gasp heavily, at which point his skin turned a blue-purplish hue. Mr. Robert opened his eyes, and they remained open until his death.<sup>16</sup>

Michael Lee Wilson was executed in Oklahoma on January 9, 2014, using Oklahoma's three-drug lethal injection protocol, starting with compounded pentobarbital. Within twenty seconds of the administration of the pentobarbital, Mr. Wilson said, "I feel my whole body burning."<sup>17</sup> Attorneys and experts had warned that pentobarbital is considered a controversial substitute for sodium thiopental because its manufacture is often poorly regulated, and contaminated batches can cause excruciating pain prior to death.

Introducing a novel and experimental two-drug execution method, the State of Ohio executed Dennis McGuire on January 16, 2014 with midazolam and hyromporhone. Mr. McGuire was described as struggling, heaving, gasping for air, and choking with clenched fists in the 25 minutes it took to execute him.<sup>18</sup> Mr. McGuire's execution was only the most recent in a long wave of botched executions in Ohio.<sup>19</sup>

Most recently, on April 29, 2014, the State of Oklahoma's execution of Clayton Lockett subjected Mr. Lockett to prolonged and apparent excruciating pain. Oklahoma took 51 minutes to insert an intravenous line into Mr. Lockett. Ultimately, the line was inserted into the femoral

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<sup>15</sup> *Lockett and Warner v. Evans*, Nos. 112741, 112764, 2014 WL 1632235 (Okla. Apr. 23, 2014).

<sup>16</sup> Dave Kolpack and Kristi Eaton, *Eric Robert Execution: South Dakota Executes Inmate Who Killed Prison Guard*, Huffington Post, Oct. 16, 2012, available at [http://www.huffingtonpost.com/2012/10/16/eric-robert-execution\\_n\\_1969640.html](http://www.huffingtonpost.com/2012/10/16/eric-robert-execution_n_1969640.html).

<sup>17</sup> Rick Lyman, *Ohio Execution Using Untested Drug Cocktail Renews the Debate Over Lethal Injections*, N.Y. Times, Jan. 16, 2014., available at [http://www.nytimes.com/2014/01/17/us/ohio-execution-using-untested-drug-cocktail-renews-the-debate-over-lethal-injections.html?\\_r=0](http://www.nytimes.com/2014/01/17/us/ohio-execution-using-untested-drug-cocktail-renews-the-debate-over-lethal-injections.html?_r=0).

<sup>18</sup> Erica Goode, *After a Prolonged Execution In Ohio, Questions Over 'Cruel and Unusual'*, N.Y. Times, Jan. 18, 2014, at A12, available at <http://www.nytimes.com/2014/01/18/us/prolonged-execution-prompts-debate-over-death-penalty-methods.html>.

<sup>19</sup> See Jim Heath, *ACLU Asks Kaisch to Halt Executions in Ohio Through 2015*, WBNS-10TV (Columbus, OH), Apr. 30, 2014, available at <http://www.10tv.com/content/stories/2014/04/30/columbus-aclu-asks-to-halt-executions.html>.

vein his groin.<sup>20</sup> The State began the administration of midazolam, the first drug, at 6:23 p.m. Seven minutes later, at 6:30 p.m., Mr. Lockett was still conscious.<sup>21</sup> Ten minutes after the initial injection, Mr. Lockett was pronounced unconscious and was administered vecuronium bromide and potassium chloride.<sup>22</sup> Shortly thereafter, it became clear that Mr. Lockett was not unconscious as he writhed, breathed heavily, and mumbled.<sup>23</sup> According to media witnesses, he clenched his teeth and tried to rise off the bed. Mr. Lockett's lawyer said it looked "like torture."<sup>24</sup> At 6:42 p.m., the prison officials then closed the blinds, blocking the witnesses' view.<sup>25</sup> The warden called off the execution, announcing the obvious: the doctor had observed a problem.<sup>26</sup> He said Mr. Lockett's "vein had blown," and they did not know how much of the drugs he had received.<sup>27</sup> Mr. Lockett died at 7:06 p.m., 43 minutes after the prison administered the midazolam.<sup>28</sup>

The White House characterized the gruesome execution of Clayton Lockett as falling short of the requirement that the death penalty be carried out humanely.<sup>29</sup> And on May 2, 2014, President Obama tasked Attorney General Eric Holder with conducting a full policy review of capital punishment in the U.S., acknowledging both the cruelty of lethal injections and racial disparities in sentencing. To prevent imminent and irreparable harm, petitioners are urging the Commission to adopt precautionary measures and, most importantly, to immediately stay executions of petitioners until the Commission has had an opportunity to review their cases and their petitions on the merits.

### III. MISSOURI AND RUSSELL BUCKLEW

#### Procedural Summary

Russell Bucklew is scheduled to be the first death row prisoner executed in the United States following Oklahoma's botched execution of Clayton Lockett. Mr. Bucklew is a Missouri prisoner, sentenced to death in 1997. He is housed at the Potosi Correctional Center in Mineral Point, Missouri. His state direct appeal, state post-conviction, and federal habeas claims were

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<sup>20</sup> Letter from Robert Patton, Director of the Department of Corrections, Oklahoma, to Mary Fallin, Governor, Oklahoma (May 1, 2014) (hereinafter Patton Letter).

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> Erik Eckholm, *One Execution Botched, Oklahoma Delays the Next*, N.Y. Times, April 30, 2014, at A1, available at <http://www.nytimes.com/2014/04/30/us/oklahoma-executions.html>.

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*; Patton Letter, *supra* note 20.

<sup>26</sup> Eckholm, *supra* note 23.

<sup>27</sup> Patton Letter, *supra* note 20.

