



September 12, 2019

Re. Public hearing on implementation of IACHR, Report No. 71/18, Case 12.958. Merits. Russell Bucklew. United States, May 10, 2018, regarding the scheduled execution of Mr. Russell Bucklew by the State of Missouri

Dear Secretary Abrão,

We are pleased that the Inter-American Commission on Human Rights has granted our request for a hearing regarding the United States' and the State of Missouri's implementation of the merits report and precautionary measures issued by the Commission regarding the case of Mr. Russell Bucklew. In advance of the hearing on September 24, 2019, Petitioners provide here:

- 1) List of persons who will make up our delegation;
- 2) List of governmental entities we hope to see represented at the hearing; and
- 3) Summary of the main points of our presentation.

Members of the Delegation (Petitioners)

Mr. Bucklew's delegation will include:

- 1) Cheryl Pilate, counsel for Russell Bucklew
- 2) Jeremy Weis, counsel for Russell Bucklew
- 3) Jamil Dakwar, Director, ACLU Human Rights Program
- 4) Cassandra Stubbs, Director, ACLU Capital Punishment Project
- 5) Megan McCracken, Contract Attorney, ACLU Capital Punishment Project

Governmental Entities at the Hearing

Petitioners believe the hearing would be most productive if the following governmental entities and individuals were represented:

- 1) Michael L. Parson, Governor of the state of Missouri
- 2) Anne L. Precythe, Director of the Missouri Department of Corrections

Summary of Main Points of Petitioners' Presentation

The Inter-American Commission on Human Rights issued a report on Mr. Bucklew's case on May 10, 2018, after issuing precautionary measures demanding his execution be stayed. After the merits report's issuance, however, the United States Supreme Court agreed to review Mr. Bucklew's case and, after holding oral argument on

November 8, 2018, issued a decision on April 1, 2019, affirming dismissal of his case and allowing his execution to proceed. Mr. Bucklew is scheduled to be executed by the State of Missouri on October 1, 2019.

In Report No. 71/18, this honorable Commission (“IACHR” or “Commission”) concluded that in Mr Bucklew’s case, the United States is responsible for violating Articles I (right to life, liberty and personal security), XVIII (right to a fair trial), XXV (right of protection from arbitrary arrest) and XXVI (right to due process of law) of the American Declaration of the Rights and Duties of Man (“American Declaration”). Moreover, the Commission concluded that, in the event the State of Missouri carries out the execution of Mr. Bucklew, the State would be responsible for a serious and irreparable violation of the fundamental right to life protected in Article I of the American Declaration.¹

Specifically, because of his unique and serious medical condition, Mr. Bucklew faces a real and present risks of extraordinary pain and suffering during his execution. If Missouri proceeds with its current execution protocol, which accomplishes death by intravenous injection of five (5) grams of compounded pentobarbital, Mr. Bucklew very likely will experience extreme pain and suffering and serious mental anguish. Moreover, Mr. Bucklew’s death sentence and his imprisonment on death row for 22 years have violated his rights under the American Declaration and necessitate effective remedy and redress.

As recognized by the Commission, the execution procedure Missouri plans to use to execute Mr. Bucklew presents a grave threat of cruel, inhumane and degrading treatment and even torture. Mr. Bucklew has suffered his entire life from an incurable condition, cavernous hemangioma, which causes clumps of weakened, malformed blood vessels to grow in his head, face, neck, and throat, displacing healthy tissue and rupturing under stress. Mr. Bucklew has a large vascular tumor in his nose, throat and airway that makes it very difficult for him to breathe. This tumor creates a very substantial risk that Mr. Bucklew would suffer excruciating pain during execution, for which he would be strapped to a gurney.

1. Mr. Bucklew’s medical condition has worsened in recent years, putting him at even greater risk of torturous pain and suffering during execution.

Mr. Bucklew’s condition is congenital, severe and progressive. The unstable tumors are highly vulnerable to rupturing under stress or any rise in blood pressure. Mr. Bucklew has had this condition since birth, and his vascular malformations have grown progressively worse throughout adulthood, causing constant facial pain and pressure, labored breathing, and impairment of his hearing and vision. Mr. Bucklew currently experiences ruptures on a daily basis and must clear blood and bloody secretions from his mouth and throat.

