

IN THE  
UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF MISSOURI  
CENTRAL DIVISION

DENNIS J. SKILLICORN, )  
)  
JOHN CHARLES MIDDLETON, )  
)  
and )  
)  
RUSSELL E. (RUSTY) BUCKLEW, )  
)  
*Plaintiffs,* )  
)  
v. ) No. 09-4071-CV-C-SOW/WAK  
)  
JEREMIAH W. (JAY) NIXON, )  
Governor, in both his )  
individual and his official )  
official capacities, )  
)  
and )  
)  
STATE OF MISSOURI )  
)  
*Defendant.* )

**FIRST AMENDED COMPLAINT  
AND REQUEST FOR INJUNCTIVE AND OTHER RELIEF  
UNDER 42 U.S.C. § 1983**

For their causes of action, the plaintiffs, Dennis J. Skillicorn, John Middleton, and Russell E. Bucklew, by and through counsel, state and allege all as follows.

## Nature of the Action

1. Plaintiffs are prisoners of the State of Missouri under sentence of death. Federal courts appointed counsel for them, and authorized their counsel to receive compensation under 18 U.S.C. § 3599 for representing them in seeking executive clemency.

2. The Missouri Department of Corrections, its General Counsel's Office, and the defendant – in his former capacity as Missouri Attorney General – have intentionally obstructed federal court appointed counsel's access to evidence in support of clemency. The state and its agents – represented by defendant in his capacity as its Attorney General – withheld documents, prohibited counsel from interviewing inmate witnesses, and instructed staff members not to speak with counsel.

3. The Missouri Supreme Court stayed Mr. Skillicorn's execution date in August 2008, holding that the state's obstructionist efforts had violated Mr. Skillicorn's right to clemency advocacy, and ordering that the state actors cease their obstructionist efforts.

4. In January 2009, defendant Nixon – who represented the state and its agents in these efforts – took office as Governor. Absent action by the courts, defendant Nixon is now vested by state law with the power of

considering the very evidence that he attempted to keep out of the clemency process. Plaintiffs acknowledge that if they were to receive clemency, they would not be able to demonstrate cognizable prejudice. Given defendant's long history of pressing for execution dates while judicial proceedings are underway and of disparaging any and all claims for relief by Missourians under sentence of death, they cannot be expected to be confident of such a possibility. As long as he has the power to deny clemency and finish the job he started as Attorney General, defendant Nixon's role as clemency decisionmaker violates the plaintiffs' rights to both procedural and substantive due process of law guaranteed by the Fourteenth Amendment of the Constitution. These rights take on sharper focus when they involve the death penalty, which implicates the Cruel and Unusual Punishments Clause of the Eighth Amendment.

5. Plaintiffs pray that this Court declare that defendant Nixon has a conflict of interest which disentitles him to reject their applications for clemency, and for its injunction that defendant Nixon be disqualified from denying clemency to them and, if he does not grant them clemency himself, he shall convene an independent board of inquiry as state law – Mo. Rev.

Stat. § 552.070 – authorizes; that it shall make a determination whether they should receive clemency; and that he shall follow the recommendation if it is in favor of clemency. Permitting the defendant to deny clemency himself would violate the plaintiffs’ right to due process of the law under the Fourteenth Amendment, because he was actively involved in opposing clemency by obstructing their federal court appointed counsel’s efforts to obtain relevant information readily available but for acts and omissions that he and his agents defended in court.

### **Parties**

6. Plaintiff **Dennis J. Skillicorn** is a citizen of the United States and a resident of the State of Missouri.

7. Plaintiff Skillicorn is a person within the jurisdiction of the State of Missouri.

8. Plaintiff Skillicorn was sentenced to death in the Circuit Court of Lafayette County (the Hon. Robert Ravenhill, then Circuit Judge) for a murder while acting together with Allan Nicklasson.

9. On July 25, 2008, the Missouri Supreme Court issued an execution warrant against plaintiff Skillicorn, on the basis of which he was

scheduled to be executed by lethal injection at 12:01 a.m. on August 27, 2008. The Missouri Supreme Court stayed the execution on August 20, 2008.

10. Plaintiff **John Charles Middleton** is a citizen of the United States and a resident of the State of Missouri.

11. Plaintiff Middleton is a person within the jurisdiction of the State of Missouri.

12. Plaintiff Middleton was sentenced to death in the Circuit Court of Adair County for one homicide and in the Circuit Court of Callaway County for two additional homicides.

13. Plaintiff **Russell E. (Rusty) Bucklew** is a citizen of the United States and a resident of the State of Missouri.

14. Plaintiff Bucklew is a person within the jurisdiction of the State of Missouri.

15. Plaintiff Bucklew was sentenced to death in the Circuit Court of Boone County.

16. Defendant **Jeremiah W. (Jay) Nixon** is the Governor of the State of Missouri.

17. Defendant Nixon has the authority, under the Missouri Constitution, to decide whether any of the three plaintiffs will receive clemency or will be executed.

18. Defendant Jeremiah Nixon was the Attorney General of the State of Missouri from his inauguration as such in 1993 until his inauguration as Governor in 2009. Defendant Nixon's office has opposed all three plaintiffs' efforts to obtain relief throughout direct appeal, state post-conviction relief proceedings, federal habeas corpus, and the other vehicles by which they have sought to raise constitutional grievances. It also prosecuted Mr. Middleton in the trial courts.