<sup>28</sup> *Id.*

<sup>29</sup> *Compounding Pharmacies and Lethal Injection*, *supra* note 13.

denied.<sup>30</sup> On April 9, 2014, the Missouri Supreme Court set his execution date for May 21, 2014.

### **The Background to Missouri’s Secrecy Litigation**

The State of Missouri has made concerted efforts to conceal information about its execution process. In 2006, the *St. Louis Post-Dispatch* uncovered disturbing facts about the basic competence of the doctor who had overseen over 50 executions in Missouri: he admitted to routine errors in the administration of the drugs, and was the target of more than 20 malpractice lawsuits. He had also been publicly reprimanded by the State Board of Healing Arts for attempting to conceal the malpractice claims filed against him from the hospitals where he was working.<sup>31</sup> The response of the legislature was, in 2007, to revise its “Black Hood Law” to shield the entire Missouri process from the public, including the identity of members of the execution team. While the troubled doctor no longer oversees Missouri executions, the identity of the new doctor is unknown. Even under the revised law, Missouri routinely provided information about the source of the drugs used in its lethal injections to the public, but on October 22, 2013, the Missouri Department of Corrections (DOC) unilaterally announced that it was adding the compounding pharmacy to its execution team, in order to shield its identity from the public.

In 2012, prisoners on Missouri’s death row filed a lawsuit in federal district court raising several constitutional challenges to the State’s new lethal injection protocol. In December 2013, the State sought a protective order to prohibit disclosure of the identities of all execution team members, including the pharmacist who compounds the pentobarbital used in executions, the laboratory that tests the compounded drug, and the doctor who prescribes the compounded drug. When the District Court ordered this discovery, the State appealed to the Eighth Circuit. A three-judge panel of the Eighth Circuit ordered the State to disclose the identities of the compounding pharmacy and testing laboratory, but not the prescribing physician.<sup>32</sup> The State sought rehearing before the full Eighth Circuit. The Court, en banc, then vacated the district court’s orders to disclose the identity of the physician, the laboratory, and the compounding pharmacy.<sup>33</sup> The Court found that plaintiffs failed to state a claim under the Eighth Amendment to the United States Constitution under *Baze v. Rees*, because they had not pled a known and available alternative to the current execution method.<sup>34</sup> The plaintiffs, including Mr. Bucklew, sought

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<sup>30</sup> See *State v. Bucklew*, 973 S.W.2d 83, 86–87 (Mo. banc 1998) (affirming Bucklew's convictions and sentences on direct appeal), *cert. denied*, 525 U.S. 1082 (1999); *Bucklew v. State*, 38 S.W.3d 395, 397 (Mo. banc 2001) (affirming the denial of postconviction relief), *cert. denied*, 534 U.S. 964 (2001); *Bucklew v. Leubbers*, 436 F.3d 1010 (8th Cir. 2006), *cert. denied*, 549 U.S. 1079 (2006).

<sup>31</sup> *Mo. Execution Doctor Had History of Errors*, Wash. Post, Jul. 31, 2006, available at [http://www.washingtonpost.com/wp-dyn/content/article/2006/07/30/AR2006073000507\\_pf.html](http://www.washingtonpost.com/wp-dyn/content/article/2006/07/30/AR2006073000507_pf.html).

<sup>32</sup> See *In re Lombardi*, No. 13-3699, 2014 WL 288937 (8<sup>th</sup> Cir. Dec. 27, 2013).

<sup>33</sup> *In re George A. Lombardi*, 741 F.3d 888 (8<sup>th</sup> Cir. 2014).

<sup>34</sup> *Id.* at 896.

rehearing of the Court’s opinion, which was denied.<sup>35</sup> The plaintiffs’ writ of certiorari to the United States Supreme Court was also denied.<sup>36</sup> Justice Ruth Ginsburg, joined by Justices Elena Kagan and Sonia Sotomayor, would have granted a stay of execution for the “reasons well stated” in the dissent in the Eighth Circuit by Judge Kermit E. Bye (as described below).

Missouri executed Joseph Franklin, Allen Nicklasson, and Herbert Smulls while litigation seeking stays of execution remained pending in the federal court.<sup>37</sup> When, after Nicklasson’s execution, the Eighth Circuit Court of Appeals dismissed his stay application as moot, Judge Kermit Bye authored a scathing dissent documenting Missouri’s long history of executing prisoners while federal courts were still considering whether the conviction and death sentence violated the U.S. Constitution. Judge Bye said, “I am alarmed that Missouri proceeded with its execution of Allen Nicklasson before this court had even finished voting on Nicklasson’s request for a stay. In my near fourteen years on the bench, this is the first time I can recall this happening.”<sup>38</sup>

When Michael Taylor, who was the next in line for execution in Missouri, sought a stay of his execution to resolve the remaining constitutional challenges to the protocol, the federal district court and a three-judge panel of the Eighth Circuit Court of Appeals denied it, and then denied rehearing en banc. Dissenting to the denial, Judge Bye, along with two other justices, sharply criticized the secrecy surrounding Missouri’s lethal injection protocol and would have granted a stay to Mr. Taylor. He wrote, “Missouri has again at the eleventh hour amended its procedure and again is using a shadow pharmacy hidden behind the hangman’s hood.” Given the secrecy surrounding the compounding pharmacy, it could be “nothing more than a high school chemistry class.” He concluded: “Missouri has a storied history of ignoring death row inmates’ constitutional rights to federal review of their executions. I once again fear Missouri elevates the ends over the means in its rush to execute [the prisoner].” Michael Taylor was executed on February 26, 2014.

With these rulings, Missouri has effectively prevented death row prisoners from arguing that a given method of execution violates the Eighth Amendment’s prohibition of cruel and unusual punishment by barring them from knowing what the method is.