¹ IACHR, Report No. 71/18, Case 12.958. Merits. Russell Bucklew. United States, May 10, 2018.

Mr. Bucklew's medical condition continues to deteriorate, as it has over the past 22 years of his confinement. This deterioration has been hastened by indifferent and inadequate medical care provided by the State of Missouri² and his extended incarceration, including two previous execution dates that have been stayed at the last minute by the Supreme Court. Cavernous hemangioma is a progressive condition, and its effects permeate all aspects of Mr. Bucklew's daily life, affecting everything from his bodily movements, balance, and ability to eat certain foods, to his ability to sleep.³

In June 2018, Mr. Bucklew nearly died from meningitis, which led to severe fever, diarrhea, vomiting, and two emergency hospital stays. At the first hospital, he was misdiagnosed and prematurely released. During the trip to the second hospital, he went into respiratory distress, requiring eleven days of in-patient care and insertion of a tracheostomy tube to allow him to breathe. After these life-threatening medical emergencies, Mr. Bucklew executed a do-not-resuscitate order, to be implemented in the event of another medical emergency.⁴

In March of this year, Mr. Bucklew reported symptoms that medical staff determined to be manifestations of recurrent Bell's Palsy. These symptoms include paralysis on the left side of his face that often prevents Mr. Bucklew from eating solid foods and consuming liquids.⁵ Additionally, Mr. Bucklew has been diagnosed with symptoms of Post-Traumatic Stress Disorder, Generalized Anxiety Disorder and Major Depressive Disorder with psychotic features—mental illnesses exacerbated by his challenging physical circumstances.⁶

Because of his compromised and deteriorating medical condition, Mr. Bucklew is especially vulnerable to potentially catastrophic complications from routine medical procedures. Even a minor medical procedure, such as a tooth extraction, requires highly skilled and attentive medical care by specialists. Between August 2018 and May 2019, Mr. Bucklew required numerous visits and evaluations by highly skilled medical professionals just to remove a tooth, foreshadowing the difficulties his medical conditions would cause if Missouri proceeds with his execution by lethal injection.⁷

If Mr. Bucklew is executed in accordance with Missouri's current execution protocol, it is likely his tumors will rupture. Mr. Bucklew will be strapped to a gurney severely restricting his bodily movements. The combinations of factors will likely cause gagging and choking, as he hemorrhages and is unable to clear his mouth and throat of bloody secretions. He is likely to struggle for air, all while bleeding from the unstable

² Appellant's Resp. in Opp'n. to the Resp't's Mot. to Set Execution Date at 3, *State of Missouri v. Bucklew*, No. SC80052 (Jun. 3, 2019) (Attached as Exhibit A).

³ *Id.* at 2.

⁴ *Id.* at 5-7.

⁵ *Id.* at 9.

⁶ *Id.* at 10.

⁷ *Id.* at 7.

tumors in his head and throat. He is also at risk for bleeding out through his mouth, nose or even his eyes.

2. If the State of Missouri executes Mr. Bucklew, the results will be catastrophic for both Mr. Bucklew and the State.

a. Because of his unique medical condition, it is highly likely that Mr. Bucklew's execution by lethal injection will inflict torturous pain and suffering and will be gruesome for Mr. Bucklew.

Because of his fragile and deteriorating medical condition, Mr. Bucklew will, in great likelihood, experience indignity, excruciating pain, and suffering as a result of Missouri's method of execution. If the state's lethal injection procedure is used to execute Mr. Bucklew, his cavernous hemangioma will likely require Missouri to perform an exceptional medical "cut-down" procedure just to find a viable vein. Moreover, he is highly likely to cough and choke on his own blood and painfully struggle against the restraints for up to four minutes before dying.⁸

b. Mr. Bucklew's execution by lethal injection will violate international human rights norms and the American Declaration.

If Missouri executes Mr. Bucklew in accordance with its current lethal injection protocol, the State would be responsible for a serious and irreparable violation of the fundamental rights to life and to not receive cruel, infamous, or unusual punishment protected by Articles I and XXVI of the American Declaration.