19. In his capacity as Attorney General, defendant Nixon represented the state and its agents in their efforts to obstruct the plaintiffs' access to evidence in support of clemency.

20. Other attorneys who appeared in court and signed pleadings in aid of the obstruction of federal court appointed counsel's clemency investigation were at-will employees of the defendant.

21. The **State of Missouri** is bound by the Due Process Clause of the Fourteenth Amendment and, by virtue of the latter guaranty, the Cruel and Unusual Punishments Clause of the Eighth Amendment.

22. Defendant State of Missouri has held itself out as providing a clemency remedy as a backstop for judicial relief. *Compare* Mo. Const. art. IV, § 7, with *Harbison v. Bell*, No. 07-8521, slip op. at 12 & n.10 (U.S. Apr. 1, 2009), *citing, inter alia, Herrera v. Collins*, 506 U. S. 390, 411-412 (1993).

### **Jurisdiction**

23. Plaintiffs bring this action to enforce and protect rights conferred by the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

24. This Court has jurisdiction under 28 U.S.C. § 1331, in that it arises under the Constitution of the United States; under 28 U.S.C. § 1343(a)(3), in that it is brought to redress deprivations, under color of state authority, of rights, privileges, and immunities secured by the United States Constitution; under 28 U.S.C. § 1343(a)(4), in that it seeks to secure equitable relief under an act of Congress, specifically 42 U.S.C. § 1983, which provides a cause of action for the protection of civil rights; under 28

U.S.C. § 2201(a), in that, one purpose of this action is to secure declaratory relief; and under 28 U.S.C. § 2202, in that one purpose of this action is to secure permanent injunctive relief.

25. This Court also has jurisdiction, pursuant to 28 U.S.C. § 1651, to enjoin the defendants from denying clemency in the plaintiffs' cases and to order defendant to convene an independent board of inquiry to make such determination, pursuant to Mo. Rev. Stat. § 552.070, and to grant such other equitable relief that is appropriate under the circumstances.

### **Venue**

26. Venue is proper in this federal judicial district under 28 U.S.C. § 1391(b)(1)-(3) in that (1) the defendant Nixon resides in its territorial jurisdiction; (2) the defendant Nixon's decisions regarding determination of clemency for death sentenced inmates are made in its territorial jurisdiction, and (3) the defendants may be found in its territorial jurisdiction.

### **Exhaustion of Administrative Remedies**

27. Though exhaustion is not required, because the plaintiffs are not challenging prison conditions, the plaintiffs have properly exhausted

administrative remedies available to them. Plaintiffs filed grievances with the Missouri Department of Corrections alleging that the Governor cannot fairly consider their cases in clemency after seeking to block their federal court appointed counsel's access to evidence in support of clemency.

28. In addition, plaintiff Skillicorn filed a formal request with the defendant asking that he appoint an independent board of inquiry pursuant to Mo. Rev. Stat. § 552.070. (Exh. 7, at C000283.)

### **Factual Basis for Claim**

#### **Procedural History**

29. Clemency is a part of the process that Missouri has adopted for the determination of whether a person convicted of a crime shall be executed.

30. The Missouri Constitution gives the Governor the power to grant reprieves, commutations and pardons:

The governor shall have power to grant reprieves, commutations and pardons, after conviction, for all offenses except treason and cases of impeachment, upon such conditions and with such restrictions and limitations as he may deem proper, subject to provisions of law as to the manner of applying for pardons. The power to pardon shall not include the power to parole. [Mo. Const. art. IV, § 7.]

31. The Missouri General Assembly, in furtherance of the Governor's constitutional powers, has given the Governor the discretion to convene a Board of Inquiry to "gather information, whether or not admissible in a court of law, bearing on whether or not a person condemned to death should be executed, reprieved or pardoned, or whether the person's sentence should be commuted." Mo. Rev. Stat. § 552.070 (1986). The statute imposes a duty on all persons to cooperate with the Board's investigation, and imposes on the Board a duty to receive and hold information in strict confidence.

32. This Court appointed counsel for plaintiff Skillicorn, and issued an order authorizing appointed counsel to receive compensation under 18 U.S.C. § 3599, for representing him in seeking executive clemency.

33. The United States Court of Appeals for the Eighth Circuit appointed counsel for plaintiffs Middleton and Bucklew, and issued orders authorizing appointed counsel to receive compensation under 18 U.S.C. § 3599, for representing them in seeking executive clemency.

34. In the course of their federal court appointed representation of the plaintiffs – after exhausting their clients' federal habeas corpus

remedies – the plaintiffs’ counsel began investigating and developing evidence in support of clemency. In each case, counsel’s efforts were met with resistance from defendant State of Missouri. Defendant Nixon represented those state actors, defended their obstruction, and opposed the plaintiffs’ efforts to investigate and develop evidence in support of clemency.

35. On August 15, 2008, each of the three plaintiffs filed substantially identical motions in the Missouri Supreme Court, seeking to stay their executions on account of state actors’ obstruction of their clemency investigation and advocacy. (Exh. 1, at C000001.) The common elements of the motion outlined counsel’s efforts on behalf of the plaintiffs to develop evidence in support of clemency and the actions by the Department of Corrections designed to thwart their efforts.