### **Compounded Pentobarbital and Central Line Administration**

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<sup>35</sup> *In re Lombardi*, 741 F.3d 903 (8<sup>th</sup> Cir. 2014).

<sup>36</sup> *See Zink v. Lombardi*, Sup. Ct. No. 13-8435 (Apr. 7, 2014).

<sup>37</sup> Andrew Cohen, *Missouri Executed This Man While His Appeal Was Pending in Court*, Atlantic, Feb. 1, 2014, available at <http://www.theatlantic.com/national/archive/2014/02/missouri-executed-this-man-while-his-appeal-was-pending-in-court/283494/>.

<sup>38</sup> *Zink v. Lombardi*, Sup. Ct. No. 13-3664 (Dec. 23, 2013).



Over the last two years, Missouri's lethal injection protocol has been a "frustratingly moving target," as the federal judge overseeing Missouri's lethal injection litigation observed. In May 2012, Missouri announced plans to use a propofol protocol. When medical professionals expressed concern that use of propofol would impact the drug's availability for legitimate medical purposes, the State abandoned that plan. It subsequently changed the propofol protocol twice, introducing new chemicals in each new protocol. On October 22, 2013, Missouri announced yet another protocol: that it would proceed with executions using compounded pentobarbital. This is the protocol that Missouri plans to use for Mr. Bucklew's execution.

Pentobarbital is a short-acting barbiturate. Its efficacy depends on its purity and concentration. Compounding pharmacies in the United States are largely unregulated and are generally not subject to the drug approval process, rigorous checks, and regulatory procedures of pharmaceutical manufacturers regulated by the U.S. Food and Drug Administration. State regulation of compounding pharmacies varies substantially from state to state, but no state regulates compounding pharmacies in a manner that would replicate the FDA's regulation of pharmaceutical manufacturers. The Missouri Department of Corrections refuses to disclose any information about the drug's safety, purity, and potency, and will not even confirm whether the drug is subject to any laboratory testing at all.

Missouri has acquired its pentobarbital in a suspect manner, in the absence of any regulation or accountability. In litigation, Missouri has consistently refused to disclose the identity of the compounding pharmacy/pharmacies where it has purchased drugs. In a recent legislative hearing, however, Missouri Department of Corrections Director George Lombardi admitted that the Department had purchased its execution drugs for at least three recent executions from a compounding pharmacy out-of-state.<sup>39</sup> The media has reported this pharmacy to be the Apothecary Shoppe in Oklahoma, which is not licensed to sell drugs in Missouri.<sup>40</sup> Lombardi also admitted that an official from the Missouri DOC drives across state lines, with \$11,000 in cash, to purchase the drug, and then transports the drug back to Missouri and that the DOC uses cash payments to protect the anonymity of the compounding pharmacy.<sup>41</sup> The identity of the compounding pharmacy currently supplying Missouri with its lethal drugs is unknown.

There have been troubling reports from executions in other states using compounded pentobarbital in a one-drug protocol, in addition to the executions using compounded pentobarbital in a multi-drug protocol as described above. Eric Robert was executed in 2012 by South Dakota using compounded pentobarbital. After he was injected, he gasped heavily, snored loudly with his eyes open, and his skin turned purple. An expert pharmacologist has described

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<sup>39</sup> Collin Reischman, *DOC Hearing Shows Legislative Action on Executions Likely*, Mo. Times, Feb. 10, 2014, available at <http://themissouritimes.com/8173/doc-hearing-shows-legislative-action-executions-likely/>.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

this reaction as consistent with contaminated drugs. Texas, too, has used compounded pentobarbital in recent executions. During the last execution in the state, on April 16, 2014, the condemned prisoner Jose Villegas said “it does kind of burn,” as the drug took effect.

The Missouri protocol further provides the option to use a central venous line (femoral, jugular, or subclavian) for the placement of the intravenous line, over the peripheral line access, commonly used in other states’ protocols. Central line access is inherently more invasive and painful, and presents a significant risk of complications, such as suffocation by collapsed lung; perforation or laceration of large blood vessels leading to severe and fatal hemorrhage or suffocation; perforation of the bowel or bladder; and cardiac arrhythmia leading to hemodynamic collapse and death.

### **The Unique Threat Posed for Mr. Bucklew’s Execution**

Mr. Bucklew’s execution with this protocol also presents a unique threat of cruel, inhuman, or degrading treatment and even torture. Mr. Bucklew suffers from cavernous hemangioma in his neck and head, a blood vessel condition that causes clumps of weakened, malformed vessels to grow in his head, face, and throat, displacing healthy tissue and rupturing under stress. He has had the condition since infancy, and his vascular malformations have grown steadily worse through adulthood, causing constant facial pain and pressure along with difficulty breathing. Mr. Bucklew has a massive vascular tumor occupying his nose, throat, and airway passages. The size of Mr. Bucklew’s tumor and the weakness of his distended vessels create the very substantial risk that he will suffer excruciating, even torturous, pain during an execution. Mr. Bucklew frequently suffers from nausea, dizziness, and bouts of severe pain, as well as loss of consciousness. The execution could cause Mr. Bucklew to bleed in his face, mouth, and throat. If the blood enters his airway, it would likely cause choking and coughing, which Mr. Bucklew would experience as severe pain and suffocation. In addition, Mr. Bucklew takes several medications to manage his medical condition, creating a substantial risk of adverse events resulting from drug interactions. Pentobarbital is an analgesic – that is, it tends to exaggerate or worsen pain. The risks arising from drug interactions and the analgesic effects of pentobarbital are further exacerbated by the use of compounded pentobarbital, which, unlike a manufactured drug, carries no guarantees of its safety, potency, or purity.

