

**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 AND AN INVESTIGATION
AND HEARING ON THE MERITS
UNDER ARTICLES 23 AND 25 OF THE COMMISSION'S RULES OF PROCEDURE,
AGAINST
THE UNITED STATES OF AMERICA
THE STATE OF MISSOURI**

**ON BEHALF OF:
JOHN WINFIELD**

Submitted under the provisions of Article 23 of the Commission's Rules of Procedure by counsel
for petitioner:

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I. INTRODUCTION

The American Civil Liberties Union (ACLU) requests precautionary measures, an investigation, and a hearing on the merits under Articles 23 and 25 of the Rules of Procedure of the Inter-American Commission on Human Rights, on behalf of John Winfield, who has been sentenced to death by the state of Missouri. **Mr. Winfield's execution is scheduled for 12:01 a.m. on June 18, 2014.**

Mr. Winfield's execution may 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. This risk is heightened by Missouri's relentless policy of secrecy, whereby it has shielded information about the source of its drugs from Mr. Winfield, all capital defendants, and the public. The planned execution of Mr. Winfield, if permitted to go forward, would violate multiple international treaties and norms, including his rights to be free from cruel, inhuman, or degrading treatment or punishment, as well as his 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 1976.¹ The U.S. death penalty system in 32 states, the federal system, and the military continue 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.² 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

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

² NAACP LDF, Death Penalty USA 1 (Winter 2014), *available at* http://www.naacpldf.org/files/publications/DRUSA_Winter_2014.pdf.

disappearance.”³ 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.”⁴

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.⁵ The number of new death sentences has dropped dramatically – from a peak of 315 in 1996 to 80 in 2013.⁶ 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.⁷ 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, 2013.⁸ 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.⁹

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. review under the International Covenant on Civil and Political Rights (ICCPR) 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.

³ 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).

⁴ 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>.

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

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

⁷ 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>.

⁸ 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>.

⁹ 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>.

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.”¹⁰

Although the U.S. Supreme Court has held that one method of lethal injection used in the U.S. is constitutional,¹¹ 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.¹² 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,¹³ and have turned to novel and untested drug combinations.

The current lethal injection scheme in Missouri violates the United States Constitution’s Eighth Amendment ban on cruel and unusual punishment by creating an objectively intolerable risk of excruciating pain. This unconstitutional practice has been facilitated by the secrecy surrounding the development and implementation of lethal injection protocols in Missouri. On April 7, 2014, the United States Supreme Court declined to review whether Missouri’s current execution protocol is constitutional under *Baze v. Rees*.¹⁴

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

¹⁰ 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>.

¹¹ *Baze v. Rees*, 553 U.S. 35 (2008).

¹² *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).

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

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

point his skin turned a blue-purplish hue. Mr. Robert opened his eyes, and they remained open until his death.¹⁵

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."¹⁶ 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.¹⁷ Mr. McGuire's execution was only the most recent in a long wave of botched executions in Ohio.¹⁸

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 vein his groin.¹⁹ 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.²⁰ Ten minutes after the initial injection, Mr. Lockett was pronounced unconscious and was administered vecuronium bromide and potassium chloride.²¹ Shortly thereafter, it became clear that Mr. Lockett was not unconscious as he writhed, breathed heavily, and mumbled.²² According to media witnesses, he clenched his teeth and tried to rise off the bed. Mr. Lockett's lawyer said it looked "like torture."²³ At 6:42 p.m., the prison officials then closed the blinds, blocking the witnesses'

¹⁵ 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.

¹⁶ 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.

¹⁷ 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>.

¹⁸ 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>.

¹⁹ Letter from Robert Patton, Director of the Department of Corrections, Oklahoma, to Mary Fallin, Governor, Oklahoma (May 1, 2014) (hereinafter Patton Letter).

²⁰ *Id.*

²¹ *Id.*

²² 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>.

²³ *Id.*

view.²⁴ The warden called off the execution, announcing the obvious: the doctor had observed a problem.²⁵ He said Mr. Lockett's "vein had blown," and they did not know how much of the drugs he had received.²⁶ Mr. Lockett died at 7:06 p.m., 43 minutes after the prison administered the midazolam.²⁷

The White House characterized the gruesome execution of Clayton Lockett as falling short of the requirement that the death penalty be carried out humanely.²⁸ 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.

III. PRIOR PETITION ON BEHALF OF RUSSELL BUCKLEW AND CHARLES WARNER

On May 19, 2014 the ACLU filed a petition and request for precautionary measures on behalf of Russell Bucklew and Charles Warner, alleging violations of the right to life (Article 1), 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) of the American Declaration of the Rights and Duties of Man.