36. The Missouri Supreme Court ordered defendant state to respond by August 20, 2008. That response, filed by defendant Nixon’s at-will employee under the name and authority of both defendants, urged that the court go forward with the executions and denied any obstructionist efforts on the part of the state. (Exh. 2, C000189). In support,

the defendant Nixon's at-will agents submitted affidavits from Warden Don Roper and Department of Corrections Legal Counsel Angela Marmion. (Exh. 2, at C000195 and C000200.)

37. Despite the insistence by the defendant Nixon's at-will employees to the contrary, the Missouri Supreme Court found that defendant state had in fact obstructed plaintiff Skillicorn's clemency advocacy and stayed his approaching execution. (Exh. 3, at C000203.) The Missouri Supreme Court granted plaintiff Skillicorn's motion to vacate on the basis that the state's obstructionist efforts violated plaintiff Skillicorn's right to clemency advocacy. *Id.* .) The Court held that "[i]n support of his clemency petition" plaintiffs' attorneys "are entitled to gather information from prisoners and prison staff." *Id.*

38. In September, counsel learned that the state had not ceased efforts to obstruct plaintiffs' access to clemency evidence. Plaintiff Skillicorn's counsel filed a Motion to Postpone Setting of Execution date on Account of State Agents' Continued Obstruction of Clemency Advocacy as well as a Supplemental Motion outlining their attempts to develop

clemency evidence and explaining the continued and renewed resistance from the state. (Exh. 4, at C000204 and Exh. 5, at C000251.)

39. Acting in his own name and through his at-will employee, defendant Nixon again opposed this motion, simultaneously denying the obstruction and arguing that if it had existed, it was corrected by the passage of time. (Exh. 6, at C000275.)

40. After the plaintiffs filed this action, the Missouri Supreme Court set an execution date of May 20, 2009, against plaintiff Skillicorn.

41. After the plaintiffs filed this action and the Missouri Supreme Court set an execution date against plaintiff Skillicorn, defendant Nixon's press officer (who had had the same position in defendant Nixon's Attorney General's Office) issued a release saying, in part, "The death penalty in Missouri is sought sparingly by prosecutors, handed down sparingly by juries, and carried out sparingly by the state" and asking the people of the state to pray for the family of "the victim of this crime." In plaintiff Skillicorn's case, of course, the person who actually killed the decedent has repeatedly accepted sole responsibility for the homicide, but the prosecution was able to persuade the trial judge to deny the jury this

exculpatory evidence in plaintiff Skillicorn's trial. During defendant Nixon's sixteen years as Attorney General, defendant State of Missouri executed, for example, mentally-retarded David Leisure for his alleged role in a car-bombing when the federal government assigned him third- or fourth-level culpability as opposed to that of his cousins who received life without parole, and James Chambers for his role in a bar fight. Whether this state meets out the death penalty "sparingly" is in the eye of the beholder. The nature of the beholder is a key fact in this case. Defendant Nixon has a right to issue press releases and to pray as he pleases, but he must accept the consequences when his public statements demonstrate his deep-seated conflict of interest in evaluating these plaintiffs' applications for clemency and the supporting evidence he only recently sought to suppress.

#### The State Actors' Obstruction

42. Defendant state obstructed the plaintiffs' access to prison files and prisoner and staff witnesses. Its agents misrepresented their obstruction to the Missouri Supreme Court, and did so under the authority of, and in legal filings bearing the name of, then Attorney General Nixon.

*Denial of Interviews of Prisoners With First-Hand Knowledge of Plaintiffs*

43. Defendant state, its agents, and their counsel have obstructed the plaintiffs' access to prisoner witnesses and denied the plaintiffs' attempts to videotape prisoner interviews. In July 2008, counsel for plaintiff Middleton scheduled an interview of a prisoner witness at the Potosi Correctional Center. Immediately before the interview, counsel learned that the Legal Office of the DOC had issued a new "directive" banning such interviews. (Exh. 1, at C000038). When counsel arrived at the prison, a deputy warden told him that the prison would not permit the interviews absent permission from the Legal Office. Counsel for plaintiffs Skillicorn and Middleton both wrote letters to the DOC and its Legal Office requesting permission to interview prisoners and referring specifically to the Legal Office's recent "directive." (Exh. 1, at C000040.) Neither counsel received a response from the DOC or its Legal Office. After the Missouri Supreme Court directed the prison to permit prisoner interviews, Legal Counsel Marmion grudgingly complied and sent the plaintiffs' counsel a letter imposing onerous limitations on the interviews -- having no penological purpose but calculated and likely to continue her obstruction of federal court appointed counsel's work. (Exh. 4, at C000237.) Legal

Counsel Marmion chastised plaintiffs' counsel that "staff will have to be called in and work overtime to accommodate these meetings so that the regular staffing needs of the institution may still be met." *Id.* These interviews were carried out by the plaintiffs' counsel.