Missouri’s lethal injection protocol calls for the administration of five grams of pentobarbital, administered through an IV line into the execution chamber, where the prisoner is alone and strapped to a gurney. No medical personnel are close at hand during the execution; they monitor the prisoner remotely from the “execution support room.” Non-medical personnel administer the lethal drug by injecting it into a syringe. No one is in the execution chamber during the administration of the lethal drug other than the prisoner.

A report following a June 2010 MRI noted that the tumor has caused Mr. Bucklew's airway to be "severely compromised." Two board-certified physicians, one an anesthesiologist, and one a neuroradiologist, reviewed Mr. Bucklew's medical records and imaging results and concluded that there is a substantial risk that, during an execution, his vascular malformations would inhibit the lethal drug from circulating properly. If the prisoner is not killed by the execution, there is no protocol or equipment for resuscitation, and nothing in Missouri's execution protocol addresses how to handle the risks posed by a prisoner's unique medical or physical condition. Accordingly, Missouri's scheduled execution of Mr. Bucklew will amount to an unregulated experiment on a human subject.

The execution team members either lack the necessary training to carry out lethal injection – particularly in the case of someone like Mr. Bucklew, who has a complex medical condition – or they are acting explicitly contrary to the dictates of safe medical practice. Only after counsel had presented the concerns of the board-certified physicians did the State acknowledge that testing should be done to evaluate and minimize the risks to him during the execution. Though his medical problems have been well-known for decades and Mr. Bucklew's tumors have continued to grow all his life, on May 7, 2014 – a mere two weeks before Mr. Bucklew's scheduled execution – the Missouri Attorney General's Office and the Missouri DOC proposed venous studies of Mr. Bucklew's arms. There was no request to conduct any scans of Mr. Bucklew's bloated vascular malformations. After discussions with counsel, the Attorney General and the DOC initially agreed that an MRI was necessary, but only if it could take place before the scheduled execution date. Going through all of the needed tests would take weeks. To date, no testing has been ordered or completed by the Missouri DOC.

The State altered the protocol again on May 13, 2014, to remove methylene blue from the saline fluids used to start and flush the IV line. Methylene blue poses risks to Mr. Bucklew because it tends to raise blood pressure, which could aggravate his tumors and cause a greater threat to his airway. The State's new plan to use no dye at all, however, poses a risk because the dye is used to ensure the IV line is running properly. Also, those injecting the syringes through the IV lines are non-medical personnel. They have trained only with fluids that include a blue dye; proceeding without the dye therefore is dangerous and outside the scope of their training. Without the dye, they will have difficulty ensuring that the IV line is running properly. The risks to Mr. Bucklew would also be amplified by his lying flat on the execution gurney, because his airway is more likely to become fully obstructed. As a result, the State is now proposing to alter the position of the gurney. The decision on the degree of adjustment of the gurney will be made by a medical professional – the doctor or nurse on the execution team – who doesn't know Mr. Bucklew, has never examined his airway, and has no recent imaging or diagnostic records to review.

Mr. Bucklew filed a suit challenging Missouri's execution protocol as it applies to him specifically, given his serious medical condition, in the United States District Court-Western District of Missouri, on May 9, 2014. In that litigation, Mr. Bucklew has sought a stay of execution and a temporary restraining order from the Court, which remain pending. In light of the willingness of Missouri officials to proceed with executions while litigation remains pending, and in light of Mr. Bucklew's imminent execution, precautionary measures are necessary.

#### IV. OKLAHOMA AND CHARLES WARNER

##### Procedural Summary

Charles Warner is an Oklahoma death row prisoner housed at the Oklahoma State Penitentiary in McAlester, Oklahoma. He was sentenced to death following a jury trial on July 23, 2003. Mr. Warner appealed his death sentence and convictions in Oklahoma state courts and to the United States Supreme Court on direct review; his claims were denied.<sup>42</sup> Mr. Warner then sought review of his conviction and sentence in state post-conviction and federal habeas proceedings. These claims were all denied.<sup>43</sup> After the United States Supreme Court denied certiorari of his federal habeas case, the Oklahoma Court of Criminal Appeals set an execution date for Mr. Warner for March 27, 2014. The Oklahoma Court of Criminal Appeals had set an execution date the week before, on March 20, 2014, for another Oklahoma death row inmate, Clayton Lockett. Because of the proximity of their execution dates, the two inmates filed joint challenges to the new 2011 Oklahoma statute governing their executions.

Before 2011, Oklahoma state law required that executions be carried out by "continuous, intravenous administration" of a short-acting barbiturate in combination with a paralytic agent until death is pronounced by a license physician.<sup>44</sup> Under the former law, Oklahoma followed a three-drug protocol for execution: first, sodium thiopental or pentobarbital, followed by vecuronium bromide, a paralytic, and finally potassium chloride to stop the inmate's heart. The three-drug protocol with sodium thiopental was originally used by the Department of Corrections in Oklahoma in 1977, and had been widely followed by other death penalty states for over twenty years in carrying out executions.<sup>45</sup>

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<sup>42</sup> *Warner v. State*, 2006 Okla. Crim. 40 (2006) (denying Warner's direct appeal), *cert denied*, *Warner v. Oklahoma*, 550 U.S. 942 (2007).

<sup>43</sup> *Warner v. State*, No. PCD-2003-897 (Okla. Crim. Dec. 19, 2006) (denying Warner's state post-conviction petition); *Warner v. Workman*, 814 F. Supp. 2d 1188 (W.D. Okla. 2011) (denying federal habeas petition), *aff'd*, *Warner v. Trammell*, 520 F. Appx. 675 (10th Cir. 2013), *cert denied*, *Warner v. Trammell*, 134 S. Ct. 924 (2014).