On May 20, 2014, the Inter-American Commission on Human Rights (IACHR) issued resolution 14/2014 and granted the precautionary measure No.177-14, requesting that "the United States take the measures necessary to preserve the life and physical integrity of Russell Bucklew and Charles Warner until the IACHR has pronounced on their petition so as not to render ineffective the processing of their case before the Inter-American system." On May 21, 2014, the IACHR transmitted the petition to the United States Government for a response by June 21, 2014.

In the interim, on May 21, 2014, the United States Supreme Court granted a stay to Mr. Bucklew, and remanded the question of the constitutionality of his execution under the Eighth Amendment to the Eighth Circuit for additional review.²⁹

²⁴ *Id.*; Patton Letter, *supra* note 19.

²⁵ Eckholm, *supra* note 22.

²⁶ Patton Letter, *supra* note 19.

²⁷ *Id.*

²⁸ *Compounding Pharmacies and Lethal Injection*, *supra* note 13.

²⁹ Order, *Bucklew v. Missouri*, No. 13-10165 (May 20, 2014).

IV. MISSOURI AND JOHN E. WINFIELD

John Winfield is a Missouri prisoner, sentenced to death in 1998. He is held in the Potosi Correctional Center in Mineral Point, Missouri. His state direct appeal, state post-conviction, state habeas, and federal habeas claims were denied.³⁰ On May 9, 2014, the Missouri Supreme Court set his execution date for June 18, 2014 at 12:01 a.m. The state of Missouri intends to execute Mr. Winfield using compounded pentobarbital, without providing any information showing where and how the drug is made, and what it is made of.

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.³¹ 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.

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. Winfield’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

³⁰ *State v. Winfield*, 5 S.W.3d 505 (Mo. banc 1999) (affirming Winfield’s convictions and sentences on direct appeal), *cert denied*, 120 S. Ct. 967 (2000); *State v. Winfield*, 93 S.W.3d 732 (Mo. banc 2002) (affirming the lower court’s denial of post-conviction relief); *State v. Winfield*, 292 S.W.3d. 909 (Mo. banc 2009) (denying state habeas relief), *cert denied*, 130 S. Ct. 2100 (U.S. 2010); *Winfield v. Roper*, 2005 WL 5112420 (E.D. Mo. March 30, 2005) (denying federal habeas relief); *aff’d*, 460 F.3d 1026 (8th Cir. 2006), *cert denied*, 127 S. Ct. 2256 (2007).

³¹ *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.

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 the 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.³² The media has reported this pharmacy to be the Apothecary Shoppe in Oklahoma, which is not licensed to sell drugs in Missouri.³³ Lombardi also admitted that an official from the Missouri DOC drives across state lines, with \$11,000 in cash, to purchase the drug before transporting it back to Missouri. He conceded that the DOC uses cash payments to protect the anonymity of the compounding pharmacy.³⁴ 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 multi-drug protocols 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 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.

A group of Missouri death row inmates, including Mr. Winfield, filed a federal civil action, *Zink v. Lombardi*, challenging Missouri's execution protocol as unconstitutional.³⁵ The death row inmates challenged alleged, among other claims, that Missouri's protocol violated the Eighth Amendment's prohibition on cruel and unusual punishment, that the use of secretly

³² 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/>.

³³ *Id.*

³⁴ *Id.*

³⁵ The other plaintiffs are David Zink, Michael Worthington, Michael A. Taylor, Leon Taylor, Walter T. Storey, Herbert Smulls, William Rousan, Earl Ringo, Roderick Nunley, Allen Nicklasson, John Middletown, Paul Goodwin, Joseph Paul Franklin, Jeffrey Ferguson, Andre Cole, Reginald Clemons, Cecil Clayton, Mark Christeson, Russell Bucklew, David Barnett, Marcellus Williams.

made and unregulated execution drugs increased the prisoners' punishment in violation of the Ex Post Facto Clause, and that the protocol's secrecy provisions violated the First Amendment as well as the prisoners' right of access to the courts.³⁶ The state of Missouri has executed six of the plaintiffs during the pendency of this litigation: Joseph Franklin (1/20/2013); Allen Nicklasson (12/11/2013); Herbert Smulls (1/29/2014); Michael Taylor (2/26/2014); Jeffrey Ferguson (3/26/2014); and William Rousan (4/23/2014).

