No. 13-10171

IN THE SUPREME COURT OF THE UNITED STATES

RUSSELL BUCKLEW

Petitioner,

v.

GEORGE LOMBARDI, et al.,

Respondents.

CAPITAL CASE

EXECUTION SCHEDULED FOR May 21, 2014

PETITION FOR WRIT OF CERTIORARI TO THE

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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REPLY TO CASE SUMMARY

Respondents' case summary, focusing on the facts of the offense, is nothing more than a distraction from the issues before the Court. Moreover, any review of the state court record will show that, during the time period surrounding the offense, Mr. Bucklew was extremely ill from the effects of his cavernous hemangiomas. He had lost a great deal of weight – hovering just above 100 pounds – and was bleeding from around his eyes. His siblings were alarmed – they thought he looked like "skin and bones" and was likely to die in the near future. He was in a great deal of pain and engaging in impulsive behavior. Indeed, Bucklew was so ill at that time, he believed his condition was terminal. All of these facts are recounted in Mr. Bucklew's opening brief in the Eighth Circuit appeal in his federal habeas case. *Bucklew v. Luebbers*, Case No. 03-3721, Brief at 16-17, 23, 29-30)

Any review of Mr. Bucklew's medical records shows that his disease has continued to progress over the years, with symptoms waxing and waning according to the size and location of the hemangiomas. Mr. Bucklew has suffered disturbances in vision and hearing, regular and very painful headaches, difficulty swallowing and breathing, episodes of impaired speech, and episodes of hemorrhaging during which he is provided gauze and biohazard bags to keep with him at all times. Mr. Bucklew's condition is considered inoperable and untreatable, and he takes several powerful medications every day for management of pain and other symptoms. (W.D. Mo. Doc. #12 at Exhibit 5, excerpts from medical records)

Respondent attempts – without factual basis -- to blame Petitioner for somehow delaying the litigation of these issues, when it is Respondents' fault that no current medical imaging exists – thereby thwarting any effort to obtain an up-to-date assessment of Mr. Bucklew's condition. Petitioner has briefed, *repeatedly and at length,* his repeated efforts since 2008 to obtain expert funding. Mr. Bucklew has described the modest and reasonable amounts he requested, and the careful supporting of his requests with an affidavit from an expert who identified the scope of the work to be done to render an opinion.

The efforts of Mr. Bucklew's court-appointed counsel to obtain funding – raised in *no fewer than eight requests* -- date back to 2008 and extend up to May 2014. They have made requests for funding under the Criminal Justice Act three times and from the Missouri State Public Defender System in *five* mandamus actions. Each effort was unsuccessful – Mr. Bucklew's requests were typically rejected with no explanation.

These facts were extensively recounted by Mr. Bucklew in his Petition for Writ of Certiorari (Petition at 4 – 5, 10), and in his Motion for Stay in the Eighth Circuit (Motion at 5 – 7, 9 - 11) and in his Reply to Defendants' Suggestions in Opposition to Mr. Bucklew's Motion for Stay of Execution. (W.D. Mo. Doc. #12 at 9 – 12). Further, in the District Court pleadings, Mr. Bucklew not only detailed the history of his attempts to get funding in state and federal court, but also pointed out that the State had actively and repeatedly opposed those efforts in Missouri state courts. Petitioner stated:

> Mr. Bucklew's inability to obtain funding has placed him at an extreme and unfair disadvantage. With the ability to assign four attorneys to this case and the ability to pay for any medical testing or the services of an expert, the State has not been similarly burdened. After repeatedly opposing counsels' efforts to obtain funding for a medical expert, they now assert that somehow that counsel should somehow have conjured up free experts willing to spend many hours reviewing records and providing opinions. Given its active opposition to Mr. Bucklew's efforts to obtain funding, *the State should be estopped from making this disingenuous argument*. At any point, the State could have changed its opposition and could have confessed error and endorsed the payment of $7200 that Mr. Bucklew was seeking for the initial expert's time and expenses.
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> (W.D. Mo. Doc. #12 at 12).