<sup>44</sup> 22 O.S. Tit. X, § 1014.

<sup>45</sup> Deborah Denno, *The Lethal Injection Quandry: How Medicine Has Dismantled the Death Penalty*, 76 *Fordham L. Rev.* 49 (2007).

After Hospira – the only FDA-approved manufacturer of sodium thiopental in the United States – stopped manufacturing the drug domestically in 2010, Oklahoma initially turned to pentobarbital as a substitute for sodium thiopental.<sup>46</sup> Then Lundbeck, the only FDA-approved manufacturer of pentobarbital in the United States (brand name “Nembutal),” imposed new restrictions to ensure that Nembutal could no longer be sold to corrections departments or used in executions. The last Oklahoma execution to use manufactured pentobarbital was in August 2012.

In response, Oklahoma changed its laws in two major ways in 2011: first, it permitted executions by lethal injection of any “drug or drugs,” no longer specifying the kinds or class of drugs permitted for use.<sup>47</sup> Second, it shrouded the entire process in total secrecy. Under the new law, “[t]he identity of all persons who participate in or administer the execution process and persons who supply the drugs, medical supplies or medical equipment for the execution shall be confidential and shall not be subject to discovery in any civil or criminal proceedings.”<sup>48</sup>

Faced with the lack of manufactured sodium thiopental or pentobarbital, the Oklahoma Department of Corrections obtained compounded pentobarbital for the 2014 execution of Michael Wilson. Compounded pharmaceuticals carry unique risks because they are manufactured with minimal government oversight and have a documented history of contamination.

Pursuant to the new statute, Oklahoma refused to disclose the source of the compounded pentobarbital and used the drug from an unnamed source to execute Michael Wilson on January 9, 2014. Observers of the execution reported that Mr. Wilson cried out after he was injected, “I feel my whole body burning.”<sup>49</sup>

Mr. Warner and Mr. Lockett also objected to the secrecy provisions, which blocked information about the source of the drugs used in the protocol. They contended that the secrecy provisions were unconstitutional because these provisions denied them access to the courts and curtailed due process by denying them information necessary to litigate their claims. Due to the secrecy surrounding the protocol, a non-speculative constitutional challenge to the extreme pain and suffering the protocol could present to the prisoners was impossible.

Mr. Warner and Mr. Lockett eventually learned that the Department of Corrections intended to execute them with an untested and new three-drug cocktail, consisting of: (1) 100

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<sup>46</sup> *Id.*

<sup>47</sup> 22 O.S. Tit. X, § 1015(B).

<sup>48</sup> *Id.*

<sup>49</sup> Lyman, *supra* note 17.

mg/100 ml of midazolam a sedative; (2) 40 mg/20cc of pancuronium bromide; and (3) 200 meq/50 cc of potassium chloride.<sup>50</sup>

No inmate had ever been executed in Oklahoma with that combination of drugs, and indeed in the country, no one had ever been executed with those drugs at those dosage levels. Florida has executed seven defendants using much larger doses of midazolam since October 15, 2013 in a three-drug protocol.<sup>51</sup> Ohio also used midazolam in a two-drug protocol – hyromorphone and midazolam – with disastrous results in the execution of Dennis McGuire.

The Department of Corrections initially informed Mr. Lockett and Mr. Warner that midazolam and pancuronium bromide would be obtained from compounding pharmacies.<sup>52</sup> They were later informed that manufactured forms of both drugs had been obtained, but the Department of Corrections refused to disclose the manufacturer or source of the drugs.<sup>53</sup>

The litigation proceeded on two separate tracks: one, litigation about whether Mr. Warner and Mr. Lockett were entitled to stays of execution; and two, litigation about the merits of their claims that the new statute was unconstitutional. On the merits, the district court ruled for the plaintiffs on March 26, 2014, and found that Title 22 of the Oklahoma Statute, Section 1015(b) was an unconstitutional denial or barrier to their right to access the courts.<sup>54</sup> The district court denied the plaintiffs' other substantive and procedural challenges to the statute.

On April 18, 2014, the State appealed the district court's ruling to the Oklahoma Supreme Court. In the meantime, the litigation for the stay had taken a long and bizarre journey to the same court. The district court ruled that it lacked jurisdiction over the stay application on March 10, 2014. Mr. Warner and Mr. Lockett appealed, and the Oklahoma Supreme Court transferred their application for a stay to the Court of Criminal Appeals on March 13. The Court of Criminal Appeals ordered briefing on the issue of the stay, and the Oklahoma Attorney General notified the court that it lacked the drugs necessary to proceed with executions. In response, the Court of Criminal Appeals reset the executions dates for 30 days later, on April 22 and April 29, 2014, respectively, and dismissed the applications for stays as moot.

After winning on the merits in front of the District Court, Mr. Warner and Mr. Lockett returned to the Court of Criminal Appeals on April 7, 2014 with a renewed application for stays. The Court of Criminal Appeals ruled on April 9, 2014 that it lacked the authority to grant the

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<sup>50</sup> Letter from John D. Hadden, Assistant Oklahoma Attorney General, to Madeline Cohen and O. Dean Sanderford, Assistant Federal Public Defenders (Apr. 1, 2014) (hereinafter Apr. 1 AG Letter).

<sup>51</sup> See Death Penalty Information Center, *State by State Lethal Injection*, available at <http://www.deathpenaltyinfo.org/state-lethal-injection> (last visited May 19, 2014).

<sup>52</sup> Apr. 1 AG Letter, *supra* note 50.

<sup>53</sup> Letter from John D. Hadden, Assistant Oklahoma Attorney General, to Madeline Cohen and O. Dean Sanderford, Assistant Federal Public Defenders (Apr. 11, 2014).