44. Declarations from prisoner witnesses, developed from these interviews, were submitted to the Governor's Office in support of clemency for plaintiff Skillicorn. (Exh. 7, at C-000371-384). These declarations detail the way that "Potosi is different because of people who are good influences like Dennis." (Exh. 7, at C000378.) Plaintiff Skillicorn "really helps guys turn their lives around in here. This also keeps the prison safer because it keeps us focused on positives instead of drugs and fights." (Exh. 7, at C000373.) Many of the prisoners discussed incidents in which plaintiff Skillicorn "stepped into disputes, talked other prisoners down, and prevented fights." (Exh. 7, at C000381.) In addition, these prisoners discuss the ways in which Mr. Skillicorn "has helped to break down segregation and racism in the prison." (Exh. 7, at C000382.) Though counsel were permitted to interview the prisoners, the refusal of the prison to permit videotaping and the restrictive conditions of the interviews made

it difficult to obtain information on behalf of Mr. Skillicorn. In addition, counsel believe that the DOC engaged in intimidating tactics with the prisoner witnesses, which may have affected their willingness to speak with clemency counsel.

45. Counsel for plaintiffs also attempted to conduct videotaped interviews of prisoners, including their clients, at Potosi Correctional Center. (Exh. 1, at C000047). Despite the fact that media interviews are routinely permitted inside of the visitation room and within the secured perimeter of the prison, and that videotaped testimony depositions have been permitted in the past, the state refused. (Exh. 2, at C000193).

According to an affidavit from the Warden, filed by defendant Nixon's office, "video cameras are never allowed inside of the prison." (Exh. 2, at C000196). Though plaintiffs' counsel have pointed to many occasions where videotaping is in fact permitted in the institution, neither the Warden nor his attorney, defendant Nixon, corrected his previous sworn misstatement.

46. Defendant Nixon's prior and continuing efforts to deprive plaintiffs of this information make it unlikely that he will now give it any meaningful consideration.

### *Denial and Deterrence of Staff Interviews*

47. Defendant Nixon was similarly involved in blocking access to staff witnesses. In April 2008, counsel for plaintiff Skillicorn began attempting to interview staff and prisoners at Potosi Correctional Center. (Exh. 1, at C000038 and C000046) In June, counsel received a telephone message from a corrections officer, informing counsel that the corrections officer could not speak with clemency counsel and that counsel must route the request through the Office of General Counsel. Meanwhile, in July, counsel for plaintiffs Middleton and Bucklew sent a letter to the Department of Corrections (DOC) requesting permission to interview staff witnesses. (Exh. 1, at C000099.) In response, on July 8, 2008, Warden Roper said, "Be advised that any staff member may speak with you if they choose to do so." *Id.*

48. In his opposition to plaintiffs' motion to vacate the execution date, defendant Nixon asserted that "there is no allegation in this case that

the Department of Corrections has threatened anyone to prevent them from giving evidence to the Governor or the parole board. Prison employees may speak with counsel if they choose to do so.” (Exh. 2, C000192.) In support, the Attorney General submitted affidavits from Warden Don Roper and Legal Counsel Angela Marmion. Both echoed defendant Nixon’s assurances that staff were free to speak with counsel. Warden Roper told the Missouri Supreme Court under oath that “at no time did I instruct staff or offenders that any was prohibited from speaking, corresponding, or in any way communicating with” clemency counsel. (Exh. 2, C000197.)

49. Despite the protestations of defendant Nixon and his clients, the Missouri Supreme Court vacated plaintiff Skillicorn’s execution date based upon the obstruction. In reliance upon the Court’s order, counsel resumed attempts to interview staff and prisoner witnesses at Potosi Correctional Center.

50. Though defendant Nixon had represented to the Court that the “Department of Corrections has not objected to staff members giving off duty interviews if they choose to do so,” (Exh. 2, C000192) counsel learned

information to the contrary. Specifically, counsel received information from staff members that Warden Roper had expressly instructed them in writing not to speak with any clemency counsel.

51. In September, counsel filed another Motion to Stay with the Court, detailing for them the information received about the state's continuing obstruction. (Exh. 4, at C000204). Because the staff member who notified counsel about the threats feared retaliation, counsel swore out two separate affidavits, one of which was deposited under seal with the Missouri Supreme Court. In it, counsel detailed the specifics of the allegations relayed by the DOC staff member. The public affidavit outlined for the Attorney General the nature of the conversation with the informant staff member. Specifically, counsel stated that,

"A current DOC employee working at a DOC institution informed me that the DOC had circulated a memorandum directing any staff members who were contacted by attorneys for death sentenced inmates to report it to their supervisors. This individual further stated he feared he would lose his job if he spoke with me. The individual said that he wanted to send me the memo but that he was concerned he would be fired if he did so. The individual further stated, if they knew I was talking to you, 'I will be fired or the retaliation will be so bad that I will have to quit.'

The individual stated that the prison administration was watching correctional staff very closely and, thus, this person did not feel comfortable talking to me or want his name released.”

[Exh. 4, at C000228-229].

52. Counsel also sent a discovery request to the Office of General Counsel requesting any memorandum or documentation of communications with staff from the administration at Potosi Correctional Center. (Exh. 5, at C000265). Subsequently, counsel received from that office a memorandum in which Warden Roper unequivocally instructed Potosi staff not to speak with clemency counsel directly. (Exh. 5, at C000273). This evidence directly contradicted the defendant state’s agent’s sworn representation that staff were free to speak with the plaintiffs’ counsel, which defendant Nixon’s at-will employee held out to the court in the name of the defendant and under his authority.