Mr. Bucklew also attached to his district court pleadings copies of the state court dockets, one (of many) examples of petitions for writ of mandamus seeking funding, and one of the Missouri Attorney General's responses in opposition. (W.D. Doc. #12, Exh. 3, 4; Doc. #16, Exh. 1 (State's Opposition in mandamus action)).

As the panel observed in its now-vacated opinion, Mr. Bucklew repeatedly sought funds, and his efforts were repeatedly opposed by the State. (8th Cir., panel op. at 3, 10, 11).

Mr. Bucklew also points out – as the Court already knows -- that it is difficult, if not impossible to get experts to work for *no fee*. Indeed, Dr. Adam Cohen, the first expert whom Bucklew's counsel contacted and whose affidavit was the basis of repeated funding requests, required an estimated $7,200 to perform a review of Mr. Bucklew's medical records and render an opinion. Dr. Cohen has maintained that stance, and Mr. Bucklew's counsel were unable to secure his services for the extensive work needed for no compensation. Counsel subsequently were fortunate enough to locate Dr. Gregory Jamroz and Dr. Joel Zivot. Dr. Zivot,

in particular, has expended substantial hours in this case – including making a trip to the prison to examine Mr. Bucklew -- with his only hope of compensation a relatively modest amount that a member of the Bucklew family intends to provide.

Without question, this Court recognizes the necessity of expert funding to assist counsel appointed under the Criminal Justice Act, as stated in *Ake v. Oklahoma*, 470 U.S. 68 (1985) and *Harbison v. Bell*, 129 S. Ct. 1481 (2009). It is an affront to the Constitution to expect that an indigent prisoner's attorneys should rely on the charity of experts to provide services necessary for representation.

Indeed, funds for such expert services are specifically authorized under 18 U.S.C. §§ 3006A(e)(1) and 3599(f) and required under the Fifth, Sixth, and Eighth Amendments to the United States Constitution. *See generally, Ake v. Oklahoma,* 470 U.S. 68 (1985)(due process requires a defendant be provided with court-appointed psychiatric assistance at trial and during sentencing if he demonstrates his mental state will be a significant factor in those proceedings.); *Walker v. Oklahoma,* 167 F. 3d 1339, 1347-1349 (10th Cir.), *cert. denied*, 528 U.S. 987 (1999)(under *Ake*, the state in a capital case should have provided Mr. Walker with the opportunity for the CT scan and electroencephalogram testing that his consulting neurologist and other experts recommended.)

In sum, Respondents' arguments regarding Petitioner's supposed untimeliness have *no basis* in fact, and appear to be an effort to distract from Respondents' failure to provide adequate medical care – including diagnostic imaging tests and monitoring – for Mr. Bucklew during the past four years. It is

the State of Missouri, not Mr. Bucklew's counsel – who are currently working with no CJA funding themselves – that has the resources and ability to obtain the necessary testing.

REPLY TO ARGUMENTS CONCERNING *BAZE v REES*,

This Court's decision in *Baze v. Rees,* 553 U.S. 35 (2008), has been misconstrued and misinterpreted by the lower courts. The prisoners in *Baze*, as part of their litigation, *chose* to propose an alternative means of execution. Nothing in the Court's decision *requires* all petitioners with Eighth Amendment claims to propose a "feasible," "alternative" method of execution when no such method is known, or no such alternative is authorized by state law. In Missouri, the death penalty statute, Mo. Rev. Stat. 546.720 authorizes officials to carry out the death penalty only through "the administration of lethal gas or by means of the administration of lethal injection." Lethal gas is not presently known to be an option in Missouri, and, in Mr. Bucklew's case, the present question concerns the ability to execute him, consistent with the Constitution, by lethal injection. Given his *rare* and *unique* condition, which involves clumps of weakened and malformed veins, it is not known – and cannot be known – what "alternative" is truly "feasible" at present in light of the lack of recent medical imaging tests and the lack of any knowledge as to the efficacy, availability and side effects of other drugs that might be used in lethal injection.