<sup>54</sup> *Lockett et al. v. Evans et al.*, No. CV-2014-330 (D. Okla. April 1, 2014).

stays. The plaintiffs appealed to the Oklahoma Supreme Court, which transferred the stay application once again to the Court of Criminal Appeals on April 17, 2014, after ruling that the Court of Criminal Appeals had jurisdiction to decide the stay application. The Court of Criminal Appeals denied the stay of execution on April 18, 2014, again concluding that it lacked authority to address the merits of the stay application. On April 21, 2014, the Supreme Court of Oklahoma granted the application for stays of execution. The Court strenuously disapproved of the Court of Criminal Appeals' order, finding that it was "invalid for not having followed the constitutional directive of this Court" and requiring the Court to act in order to avoid "violat[ing] our own oaths of office" by leaving the appellants with no access to the courts.<sup>55</sup> The Court granted stays pending the appeal, and ordered the case expedited.

The reaction of the Governor of Oklahoma Mary Fallin was swift and unprecedented. On April 22, 2014, Governor Fallin issued Executive Order 2014-08, stating that the Supreme Court "attempt[ed] to stay the execution of Clayton Lockett" and announcing that she "cannot give effect to the Order by that Honorable Court." She then exercised her own authority to stay the Lockett execution for seven days to April 29, 2014, the same date of Charles Warner's scheduled execution. She "direct[ed] the Oklahoma Attorney General to file the appropriate papers to seek guidance from the Oklahoma Court of Criminal Appeals as to how that Court would direct [her] to implement its Order of the execution of Clayton Derrell Lockett." Commentators noted that Governor Fallin had prompted a constitutional crisis in Oklahoma, by directly challenging the authority of the state supreme court to make adjudications of law and usurping the judicial function.<sup>56</sup> In the meantime, an Oklahoma legislator, Rep. Mike Christian, wrote a resolution calling for the impeachment of the five justices of the Oklahoma Supreme Court who ruled for the stay.<sup>57</sup> Against this background of rushed and overt political manipulation of the judicial process, the execution of Clayton Lockett went forward.

Governor Fallin granted a two-week stay to Mr. Warner in light of the botched execution of Clayton Lockett, moving Mr. Warner's execution date to May 13, 2014. On May 8, 2014, the Oklahoma Court of Criminal Appeals granted an additional six-month stay to allow for a "full and final review" of the execution of Mr. Lockett. Mr. Warner's execution is now scheduled for November 13, 2014.

### **Lack of Independent Review**

The concurring opinion in the Oklahoma Court of Criminal Appeals by Judges Johnson and Smith granting the six-month stay acknowledged that it was "necessary to allow sufficient time for a complete review/revision of the execution protocols in order to conform to best

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<sup>55</sup> *Lockett et al. v. Evans et al.*, No. 112-741 (D. Okla. April 21, 2014).

<sup>56</sup> See e.g., Josh Sanburn, *Oklahoma's Constitutional Crisis Ends with Execution Date Set*, Time, Apr. 25, 2014, available at <http://time.com/75694/oklahoma-lethal-injection-date-lockett-warner-set/>.

<sup>57</sup> *Id.*

practices.” But there is no reason to have confidence in the State to get to best practices because Oklahoma has not granted an independent review of Mr. Lockett’s execution.

The Governor has appointed Michael Thompson, Commissioner of Public Safety, to conduct the investigation. Commissioner Thompson is the Governor’s direct employee and a member of her Cabinet. He was formerly an employee of the Department of Corrections. His general counsel, Stephen Krise, who is involved in the investigation, was formerly an Assistant Attorney General in Oklahoma, and was directly involved in matters relating to lethal injection. And – perhaps most problematic – Commissioner Thompson was himself a witness to Clayton Lockett’s execution. This appointment falls far short of the true independence necessary to fully assess what went wrong with the execution of Mr. Lockett. Even Robert Patton, the Director of Corrections, has called for a full and independent review.<sup>58</sup>

## **V. PETITIONERS FACE IMMINENT AND IRREPARABLE HARM AS A RESULT OF PENDING INHUMAN EXECUTIONS**

Petitioners seek the immediate intervention of this Commission to order precautionary measures requesting the states of Missouri and Oklahoma to halt their plans to execute Mr. Bucklew and Mr. Warner. Article 25 of the Inter-American Commission Rules of Procedure provides that the Commission may request that a State adopt precautionary measures “whether related to a petition or not,” concerning “serious and urgent situations presenting a risk of irreparable harm to persons or to the subject matter of a pending petition or case before the organs of the inter-American system.”

The Commission has authority to consider this Petition and award precautionary measures against the United States, a Member State of the Organization of American States (“OAS”), in accordance with Article 20 of the Statute of the Commission and Article 23 of the Rules of Procedure of the Commission, which authorizes petitioners to file complaints alleging violations of the rights protected under the American Declaration of the Rights and Duties of Man. Moreover, in accordance with the principles contained in Article 25(4)(a) of the Commission’s Rules of Procedure, and as discussed above, the situation of risk has been brought to the attention of the pertinent authorities. The beneficiaries of the request have consented and authorized the ACLU to initiate this action.

Mr. Bucklew’s imminent execution is a serious and urgent situation, and thus requires an immediate protective action to preserve his right to life under Article I of the American Declaration. Moreover, if Mr. Bucklew is executed before the Commission has had an

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<sup>58</sup> Patton Letter, *supra* note 20.



opportunity to examine his case, any eventual decisions will be rendered moot in respect of the effectiveness of potential remedies, resulting in irreparable harm.