53. The memo instructed that: “[t]his issue has been addressed by the Department’s General Counsel, and they have determined that all such requests will be routed through the Department’s General Counsel, and that staff should not speak directly with the attorney.” (Exh. 5, at C000273). The memo is in stark contrast to the sworn statements of Warden Roper

and Legal Counsel Marmion, as well as pleadings from defendant Nixon. Not only had Warden Roper denied instructing staff that they could not speak with counsel, he swore under oath that “I instructed the staff members that [clemency counsel] requested to interview (sic) that any *could* speak with [counsel] on their own time if any so chose to do so.” (Exh. 2, at C000196(emphasis added)). In-house DOC counsel Marmion swore to the court that her office “has not given any directive, that staff or offenders are prohibited from speaking, corresponding, or communicating with” clemency counsel. (Exh. 2, C000201.) And then Attorney General Nixon repeatedly emphasized that the “Department of Corrections has not objected to staff members giving off duty interviews if they choose to do so.” (*Id.*).

54. Counsel for plaintiffs relied upon these multiple false representations made by defendant Nixon’s then clients and subsequently sponsored in court in his name. In addition, Warden Roper made other misrepresentations directed toward clemency counsel. Approximately one week before he issued his directive that staff not speak with clemency

counsel, he assured counsel in writing, “be advised that any staff member may speak with you if they choose to do so.” (Exh. 2, at C000099.)

55. Counsel for plaintiff Skillicorn supplemented their previous filing with this information, highlighting for the court the inconsistencies between the memo and the prior sworn statements. (Exh. 5, at C000251.) Defendant Nixon’s office responded by denying any inconsistencies. The Attorney General argued that “even if the document is read to discourage interviews,” it was subsequently remedied by later instructions from the Department of Corrections. (Exh. 6, at C000276.) The Attorney General also relied upon unsworn information from Legal Counsel Marmion that she never told the Warden to route any staff requests to speak with counsel through her office. (Exh. 6, at C000276.) Legal Counsel apparently told Governor Nixon’s office that such recommendation was not at her behest, but rather was an “unwarranted assumption” on behalf of their client, the Department of Corrections. *Id.* The Attorney General ignored the wrongdoing by their client, and defended the Department’s efforts to stymie Mr. Skillicorn’s clemency presentation to the Governor and the parole board.

56. Counsel for plaintiff Skillicorn was attempting to develop evidence of his extraordinary works within the prison, including volunteering with restorative justice groups throughout the state as well as creating organizations such as 4-H LIFE and Hospice within the Potosi Correctional Center. (Exh. 1, at C000165-174 and Exh. 7, at C000301-303.) Such restorative justice organizations provide a means for offenders to give something back to those whom they have offended, society and victims. Several Volunteers in Corrections and one former corrections officer who worked with and around Plaintiff Skillicorn for 10 years gave videotaped testimonials in support of clemency for plaintiff Skillicorn. Volunteers in Corrections work with the prisoners on a daily basis in a variety of organizations and activities, but are not paid. VIC's undergo extensive trainings and background checks, not unlike those required for paid staff members. However, as discussed above, attempts to interview current DOC staff were unsuccessful.

57. It remains imperative for plaintiff counsel to speak with Potosi correctional staff in order to present a full and complete case for executive clemency. The state's obstructionist efforts have been extremely harmful to

plaintiffs' Skillicorn's due process right to clemency. Through the course of their investigation, counsel were able to speak with former staff and Volunteers in Corrections, some of whom requested that their names be given only to the Governor and the parole board, in order to reduce the risk to their jobs. Counsel have not yet been able to speak with any current paid staff at Potosi Correctional Center, and believe that this is due to the months of threats leveled against them. The former and volunteer staff with whom counsel have spoken have all discussed the positive impact that plaintiff Skillicorn has on the institution. Several former staff and Volunteers in Corrections spoke with counsel under the condition that their names would be released only to the Governor and the Parole Board, out of fear of job loss and other retaliation. One such confidential interviewee called plaintiff Skillicorn a "peacemaker." (Exh. 7, at C000346.) "If Dennis is not executed, he will be fruitful and productive in the institution. If the state does not execute him, he will continue to make a difference. To let him live here would be positive: He is an investment, an asset. The change that he has experienced, and the impact that he has on the institution are great." (*Id.*) Rick Secoy, a former officer of ten years,

said that plaintiff Skillicorn was a “quiet leader. He leads by example, he is not going to tell someone that you need to do it this way or this is the way it’s required to be done. He is going to do it and let everyone watch and they are going to see him doing it with a smile on his face and they are going to fall in line.” (Exh. 7, at C000347.) Neal Turnbough, another former officer of five years, characterized plaintiff Skillicorn as a “good influence...I wish all the inmates were like him.” (Exh. 7, at C000368-369.) Another former corrections officer, who also spoke with counsel under the condition of confidentiality, talked about the importance of the programs that plaintiff Skillicorn has implemented and developed: “Anyone who has worked in prison sees how important the programs are to have...I think that the more programs that offenders have to occupy their time, the better they are. If they don’t have positive things to get into, then they get in trouble. All they have is time.” (Exh. 7, at C000348.) Former Potosi Correctional Center Chaplain Paul Powell also wrote about the positive effects of plaintiff Skillicorn’s interactions with staff and prisoners: “I could go on about how he worked with other inmates and gave them

encouragement. I could verify that he worked well with staff and was very cooperative and helpful in his dealings with staff.” (Exh. 7, at C000370.)