In the context of that inmates' suit, the Missouri defendants, including George Lombardi, Director of the Missouri Department of Corrections, sought a motion for a protective order to prohibit discovery or disclosure of the identities of all "execution team members," and asserted that execution team members could include entities who manufactured or otherwise provided the drugs for use in the lethal injection. The motion to keep the information secret was denied in district court, which ordered a limited disclosure to two of the prisoners' attorneys. The defendants filed a petition for writ of mandamus in the Eighth Circuit, which was granted in part by a three-judge panel and then in full by the Eighth Circuit *en banc*.³⁷ The Eighth Circuit reasoned that the prisoners failed to state a claim under the Eighth Amendment because they had not pled a known and available alternative method of execution, that the Ex Post Facto claim failed because the state had statutory discretion to change its method, and that the identities of the compounding pharmacy, the laboratory that was testing the drugs, and the physician who prescribed them were "plainly not relevant" to the prisoners' remaining claims.³⁸ The Eighth Circuit therefore vacated the district court's discovery rulings, holding that the identities at issue were not relevant to any claim that should survive a motion to dismiss. The United States Supreme Court denied certiorari.³⁹

The plaintiffs, including Mr. Winfield, amended their complaint after the Eighth Circuit's adverse ruling, alleging additional claims under federal and state law. On May 2, 2014, the federal district court dismissed all of the plaintiffs' claims with the exception of the first claim, their allegation that the protocol, specifically the use of compounded pentobarbital, would violate the Eighth Amendment.⁴⁰ The district court agreed that the inmates pled a significant risk of harm, but concluded that Eighth Circuit precedent required plaintiffs to allege that an alternative method of execution was available and less likely to create a substantial risk of harm.⁴¹ The district court gave the inmates seven days to file an amended complaint.

The plaintiffs filed a response on May 16, 2014, asserting that under controlling Supreme Court law they need only allege that constitutional methods of execution exist, rather than

³⁶ See Second Am. Compl., *Zink v. Lombardi*, No. 2:12-cv-04209 (W.D. Mo. filed Feb. 3, 2013).

³⁷ *In re George A. Lombardi*, 741 F.3d 888 (8th Cir. 2014).

³⁸ *Id.* at 895-97.

³⁹ See *Zink v. Lombardi*, No. 13-8435 (Apr. 7, 2014).

⁴⁰ See *Zink et al v. Lombardi*, No. 12-4209 CV-C-BP (W.D. Mo. May 2, 2014).

⁴¹ *Id.*

proposing an alternative method of execution.⁴² Later that same day, May 16, 2014, the district court rejected the plaintiffs' argument, dismissed plaintiffs' Eighth Amendment claim, and issued its final order and judgment.⁴³ The plaintiffs filed a notice of appeal on May 22, 2014. On June 2, 2014, Mr. Winfield filed a request for a stay of execution in the Eighth Circuit, pending the appeal of the dismissal of the *Zink* constitutional claims.

The state of Missouri previously executed three Missouri defendants while stay litigation was pending.⁴⁴ After Missouri executed Allen Nicklasson and the Eighth Circuit Court of Appeals dismissed his stay application as moot, Judge Kermit Bye authored a scathing dissent, "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."⁴⁵

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. In light of the willingness of Missouri officials to proceed with executions while litigation remains pending, and in light of Mr. Winfield's imminent execution, precautionary measures are necessary.

V. PETITIONER FACES IMMINENT AND IRREPARABLE HARM AS A RESULT OF PENDING INHUMAN EXECUTION

Petitioner Winfield seeks the immediate intervention of this Commission to order precautionary measures requesting the state of Missouri to halt its plan to execute Mr. Winfield. 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

⁴² Pl.'s Resp. to Ct.'s Order of May 2, 2014, ECF No. 442.

⁴³ *Zink et al v. Lombardi*, No. 12-4209 CV-C-BP (W.D. Mo. May 16, 2014), ECF No. 443.

⁴⁴ Missouri executed Joseph Franklin, Allen Nicklasson, and Herbert Smulls while litigation seeking stays of execution remained pending in the federal court. 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/>.

⁴⁵ *Zink v. Lombardi*, No. 13-3664 (Dec. 23, 2013).

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 beneficiary of the request has consented and authorized the ACLU to initiate this action.

Mr. Winfield'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. Winfield is executed before the Commission has had an opportunity to examine his case, any eventual decisions will be rendered moot in respect of the effectiveness of potential remedies, resulting in irreparable harm.

Legal Framework

The Petitioner requests that the honorable Commission review his petition for precautionary measures and request for an investigation and hearing on the merits, based on the 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 Charter⁴⁶ – 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 ("American Declaration"). Specifically, the Petitioner asks the honorable Commission to consider this request based on violations of his 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 Declaration⁴⁷ and the Universal Declaration of Human Rights ("UDHR")⁴⁸ 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 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

⁴⁶ Charter of the Organisation of American States art. 106, Apr. 30, 1948, (entered into force Dec. 13, 1951).

⁴⁷ 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.").