Similarly, Mr. Warner's execution deserves immediate attention and urgent consideration, even though his execution was rescheduled to November 2014. The botched execution of Mr. Clayton Lockett on April 29 has reinforced the urgency and the gravity of the situation in the state of Oklahoma, and Oklahoma has not committed to an independent review of Mr. Lockett's execution and the state's protocol. Precautionary measures in the case of Mr. Warner will also be consistent with the Commission's call to the United States and the state of the Oklahoma "to stay pending executions until the state's execution protocol is fully reviewed."<sup>59</sup>

## Legal Framework

The Petitioners request the honorable Commission to review their petition for precautionary measures based on United States human rights obligations as a Member State of the OAS, and as part of the Commission's function to oversee Member State compliance with the human rights obligations set forth in the OAS Charter,<sup>60</sup> and in the case of Member States that have yet to ratify the American Convention on Human Rights, the American Declaration of the Rights and Duties of Man<sup>61</sup> ("American Declaration"). Specifically, the Petitioners ask the honorable Commission to consider this request based on violations of their rights under the American Declaration, including their right to life (Article I), the security of person and freedom from cruel, infamous or unusual punishment (Article XXVI), and the rights to a fair trial and due process (Articles XVIII, XXVI).

The foundation of human rights law is the respect for the inherent dignity of all human beings. Both the American Declaration<sup>62</sup> and the Universal Declaration of Human Rights ("UDHR")<sup>63</sup> recognize the fundamental principle that rights and freedoms are derived from the nature of human existence and that individuals must at all times be treated with dignity and respect. While international law does not *per se* prohibit the death penalty, it does limit the

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<sup>59</sup> Press release, Organization of American States, IACHR Expresses Deep Concern over Agonizing Death of Clayton Lockett in Death Chamber in the United States (May 6, 2014), *available at* [http://www.oas.org/en/iachr/media\\_center/PReleases/2014/049.asp](http://www.oas.org/en/iachr/media_center/PReleases/2014/049.asp).

<sup>60</sup> Charter of the Organisation of American States, Apr. 30, 1948, art. 106 (entered into force Dec. 13, 1951).

<sup>61</sup> The Petitioners intend to file a separate petition requesting a hearing on the merit and consideration of their cases for violations of their rights under the American Declaration.

<sup>62</sup> American Declaration of the Rights and Duties of Man, O.A.S. Official Rec., OEA/Ser. L./V./II.23, doc. 21 rev. 6 (1948) *reprinted in* Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V./II.82, doc. 6 rev. 1, Preamble (1992) ("All men are born free and equal, in dignity and in rights, and, being endowed by nature with reason and conscience, they should conduct themselves as brothers one to another.").

<sup>63</sup> Universal Declaration of Human Rights, G.A. Res. 217 (III) A ¶ 1, U.N. Doc. A/RES/217(III) (Dec. 10, 1948) ("Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world.").

methods that may be used to exercise it. That said, there is a strong evolving consensus towards its abolition and the recognition that this form of punishment cannot be squared with maintaining respect for human dignity and the absolute prohibition against torture or cruel, inhuman, or degrading treatment.<sup>64</sup>

### *Universal Prohibition against Torture, Cruel, Inhuman, or Degrading Treatment*

The United States, including the states of Missouri and Oklahoma, must still abide by human rights standards in carrying out executions and in choosing the specific methods to be used in death chambers. Human rights law prohibits the use of torture, cruel, inhuman, or degrading treatment or punishment.<sup>65</sup> Furthermore, countries that choose to retain the death penalty must apply it in a manner that “causes the least possible physical and mental suffering.”<sup>66</sup>

The recent botched execution in Oklahoma serves as an example of the manner in which executions have taken place there and in other states like Missouri – specifically, in the use of untested combinations of drugs administered under a shroud of secrecy. These practices significantly increase the unavoidable result that the petitioners will be subjected to unnecessary suffering and excruciating pain, in violation of the prohibition of cruel, inhuman, or degrading treatment.

Even before the recent crisis, states’ use of lethal injections was widely condemned as a failure to meet universally recognized protections against abuse. In his global study on the death penalty, U.N. Special Rapporteur on Torture Juan Mendez expressed concern about lethal injection as practiced in the United States. He explained that “the conventional view of lethal injection as a peaceful and painless death is questionable” and stated that experts believe lethal injection protocols in the United States “probably violate the prohibition of cruel and unusual punishment.”<sup>67</sup>

On March 26, 2014, the U.N. Human Rights Committee expressed its concern regarding “reports about the administration, by some states, of untested lethal drugs to execute prisoners and the withholding of information about such drugs.” The Committee, after reviewing the United States fourth periodic report on compliance with the International Covenant on Civil and

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<sup>64</sup> *The Death Penalty*, *supra* note 4.

<sup>65</sup> United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 2, 16, Dec. 10, 1984, A/RES/39/46; United Nations International Covenant on Civil and Political Rights art. 7, Dec. 19, 1966, 999 U.N.T.C. 171 9 (hereinafter U.N. ICCPR art. 7).

<sup>66</sup> U.N. Human Rights Comm., *CCPR General Comment 20: Article 7* at 6, Mar. 10, 1992, U.N. Doc. CCPR/C/21/Add.3 (1992).

<sup>67</sup> U.N. Human Rights Council, *Interim Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, ¶ 38, U.N. Doc. A/67/279 (Aug. 9, 2012) (by Juan Mendez), available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N12/458/12/PDF/N1245812.pdf?OpenElement>.