58. Several Volunteers in Corrections have also made pleas for plaintiff Skillicorn’s life. Bill Henry, the VIC for Set Free Ministries, believed that Mr. Skillicorn’s “punishment would be paid better, if it were paid out to other people in service to them.” (Exh. 7, at C000310.) Andy Daus, a permanent Deacon in the Catholic Church and a VIC for Hospice, remarked upon Mr. Skillicorn’s ability to recruit and keep other prisoners involved in Hospice: “One of the guys remarked, if it weren’t for Dennis, I wouldn’t be here.” (Exh. 7, at C000311). Sam Finley, a VIC for Master Life Bible Studies, referred to Mr. Skillicorn as “a leader.” (*Id.*) He is one of those who when an inmate is disgruntled, Dennis can calm him down.” (*Id.*) Several other also spoke with counsel on the condition of anonymity.

59. Defendants have made efforts at every turn to block plaintiffs’ access to evidence in support of their clemency. Defendants’ obstructionist efforts to frustrate the plaintiffs’ access to this important clemency evidence make it doubtful that defendant Nixon can meaningfully consider it.

60. Recently, several Missouri citizens who sent letters to the Governor in support of plaintiff Skillicorn have received correspondence from the Department of Correction's constituent liaison, informing them that their letters were forwarded by defendant Nixon's office to the Department. Defendant Nixon is apparently sharing these letters of support with his former client, despite the Department's antagonism of plaintiff Skillicorn's clemency witnesses. Plaintiff Skillicorn's clemency application and supplemental clemency petition contain some information and exhibits which were submitted under seal. Defendant Nixon's release of supporting letters puts this confidentiality in jeopardy and puts the staff members at risk. This action on the part of the defendant Governor's Office is hostile to Plaintiffs' interests and has the potential of further intimidating staff members from cooperating with counsel for plaintiff Skillicorn. This is representative of the conflict that defendant Nixon faces and emphasizes the need for an independent review board in these three cases.

### *Denial of Access to Correctional Files*

61. Defendant state withheld from plaintiff Skillicorn multiple documents from his correctional file requested by counsel in support of clemency. Documents and awards in the file demonstrate his good works and achievements within the prison. After requesting the complete file in June, counsel received in July documents purporting to be plaintiff Skillicorn's complete correctional file. (Exh. 1, at C000058.) The documents sent by the DOC were brief and omitted entire categories of records routinely contained in classification files. *Id.* In plaintiff Skillicorn's original Motion to Vacate Execution Date on Account of State Agents' Obstruction of Clemency Advocacy, he alleged that the file was incomplete. *Id.* Defendant Nixon filed a Motion in Opposition and provided a sworn affidavit from defendant's client, Legal Counsel, which stated that: "The documents [counsel] alleges she did not receive will be forwarded to her to the extent that those documents exist." (Exh. 2, at C000202.) Subsequently, counsel received 45 pages of documents from plaintiff Skillicorn's classification file, consisting entirely of program awards and certificates earned by plaintiff Skillicorn at Potosi and included materials not previously forwarded. (Exh. 4, at C000234.) In his motion to

postpone his execution, plaintiff Skillicorn maintained that he had still not received his complete classification file. (*Id.*) In his opposition, defendant Nixon's at-will employee, speaking for the defendant and under his authority, denied that the file was incomplete, but revealed the existence of a separate file, of which counsel were not previously aware. (Exh. 6, at C000280.)

62. Because of defendant Nixon's involvement in obstructing the plaintiffs' access to evidence in clemency, his denial of clemency in the same proceedings would violate plaintiffs' right to due process.

63. Plaintiffs' Motion to Vacate relied upon the principles of *Ohio Adult Parole Authority v. Woodard*, 523 U.S. 272 (1998), and *Skipper v. South Carolina*, 476 U.S. 1 (1986), to argue successfully that the obstructionist efforts of the state, its agents, and its representatives violated the plaintiffs' right to due process. In *Ohio Adult Parole Authority v. Woodard*, the United States Supreme Court held that at least in capital cases, the Constitution of the United States guarantees due process in state clemency proceedings, where a state has created such a process. As such, the plaintiffs here are afforded some due process in clemency. In *Skipper v. South Carolina*, 476

U.S. 1 (1986), the Court held that a prisoner's positive adjustment to incarceration and good conduct in prison is an important consideration in making the decision between execution and incarceration for life and cannot constitutionally be withheld from a capital decision-maker.

*Defendant State's Efforts to Dissuade Plaintiffs from Seeking Clemency*

64. Plaintiff Middleton has suffered unduly harsh conditions of confinement at the hands of DOC employees designed to break his will and discourage him from pursuing clemency. The intentional behavior inflicted on plaintiff Middleton by the DOC includes inadequate medical and psychiatric care, unwarranted and extended placement in administrative segregation, and housing Middleton in a freezing cell without adequate clothing or blankets.

65. Prison staff deprived plaintiff Middleton of access to his legal work, including numerous documents provided by clemency counsel. In any capital case, this deprivation would threaten to break the condemned person's resolve to pursue clemency. In Mr. Middleton's case, it also exacerbates his inability to have meaningful communication with his attorneys in light of his mental limitations.