Mr. Bucklew is the beneficiary of precautionary measures adopted by the IACHR under Article 25 of its Rules of Procedure. This Commission has reaffirmed to the State of Missouri that carrying out Mr. Bucklew's death would not only cause irreparable harm to Mr. Bucklew, but also would be contrary to the fundamental human rights obligations of the United States as a member of the Organization of American States (OAS) pursuant to the Charter of the OAS and the instruments deriving from it.

3. Mr. Bucklew's trial counsel and prior clemency counsel failed to present relevant, extant evidence to their tribunals. Their inadequacies at trial and during clemency proceedings render Mr. Bucklew's death sentence invalid death.

Mr. Bucklew's current clemency counsel team began working together in late-2017 shortly after the Missouri Supreme Court set the second execution date for Mr. Bucklew. Counsel discovered that one of Mr. Bucklew's prior clemency attorneys failed to conduct a thorough mitigation investigation because of an inherent conflict-of-interest that pitted counsel's personal financial interests against Mr. Bucklew's. As a result of

⁸ Amicus Br. Of ACLU in Support of Petitioner App., *Bucklew v. Precythe*, No. 17-8151, at 2 (Jul. 20, 2018) (Attached as Exhibit B).

this conflict, prior clemency counsel failed to discover that the lawyers who represented Mr. Bucklew at trial and during his state post-conviction process provided him woefully inadequate representation, which was in violation of the Constitution and laws of the United States. Because of this deficient representation by previous counsel, crucial aspects of Mr. Bucklew's life history and mitigation case were never presented to the jury that sentenced him to death, and he was denied full and fair consideration of his case for clemency.

The information newly uncovered by current counsel is powerful evidence in favor of a life verdict. Moreover, because of trial counsel's errors, the jury heard a highly damaging – and false diagnosis – from the defense expert that Mr. Bucklew had antisocial personality disorder (ASPD). Presented with the life history data that trial counsel neglected to compile, that testifying psychiatrist has now admitted his mistake and, in a signed Declaration, recanted the ASPD diagnosis.⁹ If trial counsel had performed effectively, the jury at his trial would have been informed of Mr. Bucklew's chaotic, unstable and violent upbringing, and would not have heard the false and devastating diagnosis of ASPD that ended up being exploited by the prosecutor throughout the penalty phase. A jury properly informed about Mr. Bucklew's life history and mental health conditions likely would not have sentenced him to death.

a. Fundamentally Inadequate Mitigation Investigation

It was not until the appointment of new clemency counsel (from the newly formed Capital Habeas Unit in the Western District of Missouri), that Mr. Bucklew received a meaningful mitigation investigation. The results of that investigation are still being gathered as counsel race to complete their work. The multiple failures by trial counsel and former clemency counsel prevented the jury, the courts and the former governor from being able to understand Mr. Bucklew's life story and properly place his wrongful actions in the context of his background and upbringing. Complex and persuasive facts are beginning to emerge from an intensive effort to investigate the circumstances of Mr. Bucklew's life. What is apparent from the investigation is that the state's arguments for the death penalty cannot stand up in the face of closer examination.

Counsel for Mr. Bucklew now have a very different story to tell about him – a story that is far more compelling and mitigating than the one originally presented to the jury. Their recent investigation has uncovered the following information that was not presented at his trial or in his 2014 clemency presentation:¹⁰

- Mr. Bucklew was wrongly diagnosed as having ASPD by trial counsel's own expert, Dr. Bruce Harry. This devastating misdiagnosis formed the basis for the

⁹ Declaration of Dr. Bruce Harry, Pursuant to 28 U.S.C § 1746 (Feb. 23, 2018) (Attached as Exhibit C).

¹⁰ *Id.*; Trial Transcript at 1054, *State v. Bucklew*, No. CR0196-051075F (Attached as Exhibit D); Petition for Commutation of the Sentence of Death, *In the Matter of: Russell E. Bucklew* (March 20, 2018) (Attached as Exhibit E).

state's argument that Mr. Bucklew presented a continuing danger and that the death penalty was necessary to protect society. The ASPD diagnosis was the single most damaging piece of evidence presented at trial.