Political Rights (ICCPR), recommended to “ensure that lethal drugs used for executions originate from legal, regulated sources, and are approved by the United States Food and Drug Administration and that information on the origin and composition of such drugs is made available to individuals scheduled for execution.”<sup>68</sup>

On May 2, 2014, the U.N. High Commissioner for Human Rights condemned Oklahoma’s botched execution and stated that Mr. Lockett’s suffering during his execution could amount to cruel, inhuman, and degrading treatment according to international human rights law.”<sup>69</sup>

### *Secrecy and Lack of Transparency*

The secrecy surrounding the use of untested drugs for execution is incompatible with human rights standards because the realization of specific rights imposes a duty of transparency on states. Countries that have maintained the death penalty have a clear obligation to disclose the details of their application of the penalty, including the methods and protocols of execution. As the United Nations Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions has observed, such secrecy “undermines many of the safeguards which might operate to prevent errors or abuses and to ensure fair and just procedures at all stages.” In a more recent report to the U.N. Human Rights Council, the Special Rapporteur elaborated on the requirements of transparency, which include three dimensions:

First, sufficient and relevant information must be provided to those individuals who are directly concerned: the person who is to be executed and his or her immediate relatives, in addition to the defence lawyers to ensure effective representation at all stages. Second, the general public in the State in question requires transparency for informed public debate and democratic accountability. Lastly, the international community as a whole has an interest in supervising the observance of the right to life everywhere.<sup>70</sup>

By withholding information and maintaining secrecy regarding the untested drugs used for execution, the state risks undermining the public’s trust in government and judicial institutions. Further, it undermines the public’s right to the information needed to establish whether deprivation of life is arbitrary or lawful.

### *Medical Experimentation*

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<sup>68</sup> U.N. Human Rights Comm., *Concluding Observations on the Fourth Periodic Report of the United States of America*, Apr. 23, 2014, U.N. Doc. CCPR/C/USA/CO/4.

<sup>69</sup> Press release, United Nations, UN Rights Office Calls on US to Impose Death Penalty Moratorium After Botched Execution (May 2, 2014), available at <http://www.un.org/apps/news/story.asp?NewsID=47706#.U315SfldXhB>.

<sup>70</sup> U.N. Human Rights Council, *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions*, U.N. Doc. A/67/275 (Aug. 9, 2012).

Utilizing an untested and unproven drug combination would amount to medical experimentation without informed consent, widely condemned as an unlawful and unethical practice.<sup>71</sup>

While the Inter-American Commission has not specifically addressed the use of experimental medical procedures on persons facing the death penalty, the Inter-American human rights organs have explicitly recognized certain international standards relevant to the treatment of prisoners and medical ethics. These standards affirm that persons deprived of liberty must be “treated humanely, with unconditional respect for their inherent dignity, fundamental rights and guarantees, and strictly in accordance with international human rights instruments.”<sup>72</sup>

This honorable Commission “has consistently considered, as applicable international standards...[inter alia] the Principles of Medical Ethics relevant to the role of health personnel, particularly physicians, in the protection of prisoners and detainees against torture and other cruel, inhuman or degrading treatment or punishment...”<sup>73</sup> The Commission cited the Oath of Athens as “relevant” to its discussion of applicable international standards. The Oath of Athens, drafted under the auspices of the International Council of Prison Medical Services, includes a pledge “not to engage in any form of human experimentation amongst incarcerated individuals without their informed consent.”<sup>74</sup>

## **VI. RELIEF REQUESTED**

The facts outlined above establish the serious and urgent situation facing the Petitioners.

The states of Missouri and Oklahoma will place Petitioners at imminent risk of death, cruel, inhuman, and degrading treatment, and even torture. To prevent irreparable harm, Petitioners respectfully request that the honorable Commission urge the United States federal government and the states of Missouri and Oklahoma to adopt precautionary measures and, most importantly, to halt its plans to execute the Petitioners immediately.

Specifically, Petitioners seek the following precautionary measures:

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<sup>71</sup> U.N. ICCPR art. 7, *supra* note 65; Nigel Rodley and Matthew Pollard, *The Treatment of Prisoners Under International Law* 412-15 (3d ed., 2009).

<sup>72</sup> Inter-Am. Comm’n H.R., *Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas*, No. 1/08 (Mar. 13, 2008). The Commission has referenced the Principles and Best Practices in interpreting States’ obligations under the American Declaration of the Rights and Duties of Man in the death penalty context. *See* Medellín, Ramírez Cardenas and Leal García v. United States, Case 12.644, Inter-Am. Comm’n H.R., Report No. 90/09 OEA/Ser.L/V/II.135, doc. 37 ¶ 125 (2009).

<sup>73</sup> Inter-Am. Comm’n H.R., *Report on the Human Rights of Persons deprived of Liberty in the Americas*, ¶ 523 (2011).

<sup>74</sup> *See id.* at n.619 (citing International Council of Prison Medical Services, Oath of Athens, 1979).

- Instruct the United States government and the states of Missouri and Oklahoma to indefinitely stay the execution of the Petitioners and all other similarly situated inmates;
- Instruct the state of Oklahoma to conduct an independent review of the botched execution of Mr. Lockett and to make public the results of the investigation;
- Make public information regarding the procedures and protocols of execution, including the sources of the drugs obtained for carrying out the execution of the Petitioners; and
- Ensure, through the United States Food and Drug Administration, that state departments of correction do not acquire drugs to use in lethal injection procedures illegally, or in an unregulated manner.

DATED: May 19, 2014

Respectfully Submitted,

A handwritten signature in black ink, appearing to be 'J. Dakwar', with a large, stylized loop at the top.

Jamil Dakwar

A handwritten signature in blue ink, appearing to be 'C. Stubbs', with a large, stylized loop at the top.

Cassandra Stubbs

A handwritten signature in blue ink, appearing to be 'Anna Arceneaux', with a large, stylized loop at the top.

Anna Arceneaux