66. Counsel have raised questions about plaintiff Middleton's competency to be executed – an issue that is being appropriately raised in other actions. Defendant Nixon and his at-will employees in his immediately previous office have opposed Mr. Middleton's examination by an independent mental-health expert or any other relief under *Panetti v. Quarterman*, 551 U.S. 930; *Ford v. Wainwright*, 477 U.S. 399 (1986); and Mo. Rev. Stat. § 552.060. They advanced the position which the then director of the Department of Corrections took, refusing to recognize Mr. Middleton's longstanding mental-health problems as requiring investigation in connection with his competency to be executed. (*See, e.g.,* Suggestions in Opposition to Appellant's Conditional Motion for Stay of Execution Based on *Ford* Claim, *State v. Middleton*, No. SC-80941, Missouri Supreme Court, July 19, 2008.)

67. Plaintiff Bucklew has suffered unduly harsh conditions of confinement at the hands of DOC employees designed to break his will and discourage him from pursuing clemency. The intentional inflictions on Mr. Bucklew by DOC employees include: (1) unwarranted placements in administrative segregation, (2) conduct violations for seeking medical care,

(3) confiscation of legal papers and other property, (4) assault in retaliation for participating in an attorney-client phone call prearranged through the institution's litigation office, (5) withholding clean water forcing plaintiff to drink out of a toilet, and (6) incidents of personal hostility by staff – all detailed in his affidavit submitted in this action as Exhibit 8 (C000385).

68. Prison staff have subjected Mr. Bucklew to extended isolation in administrative segregation, without cause, which impedes his ability to place phone calls to persons other than his attorneys, *i.e.*, people who could assist the prisoner in seeking clemency by virtue of their possession of information vital to a thorough clemency investigation.

69. Potosi Correctional Center staff have punished Mr. Bucklew for seeking medical care.

70. Prison staff have taken property from plaintiff Bucklew, including correspondence with counsel regarding counsel's efforts to investigate grounds for seeking clemency and a booklet in which Bucklew documented incidents of medical emergencies, the denial of medical treatment, and the issuance of conduct violations for seeking medical help. Prison staff have also threatened to spray Mr. Bucklew with Mace if he did

not terminate a phone call with one of his attorneys – a direct attack on his ability to assist his counsel in their clemency investigation.

71. These deprivations are particularly troubling because plaintiff Bucklew suffers from cavernous hemangiomas, a rare and dangerous vascular condition in which clumps of distended blood vessels grow in cavities in his head. At times, Mr. Bucklew’s physical condition has been extremely fragile, and he has been in grave danger of hemorrhaging. His medical problems underscore the harsh and obstructive nature of the defendant state’s agents’ abuse of him as summarized in this complaint and set forth in Exhibit 8.

72. The Missouri Supreme Court granted plaintiffs’ motion to vacate on the basis that the state had in fact obstructed plaintiffs Skillicorn’s due process right to clemency advocacy. (Exh. 3, at C000203.)

### **Claims for Relief**

#### **Count I**

73. Plaintiffs restate and reallege the premises in paragraphs 1-69.

74. Defendant Nixon was responsible for obstructing plaintiffs’ access to clemency evidence. His consideration, as the clemency

decisionmaker, of the very evidence he or his at-will employees labored to keep out of the hands of the plaintiffs' federal court appointed counsel would violate the plaintiffs' right to procedural and substantive due process.

75. Due process requires a opportunity to be heard, and that the opportunity be meaningful. Allowing defendant Nixon to make the final call on what to do with the evidence to which he strove to block federal court appointed clemency counsel's access would inevitably thwart a meaningful opportunity to be heard by a fair, neutral decision decisionmaker. In light of his prior failure to correct other defendant State of Missouri actors' obstruction of the plaintiffs' right to clemency advocacy, and his false representations in support of them, if defendant Nixon were to deny clemency to these plaintiffs, his acts and omissions in this matter would violate their right to due process under the Fourteenth Amendment as recognized in *Woodard* and *Hayes*.

76. Execution of the plaintiffs as a result of defendant Nixon's denial of their applications for executive clemency would violate not only the plaintiffs' right to due process under the Fourteenth Amendment as

recognized in *Woodard* and *Hayes* but also the Eighth Amendment insofar as judicial decisions denying relief for certain claims rely in substantial part on the availability of executive clemency.

77. Allowing defendant Nixon to deny executive clemency following his and his at-will employees' resistance to relief from DOC's obstruction of clemency investigation would be so fundamentally unfair that it would shock the conscience and violate the plaintiffs' right to due process of law.

### Count II

78. Plaintiffs restate and reallege the premises in paragraphs 1-87.

79. Defendant Nixon served as the Attorney General of Missouri when the plaintiffs were tried, convicted, and sentenced to death. He continued serving as the Attorney General throughout the direct appeal and post-conviction relief process of each plaintiff. During these years he and his at-will employees filed motions to set execution dates against the plaintiffs and engaged in various forms of litigation to deny them a day in court or to deny them relief when they failed to deny them a day in court.

80. In plaintiff Middleton's case, in particular, assistant attorneys general from defendant Nixon's then office represented the state in his prosecution in the trial courts. The decision to seek the death penalty against plaintiff Middleton was vetted if not vested in the Attorney General's Office during defendant Nixon's sixteen years as Attorney General. Defendant Nixon decided long ago to deny mercy to plaintiff Middleton.