- Mr. Bucklew suffered from a severe prescription opioid addiction at the time of the crime that went undetected, even though the records existed to support it.¹¹
- Mr. Bucklew's upbringing was marked by violence and chaos in the family home and betrayal that he could not escape. His childhood and upbringing were the opposite of the idyllic background suggested at trial.
- Mr. Bucklew was traumatized by his father's rage and his betrayals of his wife and children.
- Mr. Bucklew's siblings, like Mr. Bucklew, were also negatively affected by their difficult and traumatic childhood. The effects have been long-ranging and widespread for them as well.
- Mr. Bucklew was exposed to dangerous levels of lead paint as a young child. This greatly increased the risk of physical and psychological development problems and may be a contributing factor to his low IQ.

If the jury that sentenced Mr. Bucklew to death had been properly informed about his mental health – and had not heard the false and damaging diagnosis of ASPD – it likely would not have sentenced him to death. If the jury had then heard the truth about Mr. Bucklew's difficult and traumatic life history, it is even more likely the jurors would have returned a sentence less than death. Likewise, if the Missouri Board of Probation and Parole had heard even some of the truth of Mr. Bucklew's life, his mental health and his character, it likely would have granted him the clemency he deserves.

b. Trial expert disavowed ASPD diagnosis

Trial counsel's mitigation investigation for Mr. Bucklew was woefully deficient, amounting to no real investigation at all. Because he knew nothing about Mr. Bucklew's life or family, trial counsel made the uninformed decision to retain and present the testimony of a psychiatrist, Dr. Bruce Harry, who also did not conduct an investigation. Instead, Dr. Harry relied on the inaccurate and incomplete information provided by trial counsel.

Dr. Harry diagnosed Mr. Bucklew with ASPD, a personality disorder, even though he lacked the data and records to support it. Defense counsel then called Dr. Harry to testify, despite this inaccurate and damaging diagnosis. As counsel has now acknowledged, Dr. Harry's ASPD diagnosis occupied center stage during the penalty phase and devastated the defense efforts to persuade the jury to reject the death penalty. Relying on the defense expert, the state seized upon the ASPD diagnosis to argue that Mr. Bucklew was an unrepentant "sociopath" deserving of death. Indeed, the prosecutor stated in closing argument that: "Their own psychiatrist diagnosed this man as a

¹¹ Declaration of Frank LoVecchio, Pursuant to 28 U.S.C § 1746 (Feb. 27, 2018) (Attached as Exhibit F).

sociopath.”¹² The prosecutor then argued to the jury that, because of his psychological diagnosis, Mr. Bucklew would pose a grave risk to prisoners and guards at the State’s maximum security prison.¹³ This argument, premised on a fundamentally flawed and false diagnosis, proved effective.

We now know that Dr. Harry’s diagnosis of ASPD is incorrect, was not supported by the record, and should never have been presented at trial. As stated by Dr. Harry, “I was incorrect in diagnosing Antisocial Personality Disorder, and my testimony at the sentencing hearing that I had diagnosed Mr. Bucklew with Antisocial Personality Disorder is wrong.”¹⁴ Because the ASPD diagnosis was the central fact in the penalty phase and likely played a large role in the jury’s decision to sentence Mr. Bucklew to death, the failure to pursue leads that pointed away from ASPD was a critical and devastating failure.

4. Neither the United States Government, nor the State of Missouri has implemented the Commissions’ recommendations or Precautionary Measures.

In Report No. 71/18, the IACHR recommended Mr. Bucklew’s death sentence “be commuted, that he be transferred out of death row, and that the State ensure that his conditions of detention are compatible with his human dignity.”¹⁵ The Commission further recommended that the government “[r]eview its laws, procedures, and practices to ensure that the persons sentenced to the death penalty have access to effective judicial remedies to challenge the possible impact of the method of execution on their fundamental rights in accordance with the standards set forth in this merits report.”¹⁶

Per the report, this would entail changing the legal standard used to review challenges to methods of execution, such that the prisoner does not bear the dual burdens of showing that there is a feasible, readily implementable alternative that would reduce severe pain and that the state has no legitimate reason for failing to adopt the proposed alternative method.