To the extent that this Court, or any lower court, believes that pleading an "alternative method" is necessary, Mr. Bucklew has indeed proposed an

"alternative" – and it involves obtaining up-to-date imaging tests to ascertain the current size, condition and location of his vascular tumors and to ascertain the specific degree to which his airway is obstructed and to evaluate means for addressing that obstruction. In sum, proposing a feasible alternative – if required – requires more information, from medical testing that the State should have obtained, and from discovery that may be obtained in this lawsuit, should it be permitted to go forward.

The State also argues that Mr. Bucklew fails somehow to satisfy the standard in *Baze v. Rees* for an Eighth Amendment claim. First, Mr. Bucklew disputes that assertion, and relies on the two affidavits of Dr. Joel Zivot, as well as affidavits from Dr. Gregory Jamroz and Dr. Larry Sasich (*see* W.D. Mo. Doc. #6, Exhs. D, I, J.; Doc. #7, Exh. M; Doc. #12, Exhs. 1, 6). These affidavits identify the very substantial risk that Mr. Bucklew, with his massive vascular tumors, will experience during an execution by lethal injection – hemorrhaging in face, head or throat, coughing or choking on his own blood, suffering a total airway obstruction and suffocating to death, and/or suffering an excruciating and prolonged execution because the lethal drug does not properly circulate in his body. (*Id.*). All of these problems are compounded by the risks inherent in the use of Missouri's use of compounded pentobarbital – in the absence of any information whatsoever about the provenance, safety, potency or purity of the drug.

Second, Respondents exaggerate the standard of *Baze* far beyond its language. The Chief Justice in *Baze* clearly stated what it actually means in a stay-of-execution lethal injection context:

> We have explained that to prevail on such a claim there must be a "**substantial risk of serious harm**," an "objectively intolerable risk of harm" that prevents prison officials from pleading that they were "subjectively blameless for purposes of the Eighth Amendment."

Baze, 553 U.S. at 50 (emphasis added). This is the language that appears throughout the Chief Justice's opinion as the legal standard on the merits in *Baze*. *Id.* at 50, 52 & n.3; *see also id.* at 116 (Ginsberg, J., dissenting) (reflecting three votes for similar standard, and not disputed by the Chief Justice as to his phrasing of the test); *id.* at 36-37 (syllabus).

Respondents are well aware that the operative standard is whether the method of execution presents a "substantial risk of serious harm," because that is what they explained almost a year ago when moving for judgment on the pleadings in *Zink v. Lombardi*:

> The Court went on to note that in the context of prison condition cases it had found an Eighth Amendment violation occurs when a prison condition is "sure or very likely to cause serious illness and needless suffering." *Id.* at 50. The Court **defined** such a risk as "a substantial risk of serious harm, an objectively intolerable risk of harm."

Zink v. Lombardi, ECF Doc. 43 at 7, quoting *Baze*, 553 U.S. at 50 (emphasis added).

It does not help Respondents to cite *Clemons v. Delo*, 585 F.3d 1119 (8th Cir. 2009). In the section of *Clemons* cited, the Eighth Circuit relies on a quotation from a case concerning sidestream cigarette smoke, *Helling v. McKinney*, 509 U.S. 25 (1993) ("sure or very likely...") and the "substantial risk of serious harm" language that the Chief Justice made his own. *See Clemons*, 585 F.3d at 1125. The latter standard appears repeatedly in *Clemons*, as in *Baze* itself. *Id.* at 1126, 1128.

Turning to the "sure or very likely" language in *Brewer v. Landrigan*, 131 S. Ct. 445 (2010), the only way to interpret that language is to interpret it consistently with the other portions of *Baze*, which make clear the standard is a "substantial risk of serious harm." *Baze*, 553 U.S. at 509.

For all of the reasons stated above, Mr. Bucklew respectfully request that this Court grant his Petition for Writ of Certiorari and issue an Order staying his execution pending the outcome of further litigation.

Respectfully submitted,

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