81. Now as Governor, defendant Nixon has a direct conflict of interest. He cannot serve both his interest as the former Attorney General in seeing the death penalty carried out against the plaintiffs and maintain a neutral and unbiased position in addressing their clemency applications.

82. Clemency is an opportunity to seek mercy, but it is more than that. It is our legal system's fail-safe for preventing miscarriages of justice once the judicial process has been exhausted. It is an opportunity to seek relief from a decisionmaker who is not bound by statutes and precedents under which some meritorious claims are not eligible for a judicial remedy. Defendant Nixon and his at-will employees argued against the claims that the plaintiffs have previously presented to the courts. It is

expecting too much of human nature to rely on him, now, to say that he and his at-will employees were wrong for decades in pleading after pleading they filed in opposition to the same grievances.

83. As applicants seeking clemency, Plaintiffs are entitled to a neutral and unbiased decisionmaker, as such a decisionmaker is necessary to afford a meaningful opportunity to be heard.

84. Allowing defendant Nixon to deny executive clemency following his and his at-will employees' resistance to relief on the grievances the plaintiffs presented at trial, on direct appeal, in state and federal post-conviction relief proceedings, and in other litigation such as the challenge to the state's lethal-injection practices would be so fundamentally unfair that it would shock the conscience and violate the plaintiffs' right to due process of law.

### Count III

85. Plaintiffs restate and reallege the premises in paragraphs 1-84.

86. At least as to these plaintiffs, defendant State of Missouri does not have a system of inflicting the death penalty that is consistent with the

Cruel and Unusual Punishments Clause of the Eighth Amendment and the Due Process Clause of the Fourteenth Amendment.

87. Plaintiffs cannot be executed by defendant State of Missouri consistently with the Constitution on the basis of a denial of clemency by defendant Nixon unless defendant Nixon appoints a neutral body that is independent in fact to make the clemency determination, for example, if defendant appoints the Chief Justice of the Missouri Supreme Court, or a person designated by her, to preside over a board of inquiry authorized by state statute, Mo. Rev. Stat. § 552.070, and appoints four Missouri circuit judges – two nominated by plaintiff whose application it would consider, and two nominated by the current Attorney General – and if defendant Nixon does not deny clemency unless the neutral, independent body determines that clemency should be denied.

#### **Prayer for Relief**

88. Plaintiffs seek this Court's declaratory judgment that if the defendant Nixon were to deny clemency to the plaintiffs, his acts or omissions in the matter would violate the plaintiffs' right to due process of law under the Fourteenth Amendment, and that defendant State of

Missouri's execution of any of them under these circumstances would violate the Cruel and Unusual Punishments Clause of the Eighth Amendment and the Due Process Clause of the Fourteenth Amendment.

89. Plaintiffs seek this Court's permanent injunction that defendant Nixon either grant clemency to them or, if he chooses to deny clemency to one or more of them, he shall appoint a neutral body that is independent in fact, such as a statutorily authorized board of inquiry consisting of the Chief Justice of the Missouri Supreme Court – or a person designated by her – as its presiding officer, and of four Missouri circuit judges – two nominated by plaintiff whose clemency application it will consider, and two nominated by the current Attorney General – and shall not deny clemency unless the neutral, independent body determines that clemency should be denied.

90. Plaintiffs seek this Court's order granting them reasonable attorney fees pursuant to 42 U.S.C. § 1988 and the laws of the United States as well as for costs of suit, and such further relief as this Court deems just and proper.

### **Note Regarding Retaliation**

91. It is beyond dispute that filing a federal civil action for the redress of grievances is a protected activity under the First Amendment, as applied against the states through the Fourteenth. Plaintiffs respectfully suggest to defendants and their agents that adverse action concerning which the filing of these claims or submitting evidence in support of them or both was a substantial or motivating factor would constitute a new constitutional violation.

Respectfully submitted,

s/Jennifer Merrigan  
JENNIFER MERRIGAN  
Public Interest Litigation Clinic  
305 E. 63rd Street  
Kansas City, Missouri 64113  
(816) 363-2795  
FAX (816) 363-2799

*Counsel for Plaintiff Skillicorn*

JOHN WILLIAM SIMON  
J.D., PH.D.  
Constitutional Advocacy, LLC  
2683 South Big Bend Blvd., Suite 12  
St. Louis, Missouri 63143-2100  
(314) 604-6982  
FAX (314) 754-2605  
*simonjw1@yahoo.com*

CHERYL A. PILATE  
REBECCA L. KURZ  
Morgan Pilate LLC  
142 North Cherry Street  
Olathe, Kansas 66061  
(913) 829-6336  
FAX (913) 829-6446  
*cpilate@morganpilate.com*  
*rkurz@morganpilate.com*

*Counsel for Plaintiffs Skillicorn,  
Middleton, and Bucklew*

*Counsel for Plaintiffs Middleton  
and Bucklew*

**Certificate of Service**

I hereby certify a true and correct copy of the foregoing was forwarded for transmission via Electronic Case Filing (ECF) this 22nd day of April 2009, to the offices of:

Michael Joseph Spillane, Esq.  
Assistant State Attorney General  
P.O. Box 899  
Jefferson City, Missouri 65102

s/Jennifer Merrigan  
Attorney for Plaintiff Skillicorn