But in its April 1, 2019 decision, the U.S. Supreme Court held that the Court’s prior decisions in *Baze v. Rees* and *Glossip v. Gross* govern both facial and as-applied Eighth Amendment challenges to a state’s method of execution.¹⁷ Mr. Bucklew’s as-applied challenge claimed that applying Missouri’s lethal injection procedure to him, in light of his medical conditions, would cause him severe pain, in violation of his Eighth Amendment right to be free from the infliction of cruel and unusual punishment. The Court held that the burden of meeting the test established by *Baze* and *Glossip* fell on Mr.

¹² Trial Transcript, *supra* n. 10, at 1161.

¹³ *Id.*, at 1165

¹⁴ See Ex. C at ¶12.

¹⁵ IACHR, Report No. 71/18, Case 12.958, at p. 21.

¹⁶ *Id.*

¹⁷ *Bucklew v. Precythe*, 139 S.Ct. 1112, 1122-29 (2019).

Bucklew. As such, Mr. Bucklew had the dual burdens of (1) providing a “feasible and readily implemented alternative method” to the state’s contested execution method that would reduce the severity of pain and (2) proving that the state did not have a legitimate reason for failing to use the alternative method for Mr. Bucklew’s execution. The Court further interpreted the Eighth Amendment as not guaranteeing a painless death, rather only guaranteeing freedom from punishments that “intensif[y] the sentence of death” and cause the “superadd[ition] of terror, pain, or disgrace.”¹⁸ Finally, the Court held that Mr. Bucklew did not meet his burden of establishing both elements of the *Baze-Glossip* test, accepting Missouri’s claim that his alternative method was not readily implementable.

The petitioners will explain that the U.S. Supreme Court reaffirmed the use of a judicial standard that runs contrary to the merits report recommendations, placing a remarkably high burden on any current or future prisoners attempting to challenge compliance of their state’s method of execution with constitutional and human rights standards against torturous execution. Furthermore, the State of Missouri has scheduled Mr. Bucklew’s execution by use of the very method contested by this litigation, effectively ensuring a horrifying, painful, and undignified execution.

Rather than commute his sentence and allow Mr. Bucklew to live out his days with some dignity off of death row, the State of Missouri has scheduled his execution for October 1, 2019. Moreover, the courts rejected his meritorious challenges to the State’s execution procedure as applied to him, denying him a full and fair opportunity to avoid an execution that will inflict extreme pain and suffering. The Governor of Missouri has the power to commute Mr. Bucklew’s death sentence. Should he choose to do the right thing, he would avoid the grave responsibility of allowing a likely gruesome and torturous execution and bring his State in conformity with international human rights obligations consistent with the Commission’s recommendations. Since neither the U.S. federal government, nor the State of Missouri can provide guarantees that Mr. Bucklew’s execution would not violate internationally recognized human rights, granting Mr. Bucklew clemency and commuting his death sentence would be the only outcome that would not stain the United States Constitution and international law.

Finally, this hearing is unprecedented because it will be the first-ever hearing where a prisoner sentenced to death will have the opportunity to demand accountability for violating his rights and appeal for concrete measures to implement the Commission’s merits report in his petition while he is about to face imminent execution. Mr. Bucklew demands no less than full protection of his human rights including protection from torture, cruel, inhuman or degrading treatment or punishment.

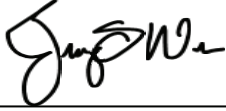
Thank you for the opportunity to present this information. We look forward to raising these issues with you at the hearing on September 24.

¹⁸ *Bucklew*, 139 S. Ct. 1112, 1124-25 (2019).

Respectfully submitted,

/s/ Cheryl Pilate

Cheryl Pilate, counsel for Russell Bucklew



Jeremy Weis, counsel for Russell Bucklew



Jamil Dakwar, Director, ACLU Human Rights Program

/s/ Cassandra Stubbs

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