⁴⁸ 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.").

respect for human dignity and the absolute prohibition against torture or cruel, inhuman, or degrading treatment.⁴⁹

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

The United States, including the state of Missouri, 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.⁵⁰ Furthermore, countries that choose to retain the death penalty must apply it in a manner that “causes the least possible physical and mental suffering.”⁵¹

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 Petitioner 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.”⁵²

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 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

⁴⁹ *The Death Penalty*, *supra* note 4.

⁵⁰ 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).

⁵¹ 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).

⁵² 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>.

Administration and that information on the origin and composition of such drugs is made available to individuals scheduled for execution.”⁵³

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.”⁵⁴

On May 6, 2014, this honorable Commission issued a statement in response to Oklahoma’s botched execution and expressed deep concerns over the agonizing death of Mr. Lockett. The Commission called “on the United States and the state of Oklahoma to conduct an independent and impartial investigation of the death of Mr. Lockett and to stay pending executions until the state’s execution protocol is fully reviewed.”⁵⁵

Secrecy and Lack of Transparency

The secrecy surrounding the use of untested drugs for execution violates Petitioner’s due process rights under Articles XXIV and XXVI of the American Declaration and 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.

⁵³ 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.

⁵⁴ 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>.

⁵⁵ Press release, Inter-Am. Comm’n H.R., *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.

Lastly, the international community as a whole has an interest in supervising the observance of the right to life everywhere.⁵⁶

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.

According to the jurisprudence of this honorable Commission, "the State has the duty to inform the person sentenced to death, in a timely manner, about the drug and method of execution that will be used, so he or she is not precluded from litigating the right to be executed in a manner devoid of cruel and unusual suffering."⁵⁷ Moreover, the Commission has ruled that "in capital cases the State has an enhanced obligation to ensure that the person sentenced to death has access to all the relevant information regarding the manner in which he or she is going to die. In particular, the convicted person must have access to information related to the precise procedures to be followed, the drugs and doses to be used in case of executions by lethal injection, and the composition of the execution team as well as the training of its members."⁵⁸

Following Oklahoma's botched execution, this honorable Commission urged "all states that use the lethal injection as a method of execution, to disclose the drugs used, their source, the execution protocol, as well as the composition and training of the execution team."⁵⁹

Medical Experimentation

Utilizing an untested and unproven drug combination would amount to medical experimentation without informed consent, widely condemned as an unlawful and unethical practice.⁶⁰

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

⁵⁶ Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, *Report of the Special Rapporteur*, U.N. Doc. A/HRC/20/22 (Apr. 10, 2012) (by Christof Heyns).

⁵⁷ Ivan Teleguz, Case 12.864, Inter-Am. Comm'n H.R., Report No. 53/13, OEA/Ser.L/V/II, doc. 50 (2013).

⁵⁸ *Id.*

⁵⁹ Press release, Inter-Am. Comm'n H.R., *supra* note 55.

⁶⁰ U.N. ICCPR art. 7, *supra* note 65; Nigel Rodley & Matthew Pollard, *The Treatment of Prisoners Under International Law* 412-15 (3d ed., 2009).

“treated humanely, with unconditional respect for their inherent dignity, fundamental rights and guarantees, and strictly in accordance with international human rights instruments.”⁶¹

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...”⁶² 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.”⁶³

VI. RELIEF REQUESTED

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

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

Furthermore, Petitioner respectfully requests that the Commission declare the petition admissible and prepare a report setting forth the relevant facts and applicable law, declaring that the United States and the state of Missouri are responsible for violations of rights affirmed in the American Declaration of the Rights and Duties of Man and in other human rights instruments and recommending that the United States take steps to:

- Make public information regarding the procedures and protocols of execution, including the sources of the drugs obtained for carrying out the execution of the Petitioner;
- 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;

⁶¹ 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).

⁶² Inter-Am. Comm’n H.R., *Report on the Human Rights of Persons deprived of Liberty in the Americas*, ¶ 523 (2011).

⁶³ See *id.* at n.619 (citing International Council of Prison Medical Services, Oath of Athens, 1979).

- Ensure that execution methods comply with applicable international human rights norms prohibiting use of torture, cruel, inhuman, or degrading treatment;
- Ensure that protocols of execution reduces, to the greatest extent possible, the Petitioner's risk of mental or physical agony;
- Ensure robust and transparent oversight over lethal injection procedures including access to effective legal remedies; and
- Such other remedies as this Commission considers adequate and effective to redress the violations alleged in this Petition.

DATED: June 4, 2014

Respectfully Submitted,

Jamil Dakwar

A handwritten signature in black ink, featuring a large, stylized loop at the top and a vertical stroke extending downwards.

Cassandra Stubbs

A handwritten signature in blue ink, consisting of a cursive 'C' followed by a series of horizontal strokes.

Anna Arceneaux

A handwritten signature in blue ink, written in a cursive style that clearly spells out the name 'Anna Arceneaux'.